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Lakshya Sharma & Siddharth Panda, 'Into the Orwellian Dystopia: A Comparative Analysis of Personal Data Protection Bill 2019 vis-à-vis Indian Privacy Jurisprudence' (2021) 7(2) NLUJ L Rev 1

INTO THE ORWELLIAN DYSTOPIA: A COMPARATIVE ANALYSIS OF PERSONAL DATA PROTECTION BILL 2019 VIS-À-VIS INDIAN PRIVACY JURISPRUDENCE

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ABSTRACT

The modern-day digitization of elements of data has stirred a debate concerning the moral clash between the state utilitarianism and an individual's right to privacy. Scholars are apprehensive of the current progression which could further lead to the political state of 'Orwellian Dystopia' – created by George Orwell in his creation '1984'. It refers to an autocratic state which is being operated using draconian policies of disinformation, crowd manipulation, and state surveillance.

In light of fostering the right to privacy, the Indian government introduced the Personal Data Protection Bill 2018 drafted by the Justice BN Srikrishna Committee. It aimed to strengthen an individual's inherent right to privacy by bestowing control over their personal and private data. However, the Indian government reintroduced the Bill in 2019 with substantial changes to the

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erstwhile draft Bill. Thenceforth, it has been heavily criticized because it allegedly undermines potential privacy concerns and compromises the very essence of the interpretative advances made in the Supreme Court judgement of Justice KS Puttaswamy (Retd.) v. Union of India.

On the aforementioned premise, the authors attempt to bring conceptual precision to the discourse; firstly, by identifying the roots of 'privacy' in the common law jurisprudence, and secondly, through a comparative analysis of Personal Data Protection Bills 2018 and 2019 on the altar of Indian privacy jurisprudence. The authors also suggest certain policy changes to bring the challenges of state security and right to privacy to a legitimate equilibrium.

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I. INTRODUCTION

In an age where digital surveillance was increasingly becoming the *modus operandi* of the government-corporate complex, popular concern for its informational privacy did not seem to match the hype around it. An average citizen considered such a phenomenon a myth of the future; something that could not be possible today. The indication of such an occurrence in George Orwell's '1984' was well appreciated but considered a work of fiction nonetheless. While the world was facing existential challenges of its own, privacy seemed to be a lesser concern for the general population of India, until, WhatsApp rolled out its updated privacy policy.

WhatsApp is, inarguably, the most popular internet messaging application with a clientele of 1.5 billion active users. It promised seamless interactivity on its platform with end-to-end encryption which assured the users about the security of their data. But everything changed when WhatsApp came out with its 'take it or leave it' policy which would allow it to share 'certain' user information with its parent company, Facebook. Facebook is infamous for allegations of large-scale data breach and info-manipulation. This stirred the pot of popular anxiety about their personal information and data. The clueless public is now frantically trying to comprehend the meaning and scope of a moniker which was casually thrown around but never truly understood: 'privacy'. They look around only to find that the lawmakers are also as clueless as they are. Without any tangible framework to address the concerns of privacy and its protection, India finds itself stranded in an unlimited space of uncertainty. This article

is an effort to clear to haze around the complexity of the issue and provide a context to the problem, if not the solution.

The authors have attempted to highlight the past, present and the possible future of informational privacy and data protection against the threats of digital surveillance, using the notion of 'Orwellian Dystopia' as an anchor to the arguments herein. The authors have traced the jurisprudence of informational privacy, its origin, being and recent developments to highlight how it has influenced the discussion around privacy in India and the world. The authors ultimately put forth an analysis of the Personal Data Protection Bill, which has extensive ramifications for the politico-economy status quo, industry and India's diplomatic standing. While this Bill is hailed by different sections of the industry and political society as the vanguard against 'data imperialism', its vulnerabilities are too patent to be left alone. Thus, the authors have critically analyzed the bill against its vision of security and welfare, and proposed ways to prevent the perils of moral hazard.

II. THE EVOLUTIONARY JURISPRUDENCE OF PRIVACY

The word 'privacy' finds its etymological roots in its Latin predecessor '*privātus'* which means 'set apart' or 'being single' in its original archaic standard. Later use of the word signified 'which is peculiar or one's own' - the contextual setting evolving from a solitary person to a person relative to the property of other persons.[1] Even today, when we incorporate privacy in a discourse, it signifies a co-relation to the property (or rights) of

[1] Jack Hirshleifer, 'Privacy: Its Origin, Function, and Future' (1980) 9 Journal of Legal Studies 649.

others. Even so, when did the right to privacy rise as a cultural, social and eventually a legal thought?

The earliest argument about privacy as a right could be traced back to S. Warren and Louis Brandeis's seminal work on 'The Right to Privacy'.[2] They contended that protection of privacy should be manifested as a right enforced by law to ensure and protect people's 'involatile personality'.[3] They also contemplated a new way to deal with it as a matter of law, through a specific privacy tort. However, they did not suggest that they were engaging in the invention of some new right. They suggested that the notion of protection of individual rights over one's property (which included the individual itself) was well-founded in common law jurisprudence and demanded that social and political changes be undertaken to acknowledge these rights.[4]

The American Fourth Amendment and its constitutive case of *Entick v. Carrington*[5] provided a preface to the notion of 'privacy' as identified by Brandeis and Warren. Eventually, the authors' broad interpretation of a right to privacy developed as a constitutional bulwark in *Olmstead v. United States*.[6] Therein, the American Supreme Court referred to the right as "*protection against such invasion of 'the sanctity of a man's home and the*

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[2] Samuel D Warren & Louis D Brandeis, 'The Right to privacy' (1890) 4 Harvard Law Review 193; Louis Nizer, 'Right of Privacy-A Half Century's Developments' (1940) 39 Mich L Rev 526.
[3] ibid.
[4] Michaela Hailbronner, 'Constructing the Global Constitutional Canon: Between Authority and Criticism' (2019) 69 University of Toronto Law Journal 248.
[5] [1765] EWHC KB J98.
[6] 277 US 438 (1928).

privacies of life', a protection provided for in the Fourth amendment 'by specific language"'.[7]

By 1905, the right to privacy or the 'right to control information about oneself' was acknowledged and expanded. It also paved the way for segregation of right to privacy from right to liberty, and right to property.[8] Hence, they invented the new concept which protected an 'unprotected' legal right, i.e., informational privacy, meaning control over the information about oneself.[9] Thereon, informational privacy became a talking point across various jurisdictions of the world. These deliberations increasingly gained popularity and priority after the technological boom in the late 20th century. The notion of privacy and its protection has since followed differential trajectories in comparative jurisdictions of USA and European Union which has influenced the global outlook in more ways than one.

A. AMERICAN JURISPRUDENCE

The right to privacy is not enunciated in the American Constitution or the United States (US) Bill of Rights.[10] The framers of the American Constitution entrusted the states and their social dominion to deal with the matters of privacy, with the significant special case of the Fourth Amendment, which controls and protects people from unreasonable state

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[7] ibid 473.

[8] Edward Keynes, *Liberty, Property, and Privacy: Toward a Jurisprudence of Substantive Due Process* (Penn State Press 2010).

[9] J Van den Hoven, M Blaauw, W Pieters & M Warnier, 'Privacy and Information Technology', *The Stanford Encyclopedia* (2014) <https://stanford.library.sydney.edu.au/archives/sp r2017/entries/it-privacy.> accessed 30 October 2020.

[10] Michael Birnhack, '*Reverse Engineering Informational Privacy Law*' (2013) Yale JL & Tech 15(1/3) <https://digitalcommons.law.yale.edu/yjolt/vol15/iss1/3> accessed 30 October 2020.

searches and seizures.[11] Privacy was additionally ensured by means of other lawful rights, for example, the right to private property and the copyright law which protects creativity rights and unpublished works.[12] However, the American jurisprudence relating to right to privacy evolved multifariously.

Firstly, the privacy hypothesis by Warren and Brandeis was followed by another canonical work by William Prosser which uniformly characterized and arranged the assortment of torts relating to privacy that Courts had come to identify.[13] According to Prosser, privacy torts involved certain invasions into an individual's interests:[14]

> "*(1) Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;*
>
> *(2) Public disclosure of embarrassing private facts about the plaintiff;*
>
> *(3) Publicity which places the plaintiff in a false light in the public eye; and*
>
> *(4) Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.*"[15]

Even though he regularly expressed that his strategies were those of a sampler and a synthesizer as opposed to a pundit or scholar, Prosser held a normative perspective on privacy that affected the manner in which

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[11] ibid.
[12] ibid.
[13] Bart van der Sloot, 'Privacy from a Legal Perspective' in Van der Sloot, B & A de Groot (eds), *The Handbook of Privacy Studies* (Amsterdam University Press 2018) 63-136.
[14] William L Prosser, 'Privacy' (1960) 48 Calif Law Rev 383.
[15] ibid.

he arranged the privacy torts. Consequently, Prosser attempted to shape the future course of privacy law in a more restrictive and cautious way.[16]

Secondly, privacy law evolved through the US Bill of Rights, especially the Fourth Amendment. For over 100 years, the Fourth Amendment was elucidated to forbid state intrusion into private places as opposed to a general provision of the right to privacy. Nonetheless, its understanding evolved parallel to the development of common law to put more prominence on ensuring an individual's personal information.[17] More specifically, the Supreme Court of the United States (SCOTUS) in *Katz v. US*[18] clarified that the Fourth Amendment, while not emphasizing on right to privacy, regardless safeguards individuals, not places, and also protects personal information against certain kinds of state intrusion. This ratio has developed significantly to protect a person's digital privacy to a certain extent.[19] For another instance, in *Carpenter v. US*[20] ("*Carpenter*"), the SCOTUS reasoned that the protection of individual privacy afforded in the Fourth Amendment extends to protect personal data from state interference even where that data was imparted to an outsider or a third party. *Carpenter* differed from Court precedents which had pronounced that data imparted to a third party was not to be protected by the Fourth

[16] Neil M Richards & Daniel J Solove, 'Prosser's Privacy Law: A Mixed Legacy' (2010) 98 Calif L Rev 1887.
[17] Stephen P Mulligan & Chris D Linebaugh, 'Data Protection Law: An Overview' *Congressional Research Service* (25 March 2019) <https://fas.org/sgp/crs/misc/R45631.pdf> accessed 23 February 2021.
[18] 389 *US* 347 (1967).
[19] Helen Nissenbaum, 'Protecting Privacy in an Information Age: The Problem of Privacy in Public' (1998) 34 Law and Philosophy 559-596.
[20] 201 L Ed 2d 507.

Amendment. It held that "an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [his cellular phone]."[21] Ergo, the Fourth Amendment has evolved to provide a restricted defence against government interruption into digital information of an individual.

Thirdly, a form of privacy protection also developed through American constitutional law. In *Griswold v. Connecticut,*[22] the SCOTUS safeguarded a wedded couple's entitlement to get information and guidance about contraceptive medication, and in the process declared that the notion of privacy is integral to the Constitution even though it has not been explicitly stated therein. Justice Douglas upheld the right to privacy as "*being older than the American Bill of Rights*". In *Whalen v. Roe*[23] ("*Whalen*"), the SCOTUS clarified that the constitutional right to privacy comprises interests of two kinds: "*One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions*."

Unfortunately, despite its expansive articulation in *Whalen*, every SCOTUS judgement thenceforth has consciously rejected the notion of informational privacy as a constitutional right and buttressed state programmes asserted to have encroached on the right.[24] Ergo, American

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[21] ibid 12.
[22] 381 US 479, 1965.
[23] 429 US 589 (1977).
[24] Fred H Cate & Beth E Cate, 'The Supreme Court and Information Privacy' (2012) 4 *International Data Privacy Law* 255–267 <https://doi.org/10.1093/idpl/ips024> accessed 23 February 2021.

privacy law stayed inside limitedly explicit segments.[25] Even in 2011, the SCOTUS in *NASA v. Nelson*[26] ("*NASA*") assumed that the Constitution safeguards an "*interest in avoiding disclosure of personal matters*", but Justice Scalia simultaneously explained that "*there is no constitutional right to 'informational' privacy*".

Besides the development in common law and American constitutional law, Congress has put efforts to provide a legislative 'patchwork' to the right to privacy, yet the rules are restricted to specific sectors and industries enumerated in the statute.[27] Despite the universal acceptance of informational privacy, the US has adopted a restricted system for privacy protection. The US still relies on self-regulatory guidelines within industry and government. It is evident that the US is still following the laissez-faire approach for protecting informational privacy.[28]

B. EUROPEAN JURISPRUDENCE

The European Union (EU) law, created and developed by the EU Commission, is the cornerstone of EU legal anatomy. Additionally, two Courts having unique jurisdiction to authorize human rights treaties, i.e., the European Court for Human Rights (ECtHR) for the European Convention on Human Rights (ECHR) and the Court of Justice of the European Union (CJEU) for the EU Charter of Fundamental Rights (CFR),

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[25] 389 US 347 (1967).
[26] 562 US 134 (2011).
[27] Edward R Alo, 'EU Privacy Protection: A Step towards Global Privacy' (2013) 22 Mich St Int'l L Rev 1095.
[28] Himanshu Dhandharia, 'Developing A Jurisprudence of Privacy in The Digital Era' (2019) 7 Int J Rev and Res Social Sci 353.

transform this setup into a concrete privacy-safeguard system with considerable constraints.[29]

The Organization for Economic Cooperation and Development (OECD) published its 'Guidelines on the Protection of Privacy and Transborder Flows of Personal Data' in 1980 to establish a homogenous system of data protection mechanism among the member states.[30] Then in 1981, the Council of Europe ("CoE") came up with the Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data ("Convention"). The Convention was additionally moored in the ECHR 1950; the main legal instrument of the CoE. Article 8 of the Convention bestows upon the individual a right to respect for his private and family life.[31] The ECtHR recognizes explicit rights with respect to information privacy based on Article 8:[32]

Article 8 – "*Right to respect for the private and family life:*

> *(1) Everyone has the right to respect for his private and family life, his home and his correspondence.*
>
> *(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime,*

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[29] Stephen J Schulhofer, 'An international right to privacy? Be careful what you wish for' (2016) 14 International *Journal of Constitutional Law* 238.
[30] Michael Birnhack, 'Reverse Engineering Informational Privacy Law' (2013) 15 Yale JL & Tech 3.
[31] ibid.
[32] Convention for the Protection of Human Rights and Fundamental Freedoms 1950, art 8.

> *for the protection of health or morals, or for the protection of the rights and freedoms of others.*"[33]

This right is directly and legitimately enforceable in the ECtHR. This clearly showcases the European standards of privacy protection has more explicit textual support and robust framework than the American right to privacy as pronounced through *NASA* and *Whalen*; it is more extensive and profound, shielding more data from less serious intrusions.[34]

CJEU case laws dealing with Article 8 of the CFR offer significant insight regarding EU standards of privacy. In one of its initial pronouncements, in *Rechnungshof v. Oster Reichischer Rundfunk*,[35] the CJEU held that "*the mere recording by an employer of data by name relating to the remuneration paid to employees cannot constitute an interference with private life*". The CJEU observed that this act of recording is "*personal data processing*" and would concern data protection rules. It is quite noticeable that for this case, the CJEU expressly made reference to Article 8 and 52(1) of the CFR which acknowledges that restrictions might be applied on CFR rights, as long as they are provided by law, regard the quintessence of those rights, and are proportionate. The judgement in *Leander v. Sweden*[36] ("*Leander*") likewise showcases the noteworthy standard of EU protection of privacy. Although the CJEU pardoned the state intrusion, it applied a three-section test with respect to permissible grounds of encroachment: *"(a) In pursuit of a legitimate*

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[33] ibid.
[34] Paul M Schwartz, 'Global Data Privacy: The EU Way' (2019) 94 NYUL Rev 771.
[35] C-465/00, [2003] EU ECJ C-465/00.
[36] [1987] 9 EHRR 433, 9248/81.

interest (here, national security); (b) In accordance with the law; and (c) Necessary in a democratic society".[37]

Clearly, the CJEU went past the available text to make sure that individuals would be cautioned in an event in which their data may be gathered, monitored or unveiled if their act doesn't warrant or trigger such disclosure (through the test laid in *Leander*).[38] CJEU presumed that the protection of individual information and the respect to private life were so important that the discretion of the legislature of EU would be diminished, and any impedance to rights contained under Article 8 of the CFR must be restricted to cases in which such intrusion becomes necessary.[39]

However, the most notable development in international privacy jurisprudence took place on 25 January 2012 when the European Commission proposed a change in the EU Data Protection regime through the General Data Protection Regulation (GDPR) so as to reinforce digital information privacy rights and augment the digital economy of the EU. It was likewise drafted to adjust to innovative developments that had happened in the earlier decade.[40]

Under Article 4(1) of the GDPR, 'personal data' is defined as:

> "*[A]ny information which could be utilized, in itself or concurrent to other information, to identify a person directly or indirectly, specifically by*

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[37] ibid.
[38] Timothy Azarchs, 'Informational Privacy: Lessons from Across the Atlantic' (2013) 16 U Pa J Const L 805.
[39] ibid.
[40] Chris Jay Hoofnagle, Bart van der Sloot, and Frederik Zuiderveen Borgesius, 'The European Union General Data Protection Regulation: What it is and What it Means' (2019) 28 Information & Communications Technology Law 65.

> *reference to an identifier, for example, a name, a recognizable unique number of identification, area information, an online identifier or to at least one components explicit to the physiological, physical, mental, hereditary, monetary, social or cultural character of that individual.*"[41]

Under the GDPR, personal data or information which incorporates data pertaining to geo-location, IP address, biometric data, for example, unique fingerprint scans, and retina checks, which is a lot more extensive than imagined in its outdated predecessor, the Data Protection Directive (Directive).[42] Second, the GDPR places a noteworthy emphasis on an individual's consent. The GDPR requires unequivocal consenting for the processing or handling of any personal information. The GDPR also aims to put an end to complicated user agreements with complex language that clients seldom read; such description must be short, coherent and direct. A third key distinction between the Directive and the GDPR is that under the GDPR both data processors and data controllers will be mutually held accountable for compliance with data protection rules. At last, the GDPR presents certain novel information rights, for example, right to data portability, which was not present under the Directive.

Article 5 of the GDPR comprises seven key principles, which has been introduced to guide how personal data can be handled. These seven

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[41] General Data Protection Regulations 2018, art 4(1).

[42] Privsec Report, 'The Data Protection Directive Versus the GDPR: Understanding Key Changes' *Privsec* (6 March 2018) <https://gdpr.report/news/2018/03/06/data-protection-directive-versus-gdpr-understanding-key-changes> accessed 23 February 2021.

principles are: "*(1) lawfulness, (2) fairness, (3) transparency, (4) purpose limitation, (5) integrity, (6) security and (7) accountability.*"[43]

The GDPR ensures that data protection safeguards are inculcated into goods and services from the initial phase of development, ensuring 'data protection by design' in new goods.[44] Customers are ensured uncomplicated access to their personal information to the extent that the organizations dealing with it shall detail how they use the customer information sensibly and reasonably.

III. A COMPARATIVE ANALYSIS OF THE PERSONAL DATA PROTECTION BILL 2018 AND 2019 ON THE ALTAR OF PRIVACY JURISPRUDENCE IN INDIA

The last couple of years have seen a formalization of the right to informational privacy in the constitutional framework of India.[45] The testing of the legitimacy of the Aadhaar venture has involved more extensive issues on the conveyance of information and privacy. The reaction to whether an individual can affirm command over important informational factors of his/her life has become an intrinsic portion of our rights and privacy jurisprudence.[46]

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[43] General Data Protection Regulations 2018, art 5.

[44] Danny Palmer, 'What is GDPR? Everything you need to know about the new general data protection regulations' *ZDNET* (17 May 2019) <https://www.zdnet.com/article/gdpr-an-executive-guide-to-what-you-need-to-know/> accessed 23 February 2021.

[45] Anirudh Burman, 'Will India's Proposed Data Protection Law Protect Privacy and Promote Growth?' *Carnagie* (9 March 2020) <https://carnegieindia.org/2020/03/09/will-india-s-proposed-data-protection-law-protect-privacy-and-promote-growth-pub-81217> accessed 23 February 2021.

[46] ibid.

A. INDIAN PRIVACY JURISPRUDENCE

The Personal Data Protection Bill 2019 follows a long queue of events in Indian privacy jurisprudence impacted by international developments as well as Indian constitutional evolution. The Constitution of India 1950 ("Constitution") does not unequivocally refer to one's right to privacy. However, Indian courts, through a series of pronouncements, have held that a right to privacy exists under the right to life and liberty ensured under Article 21 of the Constitution. However, there was always some vagueness in regard to the constitutional protection to privacy rights because of the continuous precedence of *Kharak Singh v. State of Uttar Pradesh*[47] ("*Kharak Singh*") and *MP Sharma v. Union of India*[48] ("*MP Sharma*"), wherein the Supreme Court of India ("SC") held that the right to privacy did not exist under the Constitution.

It should be acknowledged that smaller benches of the SC had indirectly affirmed that the Constitution protects the right to privacy in *Gobind Sharma v. Union of India*[49] and *R Rajagopal v. Union of India.*[50]

However, it was in *PUCL v. Union of India*[51] ("*PUCL*"), where the SC laid the modern foundation of the privacy rights jurisprudence in India with regard to informational surveillance (telephone tapping). The SC herein scrutinized the constitutional legitimacy of Section 5(2) of the Indian Telegraph Act 1885 ("IT Act") which granted unbridled power to the state

[47] 1964 SCR (1) 332.
[48] 1954 SCR 1077.
[49] (*1975*) 2 SCC 148.
[50] 1994 SCC (6) 632.
[51] (1997) 1 SCC 301.

to intercept in a situation of public emergency or in the interest of public safety. Interestingly, these two terms were not defined in the IT Act. This paved way for extensive use of this unlimited power by the enforcement agencies based on the subjective satisfaction of the central/state government(s). While the SC took notice of the conundrum, it did not declare the provision as unconstitutional. Yet, it laid down the 'two-way test' which must be satisfied to exercise this power of interception:

> A) The statutory pre-conditions of public emergency and public safety shall be read and interpreted in their entirety for they "*take colour*" from one another.[52]
>
> B) The SC interpreted public emergency to incorporate situations concerning "*the interest of public safety, the sovereignty and integrity of India, the security of the State, friendly relations with foreign states, public order, or the prevention of incitement to the commission of an offence*"[53] only. As none of these situations is secretive in nature, it should be apparent to a reasonable person.[54]

Additionally, the SC held that economic emergency does not meet the criteria of public emergency, and along these lines, an interruption for the mitigation of economic offences does not qualify the exceptionally high parameters of public emergency or public safety.

Now, the most important development in Indian privacy jurisprudence occurred when a nine-judge bench of the SC bestowed

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[52] ibid 314.
[53] ibid.
[54] ibid.

unequivocal constitutional legitimacy to right to privacy by overruling *MP Sharma* and *Kharak Singh* and subjecting the pronouncements therein to the highest level of judicial scrutiny.

Founded on the premise that "privacy is the ultimate expression of the sanctity of the individual", the Supreme Court differentiated from the pre-existing privacy jurisprudence on two grounds in *Justice KS Puttaswamy (Retd.) v. Union of India*[55] ("*Puttaswamy*"). *Firstly*, it distinctly and unambiguously expressed that the fundamental right to privacy is inherent to the Constitution. *Secondly*, the more critical ground was that the right to privacy was conceptualized as a 'right in itself', and as such, mandated its own protection. Significantly, this understanding of privacy rights works parallel to the internationally existing frameworks which deal with informational privacy. The test of proportionality and legitimacy was likewise settled and elaborated as a four-crease test that should be satisfied before any sort of state intrusion is permitted.

Most recently, the Bombay High Court dealt with a case relating to surveillance and telephone tapping in which it scrutinized Section 5(2) of the IT Act on the altar of *Puttaswamy*.[56] Herein, a businessperson had allegedly offered payoffs to bank officers to get illegitimate financial credit. He challenged certain orders of the Central Bureau of Investigation, which attempted to tap his calls, on the ground that these aforementioned orders were *ultra-vires* Section 5(2). The High Court in its judgement reiterated the 'two-way test' established by the SC in *PUCL*. Thenceforth, in light of the

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[55] (2017) 10 SCC 641.
[56] *Vinit Kumar v Central Bureau of Investigations and Ors* [2019] ALLMR (Cri) 5227.

settled positions, the High Court held that there is no clear public emergency or safety factor to justify the said orders and it doesn't fulfil the test on the principles of proportionality and legitimacy as set out in *Puttaswamy*.

In summary, the *Puttaswamy* judgement has hailed reasonability as the saviour of right to privacy'. It draws a lakshman-rekha around the right which could only be breached if the concern is legitimate and rightful in the eyes of law and logic. This paves the path for rare policy equilibrium where a citizen's individual and collective rights could complement each other.

B. THE WHATSAPP CONTROVERSY

In January 2021, WhatsApp rolled out its controversial '*take it or leave it*' privacy policy raising serious privacy concerns for the Indian sub-continent. Users were given an option either to accept it or lose access to their accounts. The social media giant received huge backlash from the Indian users in the form of them migrating to other platforms. In light of the transpired event, WhatsApp put a hold on the policy till 15 May 2021.

Highlighting the absence of any concrete legislation in place to deal with such situations, WhatsApp took it as a defence before the SC. However, the SC noted that had the proposed Personal Data Protection Bill 2019 ("PDP Bill") been in place, WhatsApp would have faced serious repercussions for such measures.[57] Although the matter is *sub judice*, it

[57] Anumeha Chaturvedi, 'Supreme Court issues notices to Facebook, WhatsApp over new privacy policy' *Economic Times* (16 February 2021) <https://economictimes.indiatimes.com/tech/technology/supreme-court-issues-notice-to-govt-whatsapp-on-plea-overprivacy-standards/articleshow/80920387.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst'> accessed 23 February 2021.

becomes quintessential to analyse the provisions of the PDP Bill alongside the controversial WhatsApp Privacy Policy as to determine whether the PDP Bill is equipped to deal with such situations.

i. Valid Consent and Purposive Limitation

As per Section 11(4) of the PDP Bill, for consent to be valid for the quality and provision of services, it should be linked to consenting only to the purpose which is primary and not incidental. Further, Section 5 provides that personal data shall only be processed "*for the purpose consented to by the data principal*".[58] This provides a purposive limitation to the processing of data.

In the case of WhatsApp, the primary purpose is to process data in order to provide messaging and communication services. Sharing the personal data with Facebook or third-party service providers for better marketing or better integration of their services is incidental in nature. Forcing the users to either accept the terms or switch to other platform is tantamount to invalid consent in the present context. Additionally, the same violates the provisions of purposive limitation - another principle adopted from GDPR[59] - since the policy deviates from its primary or specified purpose.

ii. Privacy Notice

As per Section 7, an obligation is placed on the data fiduciary (i.e., WhatsApp) to provide a notice of privacy containing intricate and essential

[58] Personal Data Protection Bill 2019, s 5.
[59] General Data Protection Regulations 2018, art 5(1)(i).

details about processing the personal data of the data principals (i.e., users).[60] The details are to be provided in an unambiguous, comprehendible and concise manner. Further, the policy is to be provided in multiple languages so as to cater the needs of larger audience.

The WhatsApp policy is unable to fit into these descriptions as *firstly*, the text-based policy runs into 3800 words and without in a layered format thereby making it incomprehensible to an extent.[61] *Secondly*, the policy uses vague terms in relation to data processing and can lead to different interpretations. *Lastly*, the current policy is based out in English and hence reduces the reach of people. Hence, WhatsApp defaults at giving a proper privacy notice.

iii. Rights of Data Principals

As mentioned previously, the PDP Bill is inspired greatly by the GDPR. The GDPR provides for users to exercise their rights as 'data principals' in the form of right to access,[62] rectification,[63] port,[64] and erase their information,[65] as well as, the right to restrict[66] and object to certain processing of their information.[67] The PDP Bill borrows such rights of data principals and has incorporated the same in the proposed framework. As

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[60] Personal Data Protection Bill 2019, s 7.
[61] 'WhatsApp Privacy Policy' *WhatsApp* (4 January 2021) <https://www.whatsapp.com/legal/updates/privacy-policy?lang=en> accessed 23 February 2021.
[62] General Data Protection Regulations 2018, art 15.
[63] ibid art 16.
[64] ibid art 20.
[65] ibid art 17.
[66] ibid art 18.
[67] ibid art 21.

per Section 17,[68] data principals have the right to confirmation and access. Section 18 empowers data principals with right to correction and erasure and Section 19 gives data principals a right to data portability.[69]

In the present case, WhatsApp has set out to share its users' data with Facebook and third-party service providers for different uses. However, the policy is silent on the identity of third-party service providers and the categories of data to be shared.[70] As per the PDP Bill, the data principal has a right to be informed and right to provide consent about the individuals or entities that requires the consent.[71] Therefore, the current policy is in clear breach of the right of data principal provided under the PDP Bill.

If the PDP Bill becomes an act, WhatsApp will have to make significant amends to its current policy by incorporating the rights of data accorded to data principals. Although, the current framework provided considerable protection from such unjust policies, the PDP Bill has some shortcomings that again raises the question over right to privacy. The authors have drawn a comparative analysis of the 2019 PDP Bill with the 2018 Personal Data Protection Draft Bill and highlighted the gaps where the concerns for privacy lies.

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[68] ibid art 17.
[69] ibid art 18 and 19.
[70] WhatsApp (n 57).
[71] Personal Data Protection Bill 2019, ss 17(3) and 7(1)(g).

C. A COMPARATIVE ANALYSIS OF THE 2019 PDP BILL VIS-À-VIS THE 2018 DRAFT BILL

The SC in *Puttaswamy* recommended the Union Government to develop "*a robust regime for data protection balancing individual interests at one hand and legitimate state concerns on the other*".[72] The Indian Government in its response to strengthen the regulation and collection of personal data of the citizens tabled the PDP Bill, which is now under the consideration of the Parliament. Upon its approval, the PDP Bill shall stem the foundation of privacy laws across the country and will govern the personal data being monitored and solicited by entities which collect and process the data in order to meet their business motives.

The Expert Committee on Data Protection led by Justice Srikrishna categorically stated in its report, "*a data protection law, to be meaningful should, in principle, apply to the State. It would indeed be odd if a law enacted to give effect to a fundamental right to privacy does not serve to protect persons from privacy harms caused by processing of personal data by the State.*"[73] The PDP Bill is an extension of the erstwhile Personal Data Protection Bill 2018 ("2018 draft Bill") proposed by the Justice BN Srikrishna Committee ("Srikrishna Committee").[74] However, the PDP Bill as introduced before the Parliament differs substantially from the Srikrishna Committee's draft.

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[72] ibid s 273.
[73] Justice BN Srikrishna Committee of Experts, *Report of the Committee on Data Protection – A Free and Fair Digital Economy Protecting Privacy, Empowering Indians* (Ministry of Electronics and Information Technology 2018) 114 ("2018 Report").
[74] ibid.

The PDP Bill introduces new concepts and deviates from the 2018 draft Bill in certain aspects. One of the key deviations includes the blanket and unaccountable powers bestowed upon the Central Government to process the data which calls for the question of privacy. The following are certain junctures through which it can be ascertained how the PDP Bill dilutes privacy:

i. The PDP Bill empowers the state with *carte blanche*

The PDP Bill empowers the Central Government to give directives and exempt government agencies from the reaches of the PDP Bill on the wide grounds of national security, sovereignty, and public order.[75] This is a stark deviation from the 2018 draft Bill, wherein such an exemption could only be availed in the name of national security when the same pass the contours of law enacted by the Parliament, provided it meets the standards of internationally recognized principles of necessity and proportionality.[76]

As per Section 35, a mere executive order will suffice to "*authorise any government agency to process personal data and allow them to conduct surveillance without any clear safeguards*".[77] The Srikrishna Committee had strongly recommended that such exemption should only be provided through the law. However, such deviation can be seen as a conscious attempt to interfere with the right to privacy of the citizens.

Additionally, the blanket powers enshrined upon the state under the guise of these exemptions fail to qualify the test laid down in *Puttaswamy* as

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[75] Personal Data Protection Bill 2019, s 35.
[76] *Puttaswamy* (n 55) 71 (Per SK Kaul, J).
[77] Personal Data Protection Bill 2019, s 35.

per which the right to privacy can be curtailed only through the law to serve a legitimate aim, while being proportionate to the objective of the law, and having procedural safeguards against the abuse. However, the PDP Bill widens the scope of these exemptions by doing away with the test laid down in *Puttaswamy* and thereby poses a serious threat to the right to privacy having far-reaching consequences. It is undisputed that national interests may override the individual's privacy, but the threshold should be high, as Justice Srikrishna Committee noted, "*to ensure that the pillars of the data protection framework are not shaken by a vague and nebulous national security exception*".[78]

ii. Impeding with the Independence of Data Protection Authority

The PDP Bill abrogates powers of the Data Protection Authority ("DPA"), to be created, under its aegis. The erstwhile 2018 draft Bill provided for the powers and functions of the DPA, which do not find a place in the current PDP Bill presented by the Central Government before the Parliament.[79] This creates an imbalance in the whole mechanism of data collection and processing, and indirectly raises the pedestal of the state in privacy matters. The 2018 draft Bill empowered the DPA with distinct regulatory powers:

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[78] Renjith Mathew, 'Personal Data Protection Bill, 2019 – Examined through the Prism of Fundamental Right to privacy – A Critical Study' *SCC Online* (22 May 2020) <https://www.scconline.com/blog/post/2020/05/22/personal-data-protection-bill-2019-examined-through-the-prism-of-fundamental-right-to-privacy-a-critical-study/#_ftn30> accessed 23 February 2021.

[79] 2018 Report (n 73) 181.

(i) The DPA, under the 2018 draft Bill, was the competent authority to notify the categorisation of sensitive personal data whereas now, as per the PDP Bill, the power to notify vests with the Central Government who can do so in consultation with the sector regulators.[80]

(ii) Furthermore, the DPA, under the 2018 draft Bill, had the primary authority to decide, identify and notify data fiduciaries. However, as per the current PDP Bill, the Central Government has taken up that role in consultation with the DPA by relocating the latter from the primary source to the secondary.[81]

iii. "The Big Brother Is Watching You"

The PDP Bill prescribes that "*the procedure, safeguards and oversight mechanism to be followed for surveillance shall be notified via rules framed by the Government*". However, no clear and specific guidelines have been provided in the PDP Bill in relation to the same, which thereby gives excessive and wide discretionary to the executive wing of the government. The delegation of such important powers solely to the government further precludes the role of legislature and rules out the possibility of any parliament debate.

The PDP Bill is inspired significantly by the GDPR which also empowers the EU member states with similar escape clauses. But, at the same time, they are subjected to other EU directives. In absence of these safeguards, the PDP Bill gifts unbridled authority to the government

[80] ibid 175.
[81] ibid 167.

through which it can access individual data over and above the existing laws, breaching the four-fold test laid out in *Puttaswamy*.

iv. The Conundrum revolving around the Non-Personal Data

The PDP Bill introduced a new provision for the government-mandated processing and sharing of privately collected and solicited non-personal data.[82] It further empowers the government to formulate policies for the digital economy in relation to non-personal data.[83]

As per Section 91(2), "*the government may direct any data fiduciary or data processor to provide any personal data anonymised or other non-personal data to enable better targeting of delivery of services or formulation of evidence-based policies by the Central Government*".[84] This is a clear deviation from the 2018 draft Bill where under Section 105, it was categorically stated that policies formulated under it would not govern non-personal data.[85]

The abovementioned addition to the PDP Bill calls for serious deliberation and reconsideration. *Firstly*, no reasonable explanation has been provided as to why a bill dealing with personal data protection includes non-personal data in its purview. *Secondly*, no definition has been provided to the said term under the definition clause and furthermore, this provision does not even enable any mechanism through which the government would process such data. It can be said, under this provision, the Central Government has the requisite power to commandeer

[82] Personal Data Protection Bill (2019), s 91.
[83] ibid.
[84] ibid s 91(2).
[85] ibid s 105.

intellectual property which could have far-reaching consequences on the incentives on innovation in the long run.

v. Anonymisation of Data

Data anonymisation alludes to an irreversible process of transforming or converting personal data to a form in which a data principal cannot be identified.[86] It further prescribes for an irreversible method of data anonymisation specified by the authority.[87] However, research findings across the world show that irreversible anonymisation is improbable.[88] The PDP Bill has no mention of the standards for the data anonymisation and penalties for any breach, thereby leaving wide scope for the state to invade privacy of the people by accessing their anonymised personal data.

IV. A KEY TO THE CONUNDRUM: REMARKS AND RECOMMENDATIONS

In the previous sections, we saw how significant changes and modifications were brought to the PDP Bill to make it in tune with the government's policy. However, the PDP Bill's objective was to empower citizens and concretise the state's role in ensuring their privacy, but it falters at both junctures. These modifications, as discussed already, have the requisite potential to jeopardise the privacy of individuals by concentrating such unaccounted and unfettered powers in the hands of government. The committee led by Justice BN Srikrishna made sure that all the provisions of

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[86] ibid s 3(2).
[87] ibid.
[88] Sophie Stalla-Bourdillon and Alison Knight, 'Anonymous Data v Personal Data - A False Debate: An EU Perspective on Anonymization, Pseudonymization and Personal Data' (2017) 17 Wisconsin International Law Journal 6.

the 2018 draft Bill were aligned with the decision of the SC in *Puttaswamy*. The moves of the state, with the introduction of the PDP Bill, are apprehensive of potential rights intrusion which could put Indian Constitutional values at stake.

The authors strongly proscribe the intent shown by the Central Government and recommend that all these provisions are to be revisited and remodelled. The authors have analysed and further a few suggestions upon which discussions and deliberations can be done:

A. REVISITING THE DEFINITION OF 'STATE' AS PROVIDED UNDER THE BILL

State plays a pivotal role when it comes to the collection of personal data of the citizens and under the same, the scope of it should be determined after exercising due care. PDP Bill defines 'state' in the exact words as the term is defined under Article 12 of the Constitution.[89] Article 12 has been defined broadly to impose the 'state' with the widest set of responsibilities and functions vis-à-vis the individual to ensure the constitutional protection of individual rights.[90] However, when this definition is used to curtail the rights of the individuals rather than expanding, then the whole legislative intent behind the wide definition stands vitiated. For instance, Section 12 allows the government to exercise non-consensual processing of data in various circumstances.[91] Given the wide scope of the definition, the provision can be used as a tool by various

[89] Personal Data Protection Bill 2019, s 3(39).
[90] *Pradeep Kumar Biswas v Indian Institute of Chemical Biology* [2002] 2002 5 SCC 111.
[91] Personal Data Protection Bill 2019, s 12.

government entities, coming under the umbrella of Article 12, to restrict individual rights. This further entails that these entities under the garb of the state could avail the option of non-consensual processing of the personal data.

By keeping the above factors into consideration, the authors suggest that the legislature should revisit the definition of the state provided under Section 3(39) of the PDP Bill and remodel it in such a manner that it does not limit the rights of the individuals. At the same time, the scope of the definition should be narrowed down so that it meets the objective set out in the PDP Bill. The test of proportionality should be made an essential threshold to process the data under Section 12 of the PDP Bill which thereby meets the requirements set out in *Puttaswamy* and safeguarding the individual rights of privacy.

B. DELETION OF SECTION 35 OF THE PDP BILL

As previously discussed, Section 35 empowers the government with a blanket and unaccountable powers to exempt any government agencies or entities from the reaches of the legislation on the broad grounds of national security, sovereignty and public order, if it satisfies the 'necessary and/or expedient' requirements which shall be prescribed by the government in due course. Further, the provision operates outside the realm of judicial oversight and thereby provides the state to ride an unruly horse which has the requisite potential to castrate the rights of the individual to shreds.

By placing reliance on the abovementioned factors, the authors believe that this section should be dropped down in its entirety as it suffers from the vices of lack of transparency and accountability. Furthermore, Section 42 of the 2018 draft Bill, which provided for such exemptions only in the event of national security, subjected to the condition that "*it is authorised pursuant to a law, and is in accordance with the procedure established by such law, made by Parliament and is necessary for, and proportionate to, such interests being achieved*",[92] should be reinstated.

C. INDEPENDENT DATA PROTECTION AUTHORITY

Bodies such as the DPA, envisaged under the PDP Bill, shoulder bigger responsibilities when it comes to serving national interest as they are vested with obligations to collect and process the inherently sensitive personal data of people. This necessitates the independence of such bodies so that they can render their functions effectively and without being subjugated to anyone.

The authors recommend that the independence of the DPA can be restored in two possible ways:

i. Composition of Data Protection Authority

As per Section 42 of the PDP Bill,[93] the DPA shall comprise of a chairperson and six whole-time members appointed by the Central Government, thereby eliminating the scope of appointment of any part-

[92] The Wire Staff, 'Final Privacy Bill Could Turn India into 'Orwellian State': Justice Srikrishna' *The Wire* (11 December 2019) <https://thewire.in/law/privacy-bill-india-orwellian-state-justice-bn-srikrishna> accessed 23 February 2021.
[93] Personal Data Protection Bill 2019, s 42.

time or non-executive member. This empowers the Central Government to exercise absolute power in the authority-selection process, unlike the 2018 draft Bill, which recommended a judiciary led selection process.[94] The erstwhile provision dealing with the selection process of the authority in the draft Bill should be reinstated so that a checks-and-balances mechanism can exist, and the executive can transparently render its obligations and functions.

ii. Powers of the Data Protection Authority

The PDP Bill provides the Central Government with discretion in the categorisation of sensitive personal data and notifying data fiduciaries. Further, as provided under Section 86 of the PDP Bill,[95] the government can issue directives to the DPA on public policy and in the interest of national security and sovereignty. It should be known that the state agencies will be the prime players to be regulated under the proposed law and therefore the discretion lying with the State in such matters interfere with the functional autonomy of the authority.

To maintain the equilibrium and restore the independence of the DPA, it is imperative that these provisions are revisited, and the recommendations of the 2018 draft Bill should be reinstated. The current state of affairs feed the apprehensions of the Srikrishna Committee – the apprehension of the state turning into an Orwellian Dystopia. Such unauthorized and unaccounted power could prove disastrous and detrimental to our cherished constitutional principles and beliefs. In light

[94] ibid.
[95] ibid s 86.

of this, it is strongly recommended by the authors that such unfettered power be ceased, and the PDP Bill be re-amended in accordance with the SC's judgement in *Puttaswamy*.

The aforementioned recommendations might be considered to manage the factors posing a threat to the right to privacy in India. Even though the state may cite problems of state security and surveillance to check potential terrorist activities, the authors in the next section have tried to depict a picture on the premise of Orwell's '1984' to draw a theoretical line of reasoning between an individual's right to privacy and the State's prerogative of surveillance.

V. THE ILLUSORY NOTION OF PRIVACY IN AN 'ORWELLIAN DYSTOPIA'

The notion about the protection of privacy is founded upon the origination of a person and their interrelation with society.[96] The possibility of public and private circles of activity expects a network wherein such an arrangement is conceivable; however, this positive origination of privacy is an advanced development which came out of a twin development in legal and political thought.[97] The right to privacy was never an absolute privilege, yet, because of the possibility of moral injury, i.e., damage done to one's conscience or moral compass,[98] through privacy violations, right to privacy must be protected by mandating the state and others to justify or legitimize

[96] Ruth Gavison, 'Privacy and the Limits of Law' (1980) 89 The Yale Law Journal 421-471.
[97] Raymond Wacks, *Privacy and Media Freedom* (Oxford Uni Press 2013).
[98] Ferdinand Schoeman, 'Privacy: philosophical dimensions' (1984) 21(3) American Philosophical Quarterly 199-213.

their need to intrude.[99] The age of digitization and the post-internet scope of privacy have left the individuals to care a lot more about their privacy concerns.[100] This warrants an urgent need for more cautious and insightful privacy safeguards and controls pertaining to means of surveillance such as telephone tapping, email hacking, medical reports, scans at the airport, biometric modes of identification, brain scans and other means to decipher and predict an individual's personality and lifestyle choices. As innovation propels, difficulties pertaining to privacy protection will multiply. The legislature, the judiciary, and socio-legal academia must put greater efforts to ensure the protection of personal privacy in these dynamic times.[101]

As per Hubbard, the advanced age of digitization produces a greater chance of unfamiliar privacy harms, considering the extended nature and degree of surveillance, the modern form of peeping is maybe not the same as the physical one:[102]

Firstly, there exists a power imbalance in the data surveillance framework. The entities which try to collect information about the individual are, often, more powerful and advanced than the individual.[103] Due to their heightened capacity, they can devise intelligent and secretive means to gather the data, employ individuals to sort and put it in order, and without much of a stretch, share or sell it. Entities with such capability can

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[99] ibid.
[100] AM Macleod, 'Privacy: Concept, Value, Right?' in A Cudd & M Navin (eds), Core Concepts and Contemporary Issues in Privacy (Springer 2012).
[101] ibid.
[102] P Hubbard, 'The Need for Privacy Torts in an Era of Ubiquitous Disclosure and Surveillance' in A. Cudd & Navin M. (eds), *Core Concepts and Contemporary Issues in Privacy* (Springer 2018) 137-157.
[103] ibid.

likewise misshape reality, mould the truth, and take things outside the realm of relevance, causing it to appear as though one has disclosed one's information, done something wrong, or disregarded a respected belief that could bring cruel repercussions. On the off chance that one becomes a victim of such an attack, one might fear the consequences it may usher.[104]

Secondly, the nature of surveillance might be impersonal, as in, the entities might be gathering data about the individual in a reductionist manner; simply a few kinds of information that they care about.[105] This implies the information about the individual is restricted, for example, a website that an individual regularly surfs or a product that an individual purchases. Such generic forms of information can appear as harmless; however, this data can be digitally mined, interconnected across different gadgets and locations, and joined with other forms of personal information about the individual. Besides, this computerized information might be put away in different locations that are latent and obscure to people of humble computational capacity. This implies that the individual or his/her digital signature cannot be forgotten – a mischief empowered by advanced innovations.[106]

Thirdly, the use of such personal information could critically hinder the bargaining power of the already deprived consumers in the global

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[104] A.E. Cudd & M.C. Navin, 'Introduction: Conceptualizing Privacy Harms and Values' in A. Cudd & Navin M. (eds), *Core Concepts and Contemporary Issues in Privacy* (Springer 2018).
[105] ibid.
[106] Macleod (n 100).

market.[107] Economists have analyzed a number of surveys concerning individuals and their business choices, identified with the utilization of personal data, as well as potential forms and impacts of prevailing privacy guidelines.[108] The standard economic analysis of privacy looks at its costs and benefits to different parties in a transaction, and their resulting incentives. Generally, consumers want producers to be acquainted with products and services of their interest; to reduce their own search costs. On the other hand, producers have an incentive to provide this information. However, consumers do not want producers to know how much they are willing to pay. Otherwise, the producer would be empowered to diminish the bargaining power of the consumer by quoting a price as close as the amount each buyer is willing to pay.[109]

With respect to protection of privacy, personal autonomy could be construed as a negative right against the state.[110] Security can be practised, to some evident degree, basically by community watches and self-conservation. Nor is this an insignificant marvel even today, a person who stays inert regardless of assaults of his rights is most likely not going to hold them. Be that as it may, for protecting our privacy, we depend upon the help of law, an arrangement of an outsider definition and execution of

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[107] Ian Brown, 'The Economics Of Privacy, Data Protection And Surveillance' in *Handbook on the Economics of the Internet* (Edward Elgar Publishing 2016).
[108] Curtis R Taylor, 'Consumer Privacy and the Market for Customer Information' (2004) 35(4) RAND Journal of Economics 631-50 <http://www.jstor.org/stable/1593765> accessed 10 February 2021.
[109] Ian Brown (n 107).
[110] Jack Hirshleifer, 'Privacy: Its Origin, Function, and Future' (1980) 9 Journal of Legal Studies 649-664.

private property rights.[111] Laws can be set up by a general town meeting and maintained by a general show of hands as the need arises. However, our society chooses (or had forced upon itself) the elective arrangement of coercion that is a 'government'. A perilous arrangement, perhaps!

While the world we have come to know is one based on monitoring by privately owned businesses, monetizing and controlling society with no end more than commercial gain, George Orwell had already foreshadowed such reconnaissance and surveillance as the realm of the state in his magnum opus '1984'.[112] Living in a post-Edward Snowden world, security and personal data is a value-based idea.[113] We have been exposed to a greater possibility where we are compelled to exchange our privacy for security and wellbeing, normalizing state surveillance in each aspect of our life, slowly heading towards an Orwellian Dystopia.

Indeed, the concerns surrounding state security and prevention of terrorism are very real and important in the current state of national and international state administration. Would it be a good idea for us to take into consideration reconnaissance innovations in exchange for our fundamental and constitutional rights? We bolster a framework that takes into account this power imbalance between the watchers and the ones being watched. Such advancements must be limited by state policy to be utilized

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111 ibid.

112 Kalev Leetaru, 'As Orwell's 1984 Turns 70 It Predicted Much Of Today's Surveillance Society' (*Forbes,* 6 May 2019) <https://www.forbes.com/sites/kalevleetaru/2019/05/06/as-orwells-1984-turns-70-it-predicted-much-of-todays-surveillance-society/#5b0e613411de> accessed 10 February 2021.

113 Anthony Berteaux, 'Orwellian Privacy Invasion' *Daily Aztex* (2 October 2014) <http://thedailyaztec.com/57152 /opinion/orwellian-privacy-invasion/> accessed 10 February 2021.

to keep up equity without attacking citizen privileges and freedoms. For police who exist to protect and serve by upholding such technology without a warrant or consent, the vagueness of the morals and power imbalance in the dreaded means of surveillance ought to earnestly concern all of us as we ask more questions – do we feel any safer than before?[114]

We live in a time where a greater portion of ordinary interactions is made through technological means. However, this convenience of sorts comes at incredible expense to our own freedom. Our variants of 'Big Brother' takes several forms; a few, yet not all of them are the organizations of different world governments. The state can effortlessly employ propaganda and surveillance systems that intently look like those of Ingsoc.[115] Recent international events have demonstrated that numerous governments promptly work to censure individuals who exercise free speech and expression. Citizens who publicly reject the state's account face serious repercussions. To summarize Orwell, until we become aware of the manners by which new media is being utilized against us, we will never revolt. Our conscience relies upon the readiness to revolt.

VI. CONCLUSION

Amidst the WhatsApp controversy, the impending PDP Bill raises multiple red flags over the right to privacy guaranteed under the constitution. The authors argue that the PDP Bill gives unaccountable and absolute powers in the hands of the State while dealing with the sensitive

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[114] Gavin JD Smith, 'Exploring Relations Between Watchers And Watched In Control (Led) Systems: Strategies And Tactics' (2007) 4 Surveillance & Society 4.

[115] Greg Diglin, 'Living The Orwellian Nightmare: New Media And Digital Dystopia' (2014) 11 E–Learning and Digital Media 6.

personal data of citizens. The wide exemptions provided under the proposed PDP Bill to the state-owned entities in processing such data jeopardize the very tenants of privacy. The authors are of the opinion that such interference with the inherent right to privacy will push for a state of complete surveillance for which a parallel has been drawn with the 'Orwellian Dystopia'.

The PDP Bill is in its final stages and is currently reviewed by a Joint Parliamentary Committee; upon enactment the same shall govern the sensitive personal data of citizens. It is crucial for the legislature to deliberate upon these provisions to make it tune with the fundamental right to privacy envisioned by our forefathers and recognised by the SC.

Prof. Shyam K Kaushik, 'Justice – An Urgent Need for a Broader Perspective' (2021) 7(2) NLUJ L Rev 42

JUSTICE – AN URGENT NEED FOR A BROADER PERSPECTIVE

Prof. Shyam K Kaushik[*]

ABSTRACT

In modern times a discussion on justice has narrowed down to a discussion on the desired attributes of a social order. This has resulted into understanding justice as a legitimate demand of the citizens from their governments. In such discourse on justice the necessary conditions for justice to be realized are often ignored. It is ignored that the demands of citizens from their governments, whatever they might be, cannot be met in the absence of a certain type of moral personality they should bear for their demands to be met. Justice as a quality of social order is not possible without a culture of justice in the personality of its citizens. Therefore, a discussion on justice need to focus not only on the desired attributes of the social order and legitimate expectations of its citizens from their government, but also the desired traits of its citizens' moral personality and their legitimate expectations from each other. And that is what this paper attempts to show.

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I. INTRODUCTION

Describing the complexity of the question of 'justice', Prof Hans Kelsen wrote: "*No other question has been discussed so passionately; no other question has caused so much precious blood and so many bitter tears to be shed; no other question has been the object of so much intensive thinking by the most illustrious thinkers from Plato to Kant; and yet, this question is today as unanswered as it ever was*".[1] "*This is one of those questions to which man cannot find definitive answer, but can only try to improve the question.*"[2] One such improvement in asking the question of justice in modern times is that now we have some consensus on what we are expecting in a discussion when we are discussing 'justice'; some boundaries are drawn in this discussion and we now know when the discussion transgresses those boundaries. What may appropriately be considered a discussion on justice is more or less settled in modern times. Such improvement in asking the question of 'justice' does not help us in understanding clearly the answer to the question of justice, but it helps in narrowing down the question to a large extent, and that is no small achievement. Justice is now accepted as a quality of social order.[3] In modern times it is a common ground that while thinking about justice, our attention should be focused primarily on how the society is organized.[4] Interpersonal behaviour is supposed to be just if it is in conformity with a just social order.[5] A question of justice, therefore, is a question about what is a just

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[1] Hans Kelsen, *What is Justice?* (University of California Press, 1960) 1.
[2] ibid.
[3] ibid.
[4] Michael J Sandel, *Justice: What's the Right Thing to Do?* (Penguin Books, 2009) 6.
[5] Hans (n 1) 2.

social order; our actions aligned with the demands of a just social order being pre-supposed to be just.

This narrowed down and extremely specific transformation of the question of 'justice' has encouraged scholars to debate on the qualities that should be present in a social order for it to be considered as a just social order. Should social order be such that it aims at maximizing the aggregate happiness of the citizens,[6] or should it be such that it aims at maximizing the freedoms of the citizens?[7] Should social order be such that it aims to eliminate arbitrariness in interfering with the life, liberty and property of people by establishing a certain structure of governance,[8] or should it be such that it proactively try to eliminate the differences (especially in wealth and income) among people and make them equal? Should natural inequality be celebrated or despised?[9] The boundaries of the debate on justice have become so clear and fixed for all the participants that even sceptics have not dared to suggest any new field to fight the battle on.[10]

Such unwavering focus on the attributes of the social order in debating on the question of justice has resulted in a tendency of making a list of demands that the order must satisfy or else be prepared to be condemned as unjust. But who is to blame for an unjust social order? Social order is a state of affairs; it is not a person. In actual practice, most of the

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[6] See generally, Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (Oxford University Press, 1996).
[7] See generally, Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974).
[8] See generally, John Locke, *Second Treatise of Government* (Watchmaker Publishing, 1921).
[9] See generally, John Rawls, *A Theory of Justice* (Harvard University Press, 1971).
[10] See generally, Amartya Sen, *The Idea of Justice* (Allen Lane an imprint of Penguin Books, 2009).

governments in contemporary times might not have actually 'established' social order in their society but they are supposed to bear the responsibility to manage the social order. In some cases, they can even make very profound changes in the existing social order and they may be rightly held accountable for the existing shape of the social order. In any case, the demands which the social order should satisfy, because of the focus on social order while discussing justice, become demands that the governments should satisfy. Governments are condemned as unjust when certain demands are not satisfied. What demands shall be raised in the name of justice depend on the claimant's conception of a 'just order'. From a certain point of view of justice, it may be a demand for unqualified liberty; from another point of view, it may be for unqualified equality. Sometimes it may be for certain changes in the existing structure of governance and sometimes it may be for status quo. Sometimes it may be for the protection of human rights of criminals and sometimes it may be for the promotion of general safety and security of citizens. From one or the other point of view of justice, all demands may be argued as just and well-meaning demands; and, if not met the social order, and therefore governments, may be labelled as unjust.

In such a narrowed down discussion on justice two very crucial issues are thrown out of focus. *First* is that while we are arguing in favour of a certain conception of justice, we are actually saying that that conception of justice is very appealing for a certain reason. That reason for appeal maybe some moral reason or even an intuitive reason. What we forget in the discussion is that the reason that makes a certain conception of justice

appealing to us cannot be the reason for the success of that concept of justice when adopted in actual practice. No matter how appealing a certain model of justice might be, there is no guarantee that it will work when applied in any given society. This is because the reasons for the appeal of a model of justice and the reasons for the success of that model after its implementation are always very different. This very crucial point is often not properly grasped when any given social order, and thereby any government, is labelled as unjust. Many countries have experimented with various models, resulting in little to no success.

The second issue that is lost sight of is that a claim for a just social order is not only a 'claim' on governments to function in a certain manner, but also a claim on each other to maintain our interpersonal relations in conformity with certain standards of behaviour irrespective and independent of the social order. A discussion on justice is not only about how the governments should function, but also about what 'responsibility' the citizens bear in a given society. A social order does not become just independent of the behaviour of the citizens who are desirous of it to be just. Saying that a citizen's conduct is automatically just if it is in conformity with a just social order is demanding nothing from the citizens while expecting everything from the social order or governments. A just social order is an outcome of certain behaviour of its constituent citizens. This point is also not well grasped when social orders, and thereby governments, are evaluated on any standard of justice.

Both these issues which are generally ignored in a discussion on justice are to some extent interrelated, for the success or failure of any

model of justice may be linked with how the citizens behave in a given society. In other words, why a social order or a government appears to be just or unjust on any parameter of justice may have something to do with what standard of behaviour its citizens maintain irrespective of the demands of the model of justice adopted in that society.

The aim of this paper is to bring the focus back on these two issues. I will attempt to highlight that the reasons for appeal of a model of justice are different from the reasons of its success. I will try to show that an otherwise very appealing model of justice once adopted may remain unsuccessful if certain conditions are not satisfied. I will also try to show that the blame for an unjust order needs to be shared by its citizens. The model of justice that I will discuss for reference is Prof John Rawls' model of justice - *Justice as Fairness*. I am choosing this model for five reasons. *First*, that it is universally accepted as a very appealing model. *Second*, that social order established in many welfare states approximate to this model. *Third*, that it is a model that advocates for liberty as the primary virtue for full development of moral powers of citizens. *Fourth*, that Rawls himself while advocating for this model succinctly discussed the moral appeal behind it and the conditions for its success. *Fifth*, that the reasons for success that are elaborated in this model may, to a large extent, be the reasons of success for even a different model that may not be advocating for liberty as the primary virtue for the full development of moral powers of citizens.

II. THE APPEAL OF JUSTICE AS FAIRNESS

Without a doubt, Rawls' idea of *Justice as Fairness* occupies a place of pride among the theories of justice. It is hailed as the most cogent

analysis of justice ever done. *Justice as Fairness* gets maximum attention when academics and other scholars discuss the question of political justice. Such attention is rightly given to this theory of justice not only because of its attention to details but also because of its starting premises that though nature is neither just nor unjust, political justice is about addressing and dealing with natural inequalities. The state cannot be a neutral spectator to the unequal outcomes in terms of income and wealth springing out of unequal initial positions of skill, power, position, opportunities, motivations, etc. Rawlsian theory does not advocate undoing the work of nature by making everyone equal. It advocates for establishing a political setup in which, after satisfying the principles of justice, the residue inequalities may be considered as just inequalities. That within any given society someone is successful and rich in life and someone else is unsuccessful and poor in life may be a just state of affairs provided that society is organized in a certain manner and sufficient conditions for equal participation in the society are created. The model of justice presented by Rawls also focuses only on the narrowed down question of justice, i.e., what is a just social order?

Rawls' *Justice as Fairness* demands that the basic structure of the society should be so organized that:[11]

> 1. *Each person has the same indefeasible claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all; and*

[11] John Rawls, *Justice as Fairness – A Restatement* (Universal Law Publishing, Indian Reprint, 2004) 42.

2. *Social and economic inequalities are to satisfy two conditions:*

a. *They are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and*

b. *They are to be to the greatest benefit of the least-advantaged members of society (the difference principle).*

This model of justice appeals to us for multiple reasons. The first and the most obvious reason is the manner in which these principles of justice are arrived at. Rawls has given us very tempting reasons for why, in the first place, these principles should be accepted as the principles of justice. In arriving at these principles as the principles of justice, he avoids the route of slavery of mankind in the world of senses, a route followed by the great champion of utility - Jeremy Bentham;[12] he also avoids the route of freedom of self in the metaphysical world outside the sensible realm, a route followed by the great champion of the moral law - Immanuel Kant.[13] Choosing the principles of justice in an unfree condition, as done by Bentham, strip off the moral appeal from such principles. How can we project any principle as having any moral foundation if the principle springs from an unfree nature of mankind? A social order organized on the basis of such principle(s), therefore, cannot have any moral foundation. Such social order will only reinforce the unfree nature of mankind and cannot be considered just. Man is much more than a pleasure-seeking entity, and to establish a social order in such a manner that conducive conditions are not

[12] Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* (Universal Law Publishing Co Pvt Ltd, 2006) 1.
[13] Immanuel Kant, *Groundwork of Metaphysics of Morals* (HJ Paton tr, Harper Perennial Modern Thought Edition 2009) 119-120.

secured for him to realize his higher self, higher than merely satisfying his senses, is the route best avoided. But a social order can also not be established on the foundation of the principles that appear to be mere speculations in a metaphysical world, as done by Kant, howsoever morally appealing they might be. Such social order will fail on empirical scrutiny and will have no defence against the objections of subjectivity. Man cannot be viewed as free and equal only in a metaphysical world. Freedom and equality while choosing the principles of justice have to be much more demonstrable. The organizing principles for establishing the social order arising from unrealistic freedom and equality in the metaphysical world should also be avoided.

The appeal of Rawls' principles of justice is the manner in which they are chosen. While choosing the principles of justice he acknowledges that man is unfree and the principles of justice, once chosen, will be the foundational principles for organizing an unfree society. Even more importantly he accepts that man is not just unfree, he is also unequal. This is unlike Bentham's approach where every man is equally unfree and therefore everyone is equal in that sense.

Rawls approaches the unfree situation of man not in the sense that he is a slave of his sovereign masters – pleasure and pain – but in the sense that he has no control over the conditions in which he is born and also no control over the native endowments that he is born with. Since everyone is born with different native endowments and in different conditions, everyone is unequal to another. In this sense, everyone is unfree and also unequal. But, unlike Bentham, he does not resign to such unfree and

unequal condition in choosing the principles of justice. He makes an effort to choose the principles of justice in such a manner that something is done about it. His thought experiment of original position is an attempt to arrive at a non-metaphysical and to some extent realistic, even if not empirically demonstrable, state of equality from where the principle should be chosen. While choosing the principles of justice, an objective awareness of unfree and unequal conditions that exist in the society for which the principles of justice need to be chosen without resigning to those conditions sets his method apart from pure utility (and therefore surrender) of Bentham and pure metaphysics (and therefore mere speculations) of Kant,[14] and that makes his principles of justice appealing to us.

Another reason that makes Rawls' model appealing to us is that it is a political, not a general, conception of justice.[15] But, despite being a political conception of justice its claim of universality is different from the claims usually made in a conception of justice. Though it is claiming to have universality in the sense that all the political societies may arrive at the same principles of justice provided the same method of discovering them are adopted, it is not making any claim that within any given political society these principles should be universally applied. *Justice as Fairness* focuses on the basic structure of the society as its primary subject. The political constitution with an independent judiciary, the legally recognized forms of property, and the structure of the economy, as well as the family in some

[14] Michael J Sandel, *Liberalism and The Limits of Justice* (2nd edn, Cambridge University Press 1998) 24 - "It is the original position that 'enables us to envisage our objective from afar', but not so far as to land us in the realm of transcendence".
[15] Rawls (n 11) 11.

form belong to the basic structure.[16] The manner in which these institutions fit together into one system of cooperation is the concern of *Justice as Fairness*. Rawls' model of justice leaves adequate scope for applying different principles of justice at the local level.[17] Labour unions, firms, universities, families, co-operative societies, NGOs and many other institutions flourish within the basic structure of the society each requiring a unique set of principles of justice for its regulation.

Rawls does not make any claim that the principles of justice appropriate for the basic structure should also be considered appropriate for the institutions operating within the basic structure. Since each institution within the society can have an independent existence generally constrained by the basic structure of the society, each one of them may be governed by a unique set of principles of justice generally constrained by the principles of justice applied to the basic structure of the society. This flexibility allows the institutions to progress and modulate as per the need of the time, yet never violating the fundamental parameters of justice that regulates the basic structure. For example, how much public-private partnership is required for the economic growth of the nation, or how much privatization of the businesses is required for the best economic output may vary from time to time and therefore be subjected to different standards of justice from time to time; but at no point of time equal access to the business opportunities should be denied because that is a principle

[16] ibid 10.
[17] ibid 11.

applied at the basic structure of the society. This cautious approach in *Justice as Fairness* makes it unique and appealing.

Applying the principles of justice to the basic structure of the society and leaving sufficient flexibility at the local level makes the idea of *Justice as Fairness* a background procedural justice. Together with its main goal of 'distribution' rather than 'allocation', the effort to maintain background procedural justice presents a very realistic picture of how people living in association with each other actually experience life. Human beings in a society associate with each other to produce resources, opportunities, commodities, wealth, etc. Participation in such cooperative production is at varying levels with varying degrees of involvement, commitment and efforts. The needs, desires and preferences of the participants also differ from one another. When it comes to claiming a share in the resources, opportunities, commodities and wealth, *Justice as Fairness* takes into account the involvement, commitment and effort as the criteria rather than the need, desire and preference of the participants. However, the involvement, commitment and efforts of the participants is conditioned by various non-voluntary reasons for which background procedural justice provides a solution. The social class in which a person is born and develops before the age of reason, the native endowments of a person, the opportunities to develop his native endowments, and good or bad luck of a person, are some of the reasons that may affect his involvement, commitment and effort in the production process that goes on in the society. Background procedural justice makes the prospects of an individual's complete life fairer by reducing the impact of non-voluntary

reasons in his participation in the process of production and in turn in his staking a claim on a share of the produce.

When considered realistically, it is not enough that there is a just distribution, even on the basis of distributive principle rather than allocative principle, only at the initial stage because the circumstances faced by people over a complete life may not remain static. Different people go through different phases in their life. In some cases, life circumstances at the time of birth may be very favourable but may change overtime to become very unfavourable. In some cases, it may be the reverse. Such reversal in life circumstances affects their involvement, commitment and effort in the production. Applying the principles of justice to the basic structure and making it a background procedural justice is an effort to understand that justice is not only about initial just distribution, but also about continued fairness in distribution over the complete lifespan of citizens. The agreements that citizens enter upon and the share that they get in the produce over their complete lifespan are just if those agreements and distributions are done within the constraints of background procedural justice. Such realistic and humane approach of addressing the inequalities over a complete lifespan makes Rawls' model very appealing.

While addressing inequalities, the aim of *Justice as Fairness* is not to establish 'formal' equality. It attempts to establish 'fair' equality. When it comes to offices and positions in the society, *Justice as Fairness* demands that they should be open to all under the conditions of fair equality of opportunity. Fair equality of opportunity is that pre-condition of competition for the offices and positions where people who are similarly

gifted, similarly motivated and making similar level of effort should have a similar chance of success in attaining those positions and offices. In contrast, formal equality of opportunity is that condition of competition where no one is excluded from competition but competitors for offices and positions do not have similar chances of success in attaining them even if they are similarly talented, motivated and hard-working. Without empowering the citizens and enabling them to compete at a level playing field, the equality is only 'formal' and not 'fair'. If people do have enough training opportunities for the competition, or if offices and positions are concentrated only at very few places in the society where only some people can have access, people will not have similar chances of attaining the offices and positions even if they are similarly talented, motivated and hard-working, and even if no one is prevented from participation in the competition. That will be only a 'formal' equality of opportunity and not 'fair' equality of opportunity.

In a free-market system, the long-term trend of wealth concentration is the primary reason that adversely affects equality. In a free-market economy, long-term trend of wealth concentration leads to an uneven development of various sectors in the society. When it comes to enabling people to compete with each other for offices and positions, one such sector becomes very crucial, and that is education sector. Due to wealth concentration in the society, some pockets in the society tend to exhibit far better development in quality of education available there, compared to many other pockets in the same society. Though nobody may be denied access to education the availability of good quality education for

all may not be a reality in free-market economy. Also, wealth concentration may result in political domination. Attainment of political positions may not remain a realistic possibility for poor and economically deprived classes. *Justice as Fairness* ensures that market forces are so regulated that if not long-term trend of wealth concentration, at least its accompanying vices of affecting political offices and equal distribution of opportunities in the society are neutralized. It also advocates for establishing equal opportunities of education for all irrespective of initial birth condition. Advocacy for free market economy with a mechanism to avoid the vices of wealth concentration is yet another reason to prefer Rawls' model of justice.

Once fair equality of opportunity is established, *Justice as Fairness* goes one step further and allows for social and economic inequalities if they are for the greatest benefit for the least-advantaged members in the society.[18] Yet another charm of Rawls' model of justice in this 'difference principle' is that the identification of least advantaged members of society is to be done solely on the basis of their income and wealth.[19] Assuming that historically, inequalities have arisen due to gender, colour of the skin, race, caste, ethnicity or a combination of these or similar factors, and now after the application of 'equal basic liberties' principle and 'fair equality of opportunities' principle such factors may not be independently operating for creating inequalities in the society, the only independent variable for creating inequality shall be income and wealth.

[18] ibid 42.
[19] ibid 59.

Other reasons for inequalities like gender, caste, colour of skin, etc. may overlap with income and wealth but shall not independently operate. It may so happen that people with lower income and wealth 'also' are usually women or are born with a certain colour of skin, but that may only be a tendency for such features to characterize who are less well-off in income and wealth after the 'equal basic liberties' and 'fair equality of opportunity' is ensured. The crucial question is: should such inequalities in income and wealth be considered as 'just' inequalities? Or, should some further correction be done? This is a very crucial point because it brings our attention to the main reason behind the entire exercise of identifying the principles of justice.

Establishing a just social order is not only about neutralizing the historical and non-voluntary factors that create inequalities in the society, but also about recognizing the dynamic nature of life circumstances and creating such background conditions in which everyone has a chance to realizes his full potential no matter where he is placed at the moment. It is important to realize that there cannot be a static just condition. For example, one section of the society may need some extra support at one point in time but after some time they may not need that support because they may have gained enough ground, and now continued support to them may result in pushing some other section of the society on a downward slope. A correction will then be required, and support may require to be extended to some other section of the society. Identifying the least advantaged section on the basis of income and wealth brings the kind of dynamism that is required in a just social order. Other factors like sex,

colour of the skin, caste, etc., remain unaltered with a person for his entire life span, but income and wealth is a fluctuating factor. Any support on the basis of static factors will be a continued support even after the beneficiary becomes an equal participant in the society and no longer needs the support.

In Rawls' model at any given point of time, a person's capacity for equal participation in the society is directly correlated with his income and wealth at that point of time because it is his income and wealth that determine his prospects of accessing primary goods.[20] Income and wealth being a non-static factor, people may gain or lose their capacity to fully exploit the basic liberties to their advantage at different stages of their life. A just social order should be sensitive to this changing capacity of people. Who has gained the capacity to equally participate in the society and who has lost the capacity to equally participate in the society should not be a settled question. A just social order should always be searching for the section of the society that needs support at the present moment because it has lost, or it is losing, the capacity to remain equal with others. If the social order is so arranged that the schemes of cooperation are chosen in such a manner that the preferred scheme is enhancing the chances of access to

[20] ibid 58-59:
Five things are identified as primary goods, (i) The basic rights and liberties: freedom of thought and liberty of conscience, and the rest; (ii) Freedom of movement and free choice of occupation, against a background of diverse opportunities; (iii) Powers and prerogatives of offices and positions of authority and responsibility; (iv) Income and wealth, understood as all-purpose means (having an exchange value) generally needed to achieve a wide range of ends whatever they may be; and (v) The social basis of self-respect, understood as those aspects of basis of institutions normally essential if citizens are to have a lively sense of their worth as persons and to be able to advance their ends with self-confidence.

primary goods, and thereby being equal with others for those who have the least chances at the present moment in time, then it establishes a dynamic equality. In such an order the lowest in the order will always be pulled up, and who is the lowest is not determined for all times to come. The result is that the social order will continually be searching a new lowest in the order which needs support at that time. Empowerment schemes will not be extending benefits to only a permanently identified group. *Justice as Fairness*, in its difference principle, allows this dynamism by continually identifying the section of the society that needs support at the present moment and by adjusting the social and economic inequalities in such a manner that they work out for the greatest advantage for such section. Advocating for justice as equality in such dynamic sense makes *Justice as Fairness* even more appealing to us.

However, neither it is an equality in the initial participation in the process of production of social resources and wealth, nor it is an equality in the final distribution of the outcome of the production. *Justice as Fairness* guarantees an equality of a very different kind. It ensures equality in providing conducive political and social conditions, essential for developing their moral powers, to all citizens. Therefore, *Justice as Fairness* mandates a lexical priority in applying the principles of justice. The first virtue of a just social order from this point of view is that it ensures equal basic liberties. Freedom of thought, liberty of conscience and freedom of association, etc., allow people to develop and exercise their moral power in judging the justness of the basic structure of the society and in forming, revising and rationally pursuing their conception of the good. Such version of equality

where liberty is the core value for the sake of developing the moral powers of people is a unique vision. People should not only be free to choose their calling, but they should also be free to judge the justness of the basic structure of the society. Such freedom is not possible in a social order where such moral powers of people cannot be fully developed or exercised. A model of justice that 'empowers' people to develop and exercise their moral powers to pursue their conception of good and to evaluate the justness of the basic structure of the social order at the same time is without doubt bound to be appealing to one and all.

Rawls' model of *Justice as Fairness* uncovers the basis of a possible moral agreement among the citizens who are differently situated in life and who are pursuing different and sometimes conflicting conceptions of the good. Despite allowing enough scope to pursue their unique lives in their private sphere this model of justice encourages citizens to look beyond their individual self and grasp the larger picture of a society that they inhabit – a society which has a history and a future. This model of justice very successfully attempts to calm our frustration and rage against our society and its history by showing us the way in which its institutions, when organized according to the proposed principles, may work out to be just for everyone.

To sum up, the appeal of *Justice as Fairness* lies in these unique features of this model – it is derived from an objective awareness of unfree and unequal conditions of human beings without resigning to such conditions; it makes a limited claim of universality; it focuses on distribution and not on allocation; it advocates for fair and not just formal equality; it

attempts to extend help to the least advantaged by identifying them on the basis of a dynamic factor of income and wealth; it empowers people to develop and exercise their moral powers; it uncovers the basis of moral agreements among the citizens; and, it calms our nerves by showing a possibility of a just social order. But, all these features, that make this model very unique and appealing to us, even collectively are not sufficient to ensure the success of this model. Success of a model of justice is another story. The success of *Justice as Fairness.*

A model of justice, despite all its attractiveness, requires favourable conditions for its success.[21] Conditions that are supposed to be favourable for the success of *Justice as Fairness* involve a certain kind of moral personality that the citizens of a political society are expected to carry. As noted in the previous section of this paper, Rawls' idea of *Justice as Fairness* envisions that a just social order is the one which 'empowers' people to develop and exercise their moral powers to pursue their conception of good and to evaluate the justness of the basic structure of the social order. But for the success of this model what is first needed is that the social order is arranged in accordance with the principles of justice and the moral powers of its citizens which it aims to strengthen work in a symbiotic relationship. The social order should strengthen the moral powers of its citizens and the moral powers of the citizens should in turn strengthen the justness of the social order. This is the first requirement for the success of this model of justice, and this needs some further explanation.

[21] ibid 13.

Citizens of a social order, in this conception of justice, are imagined having a personality such that all of them have sufficient moral powers necessary to engage in social cooperation over a complete life and to take part in society as equal citizens. They are supposed to have two such moral powers, namely: (i) capacity for a sense of justice, and (ii) capacity for a conception of the good.[22]

Capacity for a sense of justice is their capacity to understand, apply and act from (and not merely in accordance with) the principles of political justice. Capacity for a conception of good is their capacity to have, to revise, and to rationally pursue a conception of the good. A conception of good is a citizen's personal aim in life - the final end toward which he works. As seen in the previous section, a just social order should ensure access to basic goods which help an individual in forming and realizing his conception of good. With enough freedoms and empowerment measures secured in the basic structure of the social order one may form his conception of good, he may also revise his conception of good as many times as he wants.

Our conceptions of good is, however, shaped by various religious and philosophical and moral views that we hold. Because our religious and philosophical and moral views differ with each other, our conceptions of good conflict with the conception of good of our fellow citizens. A just social order cannot be established on any one conception of good. For the success of *Justice as Fairness*, the moral power to form and revise our conception of good should not be understood to allow us to impose our

[22] ibid 18-19.

conception of good over others. Citizen's moral power of having the sense of justice should be prevailing over their moral power to form their conception of good. The citizens are expected to understand, to apply, and to act from the principles of political justice. It is expected that citizens act from the principles of political justice not *because* they feel a need to compromise and strike a balance between their different conceptions of good, but *in spite of* and *independent of* their conception of good. Their moral power to act from the principles of justice should have an independent existence (independent of their moral power to form a conception of good) in their moral personality. They need to understand that the constitution and its political values as realized in their institutions must be affirmed by their actions.[23] Only then their individual conceptions of good can be realized. This establishes a symbiotic relationship between the social order and the moral powers of the citizens. They get strength from each other. First requirement for the success of *Justice as Fairness*, therefore, is that citizens should so act that a symbiotic relationship is established between their moral powers and the social order.

Justice as Fairness recognizes that most serious conflicts are the conflicts within ourselves. Our judgments on various issues are not consistent with each other. If we do a close examination of our judgments on various issues, we may discover that on many occasions our stance in one issue is principally in conflict with our stance in a different issue. We suffer from internal inconsistency. This happens because we refuse to consider the counter arguments. We tend to stick to the first view that we

[23] ibid 20.

have formed on any issue and try to justify that view in a dogmatic manner no matter how persuasive the counter arguments might be. This is the defect of 'narrow reflective equilibrium'. This leads to an internal inconsistency which in turn extrapolates in the form of a clash of our judgments with the judgments of others.

If the citizens form their opinion about justice on a narrow reflective equilibrium there shall never be a consensus in the society on what is just. What is required is that after forming an opinion people should reconsider and make many changes in their first opinion. This wide-ranging reflection and, therefore, a 'wide reflective equilibrium' is necessary to develop a general consensus on how the members of the society shall justify their actions to each other.[24] Without such wide reflective equilibrium Rawls' model of justice cannot have the foundation of equality among citizens as moral persons capable of forming and pursuing their conception of good. A dogmatic adherence to one's views undermines the idea of freedom and equality. Free and equal persons should be able to reach at the consensus on the terms which are accepted as just and on which they should be able to cooperate with each other. They should be able to create common reference points for the justification of their conflicting opinions.

A just social order cannot be established where the citizens consider justice only from their narrow reflections and refuse to accommodate the reflections of others. Citizens need to treat each other as equal moral persons. A model of justice has to be a publicly justifiable model, which is

[24] ibid 29-32.

not possible without internal consistency in its citizens and social cooperation with mutual respect among its citizens. But, even more importantly, the demand for *Justice as Fairness* is that cooperation should not be a result of any coercive political authority exercised over people.[25] This cooperation should be there in the society even without the exercise of any coercive political authority. Without anyone coercing them, citizens should align their views and make them internally consistent, and they should also align their views with the views of fellow citizens. That the citizens have such capacity for reason that *without any coercive political authority* they are able to make their judgements consistent both within themselves and also with the considered judgments of others, thereby creating common reference points (whatever they might be) for evaluating their divergent views is the second requirement for the success of *Justice as Fairness*.

For distributive justice, a society is viewed as a fair system of cooperation over time from one generation to the next.[26] A fair system of cooperation is more than merely coordinated activities. Activities may be coordinated by coercive orders. For example, drivers of vehicles may be asked to drive on the left side of the road by some authority which has coercive power over all the drivers. When everyone drives on the left side of the road, the activity of the drivers is coordinated. But this may not be cooperation among the drivers. An inter-generational fair system of cooperation, in contrast with merely coordinated activities, require mutuality and reciprocity. Every generation inherits something from the

[25] ibid 50.
[26] ibid 58-59.

previous generations and passes on something to the next generations. Citizens of a just social order have to be sensitive to this inter-generational relationship. The production and distribution of wealth, resources and opportunities in a society is required to be viewed as an ongoing process taking place from generation to generation. That the citizens are able to understand their position in this inter-generational process, and that they are ready to cooperate in the process of inter-generational production and distribution is the third demand for the success of *Justice as Fairness*.

When it comes to justice our expectations are often in conflict with our character. We demand a lot from the social order, but we are not ready to contribute to its maintenance. We highlight the injustices done to us, but silently sweep under the carpet our own acts of injustice. The fourth pre-condition for the success of *Justice as Fairness* is that the citizens should act reasonably. For the success of a just social order, it is expected that citizens act reasonably and not merely rationally. It might be rational for a person to protect his personal interest, but it might not always be reasonable to do so. Reasonable persons protect their personal interest only when it is also the right thing to do. They act on non-utilitarian reasoning.[27] Reasonable persons honour commitments even at the expense of their own interests; rational persons merely pretend or propose to honour commitments but are ready to violate them when it advances their personal interest. Rational persons demand the protection of their rights from the top of their voice but conveniently ignore their duties. Reasonable persons are ready to share

[27] Think of Kant's Categorical Imperative - 'Universalize Your Maxim' - as a non-utilitarian reason to choose your actions, always asking – 'am I prioritizing my interest over that of others?'.

the burden of sustaining a just social order. They give importance to the duties of citizens as much as they give to the rights of citizens. *Justice as Fairness* cannot succeed if citizens are merely rational, and not reasonable.

Justice as Fairness can succeed only when citizens successfully overcome their tendencies of envy, spite, and a will to dominate others; when they are ready to reaffirm and strengthen the social order even to the detriment of their personal interests; when they are ready to revise their comprehensive religious, moral and political views; when they envision themselves as a part of inter-generational arrangement in which cooperative production and distribution need to be done. The success of *Justice as Fairness* is possible only when the citizens include the good of political society in their conception of good for themselves.[28] Only when the citizens have a capacity and will to give justice to each other despite their different comprehensive moral views about life, and this they are willing and able to do without any compulsion, force or coercion, can *Justice as Fairness* succeed. In other words, the success of *Justice as Fairness* is possible only when the citizens of the society have a certain kind of moral personality.

There should be no doubt that, at least from the contractarian point of view, the social order emerges from the moral personality of the citizens. Subsequently, it is maintained for further strengthening that personality. It should be clear that the *appeal* of *Justice as Fairness* lies in that it proposes a scheme in which the citizens are guaranteed sufficiently favourable conditions to develop their moral powers, but its *success* depends on how

[28] ibid (n 11) 202.

citizens actually put to use those powers – and that is their moral personality which they already have. And they are two very different things. It demands its success that *first*, citizens already have in their personality justice as the primary virtue, and *second*, they participate in the social order in such a manner that their sense of justice is further strengthened. Therefore, the onus is on citizens when it comes to making justice a reality. No matter how appealing a model of justice they adopt in their constitution and how they organize their social and political institutions, citizens cannot dream of a just social order without first imbibing a culture of justice in their individual personalities.

III. CONCLUSION

The narrowed down discussion on justice in modern times asking only the question – 'what is a just social order' – and claiming that 'the conduct of citizens is just if it is in conformity with a just social order' is losing sight of the fact that the social order itself emerges from the moral personality of its constituent citizens, and it is their moral personality that is chiefly responsible for justness or unjustness in the social order. This narrow approach toward justice focuses entirely on what the social order provides for the citizens, and completely throws out of focus what citizens need to bring to the table. It encourages us to understand justice as a relationship between citizens and their governments in which the role of the governments is to protect rights of the citizens and citizens are always justified in claiming rights. From this viewpoint, just governments are the ones which protect more and more rights. So much so that the

governments are expected to be tolerant toward anti-democratic claims of the citizens. This is the slippery slope where justice can never be realized.

The discussion on justice needs to be broadened. In a discussion on justice an equal, if not more, attention should be given to what is expected from the citizens. It is not correct to say that the conduct of citizens is just if it is in conformity with a just social order. The correct approach toward justice is that *a social order will usually be just if its citizens' conduct is just*. Search for justice needs to start from within our moral self. It should be realized that justice is as much about how we as moral personalities act as it is about how governments function. Unjust social order and unjust governments cannot be established when the citizens' moral personality is already exhibiting justness. Justice is as much about our reasonable behaviour in staying committed to the institutions of democracy, even when it is not to our rational advantage, as it is about claiming for the protection of our rights to show dissent. Justice is as much about our self-restraint and showing respect toward fellow citizens as it is about our claiming a right of self-expression. Justice is as much about how citizens treat each other as it is about how governments treat citizens. Justice is as much about duties as it is about rights. If justice is the primary virtue of citizens' moral personality it will be the primary virtue of the social order. Justice is not a thing to be demanded, it is a thing to be given!

Abhishek Tripathy & Akshita Totla, 'Changing contours of Merger Control: Exploring the enforcement gap in regulating nascent acquisitions' (2021) 7(2) NLUJ L Rev 71

CHANGING CONTOURS OF MERGER CONTROL: EXPLORING THE ENFORCEMENT GAP IN REGULATING NASCENT ACQUISITIONS

Abhishek Tripathy[*] *& Akshita Totla*[#]

ABSTRACT

This paper deals with the anticompetitive effects of nascent acquisitions. The traditional approach in merger control is based on the turnover of the merging entities, assets, and other notifiable requirements. More often than not, acquisition involving nascent competitors do not meet the required thresholds, and hence evade antitrust scrutiny. At other times, though the threshold of the acquisition invokes the jurisdiction of the regulator, it escapes the liability due to existing loopholes in the enforcement framework. The authors analyse the peculiarity of major jurisdictions (US, EU, UK and India) in tackling the issues involving nascent acquisitions, and attempt to locate the existing enforcement gap within the larger debate of regulating nascent acquisitions. Recent research and empirical data have shown the evolution of various theories of harm with respect to nascent acquisitions. This paper specifically deals with the Killer Acquisition theory and the Nascent Potential Acquisition theory.

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The apprehension of harm caused by such acquisitions is prevalent in dynamic markets, such as pharmaceutical markets and new-age digital markets. The authors argue in this paper that the potential for harm in cases of nascent acquisitions should be duly addressed and dealt with in order to ensure continuous innovation in dynamic future markets.

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I. INTRODUCTION

Nascent firms and start-ups are integral to every competitive market. In fact, nascent firms encourage innovation, steer economic growth, increase competition, reduce market inequality, and shun stagnancy in the market.[1] Saying this, they are more vulnerable to exclusionary and abusive conduct by dominant firms in the market.[2] The primary duty of an antitrust regulator is to provide a level playing field and to ensure the continuing presence of nascent firms in the market.[3]

In this paper, we will deal with two different approaches to merger control in the antitrust regime. The current approach, which we term as the traditional approach, mandates antitrust scrutiny only on the fulfilment of a certain threshold. The threshold can be based on the turnover of the merging entities, assets and other notifiable requirements. More often than not, acquisition involving nascent competitors do not meet the required thresholds, and hence evade antitrust scrutiny.[4] At other times, though the threshold of the acquisition invokes the jurisdiction of the regulator, it escapes the liability due to existing loopholes in the enforcement framework. Such loopholes in the framework are a result of multiple factors

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[1] C Scott Hemphill and Tim Wu, 'Nascent Competitors' (2020) 168 University of Pennsylvania Law Review 1879 <https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3665&context=faculty_scholarship> accessed 8 March 2021.

[2] ibid.

[3] Tim Wu, 'Taking Innovation Seriously: Antitrust Enforcement If Innovation Mattered Most' (2012) 78 Antitrust Law 313 <https://scholarship.law.columbia.e du/cgi/viewcontent.cgi?article=2768&context=faculty_scholarship> accessed 8 March 2021.

[4] Policy Statement 225/730 ICC Recommendations on Pre-Merger Notification Regimes (2015).

such as inaccurate assessment of counterfactual, no authority for ex-post review of merger control decisions, etc. For instance, mergers such as *Google/Waze*, *Facebook/Instagram* evaded antitrust scrutiny for not meeting the required threshold, or for the assumption of having an inconsequential impact.[5] We discuss such missed opportunities in detail later in the paper.

The term 'nascent competitor' mainly denotes a particular category of product or technology that is relatively new, and has the ability to be a notable competitor in the future.[6] It is often confused with the term 'potential competitor', but it differs in meaning. Broadly speaking, a nascent competitor is one that exists in the market but still has not matured or reached its potential. Whereas the term potential competitor refers to a product or service that does not exist currently but is likely to be a competitor in the near future.[7] The traditional approach in merger control and antitrust regulation has limited the role of these nascent firms to only forecasting barriers to entry or providing an estimate of competitive constraint in a relevant market.[8] This approach coupled with their rare presence as a merger entity (due to low turnover) has created a perception of them having an inconsequential impact on competition.

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[5] Jessica Bowring and Louise Tolley, 'The Lear Report on Digital Mergers' (2019) Thomas Reuters 27 June 2019 <https://uk.practicallaw.thomsonreuters.com/w-020-9330?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed 8 March 2021.

[6] John M Yun, 'Potential Competition and Nascent Competitors' (2019) 4 The Criterion Journal on Innovation 625, 629.

[7] ibid.

[8] OECD Secretariat, 'Start-ups, Killer Acquisition and Merger Control Thresholds' (2020) OECD 12 May 2020 <https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf> accessed 4 November 2020.

The contests to such a traditional approach started when Cunningham et al (2018) identified the trend of dominant market players acquiring a large number of newly formed nascent firms.[9] They studied a sample of more than 16,000 projects initiated by nearly 4,000 pharmaceutical companies over a period of two years. In an attempt to prevent future competition, these incumbents acquired nascent targets in the horizontal market to discontinue – or 'kill' – their ongoing projects. The researchers named such acquisitions as 'Killer Acquisitions' for their ability to pre-empt potential competition and get rid of a promising and innovative project. This analysis gave perspective to an apparent loophole in antitrust scrutiny and merger control in major jurisdictions around the world.

The apprehension of harm caused by such acquisitions is accentuated in the context of new-age digital markets. Elena Argentesi et al (2020), taking a cue from the existing narrative, argues that the trend of acquiring nascent firms is more pervasive in the digital economy.[10] The tech giants in recent years have been aggressively involved in acquisitions of start-ups that might pose a future competition constraint. In between 2008 to 2018, Google acquired 168 companies, Facebook acquired 71 companies and Amazon acquired 60 companies.[11] These nascent firms, if not acquired, might have continued to possess a competitive threat to the incumbents.

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[9] Cunningham and others, 'Killer Acquisitions' (2020) Journal of Political Economy 19 April 2020 <http://dx.doi.org/10.2139/ssrn.3241707> accessed 21 October 2020 (forthcoming).

[10] Elena Argentesi and others, 'Mergers and Merger Policy in Digital Markets' (2020) Vox CEPR 4 March 2020 <https://voxeu.org/article/mergers-and-merger-policy-digital-markets> accessed 3 November 2020.

[11] ibid.

The end result might have been more innovation, low entry barriers and streamlined market behaviour.[12] On the contrary, however, allowing for the acquisition of these nascent firms without proper scrutiny would curb the rate of innovation, increase market concentration and further tip the market in favour of the incumbents.[13] Saying this, we are not arguing that all of such acquisitions have had a negative impact on innovation in the market, but at the same time, we cannot ignore the fact that many acquisitions have evaded antitrust scrutiny irrespective of their impact.

The acquisition of a nascent firm does not necessarily mean that its projects will be discontinued. Many times, the proposed aim of an acquisition is to remove a competitor which would allow the incumbent to further strengthen its foothold in the market. Such type of acquisition can be categorized as 'Nascent Potential Acquisition'. In any case, such an acquisition always has chilling effects on competition in the market.[14] Nascent acquisitions also include a range of other probabilities based on the situation in the present and future market. But the discussion in this paper is only limited to killer acquisition and nascent potential acquisition. It is imperative to note that these terms are only indicative of the rationale behind an acquisition that is derived from an observed trend and does not constitute a different category of acquisition in itself. The terms only highlight a probable theory of harm that is relevant in the assessment of an acquisition.

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[12] Hemphill and Wu (n 1).
[13] OECD Secretariat (n 8).
[14] ibid.

The debate surrounding nascent acquisitions has recently gained traction with the increase in empirical evidence,[15] and with the publication of peer review by OECD (2020) on start-ups, killer acquisitions and merger control.[16] The recent trends coupled with evolving research attracted the vigilance of competition regulators to this issue.[17] Enforcement agencies across jurisdictions have taken the effort to address the nuances of the anticompetitive impact of nascent acquisitions, and the scope of improvement in antitrust policy. Through this paper, we argue that nascent potential acquisitions and killer acquisitions possess an imminent threat to innovation, and dynamism in new age markets, and hence greater emphasis needs to be given to identify, investigate and regulate these acquisitions.

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[15] Cunningham (n 9); Argentesi (n 10).

[16] OECD Secretariat (n 8).

[17] Stigler Committee, 'Stigler Committee on Digital Platforms, Final Report' (2019) Chicago Booth September 2019 <https://www.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf> accessed 2 November 2020; Report of the Digital Competition Expert Panel, 'Unlocking digital competition' (2019) UK Government March 2019 <_https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf> accessed 8 March 2021; Lear, 'Ex-post Assessment of Merger Control Decisions in Digital Markets' (2019) Competition and Market Authority 9 May 2019 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/803576/CMA_past_digital_mergers_GOV.UK_version.pdf> accessed 19 October 2020; Ministry of Corporate Affairs 'Report of the Competition Law Review Committee' Ministry of Corporate Affairs July 2019 <http://www.mca.gov.in/Ministry/pdf/ReportCLRC_14082019.pdf> accessed 3 November 2020; Jacques Crémer and others, 'Competition policy for the digital era, Final Report' (2019) European Commission 2019 <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf> accessed 4 November 2020.

This paper is divided into three parts. Part I surfaces our primary argument on the need to regulate nascent acquisitions, particularly killer acquisitions and nascent potential acquisitions. We conflict our ideas with that of the scholars who argue for a lenient merger control regime in order to curb the possibility of over regulation. In doing so, we base our argument on the traditional understanding of consumer welfare in antitrust. Part II of the paper deals with the procedural and jurisdictional aspects of merger control in the United States (US), the European Union (EU), the United Kingdom (UK) and India. This part analyses the peculiarity of each jurisdiction in tackling the issues involving nascent acquisitions and attempts to locate the existing enforcement gap. By enforcement gap, we mean the prevailing uncertainty as to the treatment of nascent acquisitions in each of those jurisdictions. Part III of the paper elaborates on the possible remedies and focuses on the investigation and assessment part of merger control. In light of this, we emphasize that the merger control regime across jurisdiction needs to evolve in policy and action to better tackle the issues of market concentration, and loss of innovation in dynamic future markets.

II. PART I: THE NEED TO REGULATE NASCENT ACQUISITIONS

To better understand the need to regulate nascent acquisitions, it is important to discuss the strategy behind such acquisitions. Though not an exhaustive examination, an incumbent might acquire a nascent firm for the following possible reasons: (1) to provide investment aid to the nascent firm, (2) to shun future competition by acquiring a firm before it matures, or (3) to continue the nascent firm's projects without the risk of harming

its own sales. The first type of acquisition highlights that not all nascent acquisitions are anti-competitive in nature as they might help in providing necessary funding to the nascent firms.[18] The second kind of acquisition can be termed as a 'killer acquisition', wherein the intention is to discontinue the existing projects of the firm upon acquisition. It has been seen to be the most prevalent in the pharmaceutical sector.[19] The third type of acquisition can be termed as a 'nascent potential acquisition', the aim of which is only to kill the existing competition and not the product itself. This is more prevalent in digital markets, wherein an incumbent leverages and builds on the network effects created by the nascent firm.[20] In this paper, we are primarily concerned with the second and third type of acquisitions, namely killer acquisitions and nascent potential acquisitions.

A post-acquisition scenario can have infinite possible outcomes, but can be broadly distributed into three categories based on the impact on its consumers: (1) an acquisition can be good for the consumers in the market, (2) an acquisition can be bad for the consumers in the market, and (3) an acquisition can have no particular impact on the consumers.[21] The measurement of good and bad in antitrust is based on the consumer welfare

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[18] Jay Ezrielev, 'Shifting the Burden in Acquisitions of Nascent and Potential Competitors: Not so Simple' (2020) Competition Policy International 4 November 2020 <https://www.competitionpolicyinternational.com/shifting-the-burden-in-acquisitions-of-nascent-and-potential-competitors-not-so-simple/> accessed 6 January 2021.

[19] Cunningham (n 9).

[20] Unlocking Digital Competition (n 17).

[21] Amy C Madl, 'Killing Innovation?: Antitrust Implications of Killer Acquisitions' (2020) Yale Journal on Regulation Online Bulletin, 5 <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1002&context=jregonline> accessed 7 March 2021.

standard.[22] That means that the market is always assessed from the perspective of benefit accrued to the consumers without delving into the specific performance of the firms.

The consumer welfare standard is usually assessed based on price, quantity, range of products and the quality of the products available to the consumers.[23] Though the consumer welfare standard as the basis for antitrust scrutiny has been contested by the proponents of the Structure-Conduct-Performance Paradigm for being narrowly focused on short-term price changes, it remains to be the most accepted benchmark for competition policy.[24] This paper does not delve into the consumer welfare debate but accepts it as an essential benchmark in merger control. Saying this, the question still remains, whether regulating nascent acquisitions is the right approach to advance consumer welfare?

Some scholars argue that an increase in regulation of nascent acquisitions is contrary to the understanding of consumer welfare.[25] To substantiate this, they give the example of the *Facebook/Instagram* acquisition to argue that Instagram has almost tripled its user base while Facebook has doubled its reach in the period following the acquisition.[26] Such an

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[22] Yun (n 6).

[23] Christine S Wilson, 'Luncheon Keynote Address' George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads? 15 February 2019 <https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf> accessed 3 November 2020.

[24] ibid.

[25] Yun (n 6); Madl (n 21).

[26] Ben Sperry, 'Killer Acquisition or Successful Integration: The Case of the Facebook/Instagram Merger' *The Hill* (10 August 2020) <https://thehill.co

expansion is contrary to the understanding of an anticompetitive outcome. An anti-competitive outcome is typically characterised by decreasing innovation, productivity, quality and output.[27] Facebook's acquisition of Instagram does not fit this profile and has in fact increased the interaction of consumers with the product. A prevalent norm of nascent acquisitions implies a continuous influx of new players in the market. The low barriers to entry highlight that the element of market power in such a market is not certain and is subject to challenge from nascent competitors, thereby sustaining competition in the market.

Their second argument being that even if there is a slight possibility of harm, a nascent acquisition in most cases provides a great deal of consumer value.[28] Such an acquisition provides much-needed steam to the nascent firm to further develop its product and in turn, increases consumer access to innovation. The crux of the argument is that the increase in resources and accessibility due to nascent acquisitions results in improvement in quality of the product, lower prices and increase in supply. The focus is more on the potential for consumer benefits than the potential of harm.

While their arguments do reflect a perspective, we believe that it is only one side of the coin. We argue that nascent acquisition is against the

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m/blogs/congress-blog/politics/520211-killer-acquisition-or-successful-integration-the-case-of-the> accessed 3 November 2020.

[27] Hassan Qaqaya and George Lipimile, 'The Effects of Anti-Competitive Business Practices on Developing Countries and their Development Prospects' (2008) UNCTAD July 2008 <https://unctad.org/system/files/official-document/ditcclp20082_en.pdf> accessed 3 November 2020.

[28] Yun (n 6).

consumer welfare standard. We base our argument on two limbs, *firstly*, a nascent acquisition can have a widespread impact on the future market, and *secondly*, allowing nascent acquisitions without proper scrutiny increases market concentration and kills innovation.

Pertinently, in 2012, the Federal Trade Commission (FTC) approved the acquisition of *Newport Medical Instruments/Covidien*.[29] Covidien with a turnover of USD 12 billion had an established line of business of selling ventilators to treat patients suffering from flu and other viral diseases. On the other hand, Newport was a relatively new firm, which won the US government contract in 2010, to provide low-cost ventilators to the government. The government intended to stockpile ventilators to deal with a future pandemic like situation. After the acquisition, Covidien assumed the charge of Newport's running projects. While filing for the approval for the supply of ventilators, Covidien asked for a higher price, contrary to the one quoted by Newport. The government, upon considering the new terms to be unprofitable, withdrew from the deal and contracted with another party for delivery of 70,000 ventilators. By early 2020, only 12,700 ventilators of the total order were delivered. The stockpile that was intended was never created, while the country faced an acute ventilator shortage due to the onslaught of the COVID-19 pandemic.[30] This

[29] Reuters Staff, 'Covidien to Buy Ventilator Maker Newport for $108 million' *Reuters* (23 March 2012) <https://in.reuters.com/article/us-covidien/covidien-to-buy-ventilator-maker-newport-for-108-million-idUSBRE82L16N20120322> accessed 3 November 2020.

[30] Nicholas Kulish and others, 'The US Tried to Build a New Fleet of Ventilators. The Mission Failed.' *The New York Times* (29 March 2020) <https://www.ny

acquisition is a prime example of the impact of harm that can be caused by a nascent acquisition. The harm in this case not only resulted in an alteration in market functionality but also led to an irreplaceable loss to life, economy, and the public at large.

The issue of under-enforcement in the case of nascent acquisitions has been gaining steam as the big tech companies, and conglomerates in various sectors have involved themselves in a series of acquisitions to gain a substantial edge over their competitors, and in many cases to foreclose competition. It is essential to note that productivity slowdown in a market is a result of reduced dynamism resulting from an increase in market concentration.[31] In the period of 2007-2019, Facebook was involved in as many as 90 acquisitions of nascent firms. Most of the projects of these firms were either discontinued or simply side-lined.[32]

Through the *Facebook/Instagram* transaction, Facebook eliminated one of its most dreaded competitors. Prior to the acquisition, Instagram had not evolved as a platform that was capable of generating revenue through advertisements. The antitrust agencies ignored the prospect of

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times.com/2020/03/29/business/coronavirus-us-ventilator-shortage.html> accessed 3 November 2020.

[31] Jason Furman and Peter Orszag, 'A Firm-Level Perspective on the Role of Rents in the Rise in Inequality' (2015) Obama White House Archives 16 October 2015 <https://obamawhitehouse.archives.gov/sites/default/files/page/files/20151016_firm_level_perspective_on_role_of_rents_in_inequality.pdf> accessed 7 March 2021.

[32] Mark Glick and Catherine Ruetschlin, 'Big Tech Acquisitions and the Potential Competition Doctrine: The Case of Facebook' (2019) Institute for New Economic Thinking Working Paper No 104 October 2019 <https://www.ineteconomics.org/uploads/papers/WP-104-Glick-and-Reut-Oct-10.pdf> accessed 3 November 2020.

Instagram developing on the lines of Facebook. Post such acquisition, Instagram emerged as a proxy for Facebook and was developed as a social media platform, and not necessarily as a photo-sharing platform. The balance of consumer welfare through this transaction is still questionable, but what is certain is that Facebook not only eliminated its competitor but also has leveraged the target platform to attract consumers to its own platform.

The result of an increase in unregulated nascent acquisitions and a lenient merger control gave way to the creation of '*superstar*' firms (like Facebook, Google, etc.) that dominated specific sectors and garnered supra-normal profits.[33] Jason Furman's testimony before OECD (2020) provides more perspective to this understanding of under-enforcement and weakening of merger control.[34] In his testament, he provides evidence of market concentration by highlighting that a few large players in specific markets have gained substantial market share in recent years. This selective increase in market share is a result of declining competition and a reducing incentive to innovate in the market.[35] One of the reasons for such an impact, as highlighted by him, is the deliberate policy choices made by competition regulators across the world. Thus, the solution as argued by

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[33] Jason and Orszag (n 31).

[34] Jason Furman, 'Hearing on Market Concentration' (2018) DAF/COMP/WD(2018)67 OECD 7 June 2018 <https://one.oecd.org/document/DAF/COMP/WD(2018)67/en/pdf> accessed 3 November 2020.

[35] Ryan Decker and others, 'Where has all the skewness gone? The decline in high-growth (young) firms in the US' (2015) NBER Working Paper Series 21776 <https://www.nber.org/system/files/working_papers/w21776/w21776.pdf> accessed 8 March 2021.

Furman, lies in increasing regulation and formulating a more exhaustive antitrust policy.

III. PART II: PROCEDURAL AND JURISDICTIONAL ASPECT OF MERGER CONTROL

Competition agencies around the world are now giving increased attention to mergers for their ability to impact future markets.[36] Large firms often engage in merger activity involving high valued nascent firms. These firms generally have a low turnover as a result of which their acquisitions might not attract the attention of the competition authorities despite the potential harm to the competition. We argue in this paper that the potential for harm in cases of nascent acquisitions should be duly addressed and dealt with in order to ensure continuous innovation in dynamic future markets. In this part, we discuss the flexibility of merger control provisions in various jurisdictions, and also attempt to highlight the enforcement gap in regulating nascent acquisitions.

A. UNITED STATES

The two primary antitrust enforcement agencies in the US are the Antitrust Division of the US Department of Justice (DOJ) and the FTC. Their primary work in merger control is to keep a check on the increase in market power (due to elimination of present or potential competitors),

[36] Cristina Caffarra and others, 'How Tech Rolls: Potential Competition and Reverse Killer Acquisitions' (2020) Vox EU 11 May 2020 <https://voxeu.org/content/how-tech-rolls-potential-competition-and-reverse-killer-acquisitions> accessed 28 October 2020.

ensure consumer welfare and cease anti-competitive behaviour.[37] The Hart-Scott-Rodino Act of 1976 ("HSR Act") provides for a mandatory pre-merger review notification system.[38] It mandates the parties in a merger to notify the agencies before entering into the transaction. The statutory threshold for notification is subject to the size of the transaction, assets held and the available exemption.[39] These thresholds are adjusted periodically and are aimed to identify and prevent anti-competitive mergers.

The HSR Act is ably supported by the Clayton Act 1914 and the Sherman Act 1890, the two major antitrust regulations.[40] Section 7 of the Clayton Act 1914 is the backbone of merger control in the US, as it intends to prohibit any transaction that may adversely affect the competition in the relevant market. In addition to this, any transaction can be challenged if it violates or can violate Section 1 and 2 of the Sherman Act 1890.[41] Section 1 of the Sherman Act illustrates that any combination in restraint of trade is deemed to be declared illegal; whereas Section 2 makes it illegal for any

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[37] US Department of Justice and the Federal Trade Commission, 'Horizontal merger guidelines' (2010) The United States Department of Justice 19 August 2010 <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010> accessed 3 November 2020.

[38] The Hart-Scott-Rodino Antitrust Improvements Act 1976, s 18a.

[39] Federal Trade Commission, 'Steps for Determining Whether HSR Filing is Required' <https://www.ftc.gov/enforcement/premerger-notification-program/hsr-resources/steps-determining-whether-hsr-filing> accessed 3 November 2020.

[40] Federal Trade Commission, 'The Antitrust Laws' <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> accessed 2 November 2020.

[41] Douglas H Ginsburg & Koren W Wong-Ervin, 'Challenging Consummated Mergers Under Section 2' (2020) Competition Policy International 25 May 2020 <https://www.competitionpolicyinternational.com/challenging-consummated-mergers-under-section-2-2/> accessed 3 November 2020.

kind of discrimination in price, services, or facilities. The difference between both the approaches is that the former does not require any certainty on a specific anticompetitive harm to block a transaction, but only a general notion of a mere possibility of harm; whereas a challenge through the latter should necessarily prove an arrangement in restraint of trade or abuse of one's dominant position. Such arrangement /acquisition should prove that the acquisition is reasonably capable of contributing significantly to the position of dominance.[42]

The aspect of a threshold as a limitation to investigate mergers has been contentious in recent times as the mergers that fall below the threshold, do not necessarily require the approval of the agencies. However, the US merger control regime has shown to possess the flexibility for ex-post assessment of mergers while dealing with issues arising out of nascent acquisitions.[43] This means that the agencies can call for an investigation into transactions that do not meet the required notification threshold but have posed a significant competitive constraint post its approval. For instance, in 2017, the FTC challenged the low value and non-reportable transaction *of Questcor/Synacthen*.[44] In that case, Questcor, a monopolist and subsidiary

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[42] ibid.

[43] Clayton Act 1914, s 7; Scott Sher, 'Closed But Not Forgotten: Government Review of Consummated Mergers Under Section 7 of the Clayton Act' (2004) 45 Santa Clara L Rev 41 <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1212&context=lawreview> accessed 7 March 2021.

[44] Federal Trade Commission, 'Mallinckrodt Will Pay $100 Million to Settle FTC, State Charges It Illegally Maintained its Monopoly of Specialty Drug Used to Treat Infants' (2017) FTC 18 January 2017 <https://www.ftc.gov/news-events/press-releases/2017/01/mallinckrodt-will-pay-100-million-settle-ftc-state-charges-it> accessed 1 November 2020.

of Mallinckrodt acquired the development rights of a competing drug, Synacthen Depot from its potential competitor (Novartis). Soon after the acquisition, Questcor stopped the development of the said drug, a situation that is now termed as killer acquisition. The transaction was challenged by the FTC under Section 2 of the Sherman Act 1890 stating that the acquisition prevented its competitors from developing another synthetic Adrenocorticotropic Hormone ("ACTH"). Subsequently, the Federal District Court ordered the company to sublicense its right to develop the drug, Syncathen, to another US pharmaceutical company. Questcor also agreed to pay an amount of $100 million to settle FTC charges.

Similarly, another nascent acquisition that was challenged as a part of the ex-post assessment was the *Bazaarvoice/Power Reviews* merger.[45] Bazaarvoice, an established product rating and review platform acquired Power Reviews, which was only seven years old at the time of acquisition. This transaction had earlier evaded the HSR scrutiny as it did not meet the threshold requirements. Upon noticing that Bazaarvoice had not catered to the projects of the target company, the DOJ brought an action under Section 7 of the Clayton Act 1914, highlighting that the acquisition substantially hampers competition in the market. The District Court accepted DOJ's contentions and asked Bazaarvoice to get rid of all the assets acquired as a part of the acquisition.

The power of ex-post enforcement makes the US merger control regime more flexible as compared to few other jurisdictions. Although ex-

[45] *United States v Bazaarvoice Inc* [2014] ND Cal 13-cv-00133-WHO, [2014].

post assessment is not a solution to all the problems posed by nascent acquisitions, it has been seen as a possible solution in some straightforward cases. We discuss ex-post enforcement in detail in the next chapter and recommend it as one of the possible measures in tackling the anticompetitive impact of a nascent acquisition, especially in evolving economies.

Saying this, we do not entirely believe that the US merger control regime is able to tackle nascent acquisitions effectively. We base our argument on the observation that a number of nascent acquisitions have not only evaded the antitrust scrutiny on not meeting threshold requirements but also that the identification of post-merger impact remains minimal, to say the least. For instance, Facebook has been involved in more than a hundred acquisitions, whereas the antitrust agencies have investigated only one of its acquisitions, i.e., the 2012 acquisition of Instagram by Facebook.[46] In its other acquisitions, the investigative agencies did not even ask for additional material or information.

Similarly, as widely reported, Apple buys a new company every two to three weeks to acquaint itself with innovation and acquire intellectual property.[47] In 2020, Apple has acquired multiple start-ups in the virtual

[46] Subcommittee on Antitrust Commercial and Administrative Law of the Committee on the Judiciary, 'Investigation of Competition in Digital Markets' (2020) US House of Representatives 2020 <https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519> accessed 8 March 2021.

[47] Lauren Feiner, 'Apple Buys a Company Every Few Weeks Says CEO Tim Cook' *CNBC* (6 May 2019) <https://www.cnbc.com/2019/05/06/apple-buys-a-company-every-few-weeks-says-ceo-tim-cook.html> accessed 25 October 2020.

reality and artificial intelligence industry.[48] In a typical example of killer acquisition, Apple has shut down the weather application DarkSky upon acquisition in order to integrate it with the weather widgets provided in iPhones.[49] DarkSky earlier used to provide local weather information to multiple third parties. Due to the acquisition, these third parties have to now move to more expensive alternatives to collect information at the risk of making their services more expensive for the consumers. This is only one such instance, and similar treatment has also been meted out to various other startups like Swell, Texture and Beats Electronic.[50]

As it is now evident from the above instances, ex-post-merger assessment cannot be the only tool to assess the anti-competitive impact of nascent acquisitions as big firms involve themselves in the routine acquisition of low valued startups, and nascent ventures. It is increasingly difficult for the investigative agencies to look into every such transaction, and needless to say, many of these transactions will evade scrutiny. This has also been recognised in the recent Congressional Report on Big Tech,

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[48] Jordan Novet and Kif Leswing, 'Apple Buys an AI Start-up that Came from Microsoft co-founder Paul Allen's Research Lab' *CNBC* (15 January 2020) <https://www.cnbc.com/2020/01/15/apple-acquires-xnor-ai-startup-that-spun-out-of-alleninstitute.html> accessed 21 October 2020.

[49] Hannah Klein, 'The Dark Sky Android App is Officially Kaput' *Slate* (4 August 2020) <https://slate.com/technology/2020/08/dark-sky-app-android-shuts-down.html>accessed 23 October 2020.

[50] Rob Marvin, 'The Biggest Tech Mergers and Acquisitions of all the Time' (2019) PCMag 9 July 2019 <https://in.pcmag.com/gallery/126270/the-biggest-tech-mergers-and-acquisitions-of-all-time> accessed 3 November 2020.

wherein the report suggests more intuitive measures to tackle the issue of rampant nascent acquisitions, including killer and potential acquisition.[51]

B. EUROPEAN UNION

The European Union has a mandatory notification system that is based on turnover thresholds.[52] The only purpose of turnover based threshold in EU merger control is to deduce the jurisdiction and not to assess the market concentration, or the impact of the transaction.[53] If a transaction does not fulfil the threshold requirements as established by the European Commission (EC), then it may be scrutinized by the agencies in the respective member state. Under certain conditions, national competition authorities in the EU can also refer a merger to the EC.[54] The EC can review a transaction if it is notifiable under the national competition law of minimum of three member states.[55] This has provided much-needed flexibility to assess any acquisition that might have an adverse effect on the market within the European economy.

The flexibility of the EU merger control regime can also be inferred from the conditional approach in the case of *Facebook/WhatsApp*.[56] At the time of Facebook's acquisition of Whatsapp, Facebook already had a formidable market presence with high turnover, whereas WhatsApp had a

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[51] Investigation of Competition in Digital Markets (n 46).

[52] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) art 1 [2004] O J L 24.

[53] Council Regulation (EC) No 139/2004 Commission Consolidated Jurisdictional Notice on the control of concentrations between undertakings [2008] O J C 95.

[54] Council Regulation (n 52) art 4(5).

[55] Council Regulation (n 52) art 22.

[56] Facebook/WhatsApp [2014] EC Case COMP/M.7217, [2014].

low turnover with more than 600 million users worldwide. The EC reviewed the merger under the referral mechanism when it was notified by three of its member states. After much investigation, the EC allowed for the acquisition after considering that both the entities are in different relevant markets. The EC duly cautioned Facebook to not leverage the target platform to build on its own product. A similar approach was followed in the case of *Dow/Dupont*,[57] wherein the EC investigated into the transaction and found some evidence of decrease in innovation. Though the EC allowed the transaction, it laid out certain conditions for the parties, to ensure that the transaction does not lead to higher prices or less innovation for consumers in the market.

It is well recognised that regulating nascent acquisitions needs an improved approach. The over-dependence on transaction value threshold to regulate mergers will not provide effective results in dynamic markets.[58] Recently, France has announced that due to high thresholds of mandatory notifications, there have been many unexamined mergers which could be detrimental to the competition.[59] Similarly, recognizing the inherent problems with the threshold-based system, Germany and Austria recently

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[57] Dow/DuPont [2004] EC Case M 7932 [2004].

[58] Directorate for Financial and Enterprise Affairs Competition Committee 'Start-Ups, Killer Acquisitions and merger control- Note by European Union' (2020) OECD 25 May 2020 <https://one.oecd.org/document/DAF/COMP/WD(2020)24/en/pdf> accessed 3 November 2020.

[59] Senat, 'Proposition de loi visant à garantir le libre choix du consommateur dans le cyberespace' (2020) SENAT 24 February 2020 <http://www.senat.fr/espace_presse/actualites/202002/libre_choix_du_consommateur_dans_le_cyberespace.html> accessed 6 March 2021.

introduced additional value-based thresholds.[60] We explore this as a remedy in the next chapter.

The EC has also made an attempt to review its merger control procedures through a public consultation process.[61] In the process, it was noted that investigation into low or high turnover mergers would depend upon the existence of non-turnover based threshold standards of the member nations. This suggests that national agencies need to have a proactive role in referring mergers to the EC as well as in adopting non-turnover based thresholds to detect low turnover mergers to tackle the vices of killer acquisitions or nascent potential acquisition.

C. UNITED KINGDOM

The UK follows a voluntary pre-merger notification system. The Competition and Markets Authority (CMA) uses share-based tests in addition to turnover based thresholds.[62] The CMA reviews transactions if

[60] Germany and Austria Guidance on Transactional Value Thresholds for Mandatory Pre-merger Notification, ss 35(1a) and 9(4) KartG (2018) Bundeskartellamt July 2018 <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2> accessed 7 March 2021.

[61] European Commission, 'Summary of replies to the Public Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control' (2017) European Commission July 2017 <https://ec.europa.eu/competition/consultations/2016_mergercontrol/summary_of_replies_en.pdf> accessed 4 November 2020.

[62] Competition Commission & Office of Fair Trading, 'Merger Assessment Guidelines' (2010) OFT1254 September 2010 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284449/OFT1254.pdf>accessed 6 February 2021.

parties to the merger have a share of supply exceeding 25% or the transaction results in an increase in the supply share above 25% in the UK.[63]

Recently, the Report of the Digital Competition Expert Panel constituted by the Government of UK examined the lack of scrutiny by CMA in digital market mergers.[64] It noted that Amazon, Apple, Facebook, Google, and Microsoft made around 400 acquisitions in the last 10 years.[65] In 2017, these companies collectively spent USD 31.6 billion, and only few of them were examined by the CMA.[66] It can be inferred that the CMA has restrictive power and can only review a merger if it either meets the turnover test or the share of supply test. More legislative measures need to be undertaken to empower the agency in dealing with cases of nascent acquisitions in dynamic markets. The report recommended that dominant digital companies should be required to notify CMA of all intended acquisitions.[67]

In order to tackle the evolving issues, the CMA has recently been following a more flexible routine in assessing the impact of the mergers especially in cases of nascent acquisition as reflected in the recent case of *Roche/Spark*.[68] In this case, the CMA called in for investigation into the

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[63] Enterprise Act 2002, s 23.

[64] Unlocking Digital Competition (n 17).

[65] ibid.

[66] The Economist 'American Tech Giants are Making Life Tough for the Start-Ups' *The Economist* (San Francisco, 2 June 2018) <https://www.economist.com/business/2018/06/02/american-tech-giants-are-making-life-tough-for-startups> accessed 2 November 2020.

[67] Ex-post Assessment of Merger Control Decisions in Digital Markets (n 17).

[68] Competition & Markets Authority 'Anticipated acquisition by Roche Holdings, Inc. of Spark Therapeutics, Inc.' [2019] Competition and Markets Authority Decision

transaction, which was earlier not notified by the parties. The transaction was not notified by the parties as they did not meet the requirement of the turnover based test or the share of supply test. Interestingly, the CMA sought intervention even though Spark, a US-based company, had not made any sales in the UK. The CMA looked into the collective impact of the merger and the procurement of resources from the UK to establish its argument that the merger comes under the share of supply test and hence is notifiable. The merger was eventually cleared by the CMA, but it highlighted the flexible and proactive approach of the CMA in dealing with transactions. A similar approach by the CMA has been taken in other cases such as *JustEat/Takeaway.com*[69] and *Amazon/Deliveroo.*[70] The effort has been to not be restricted by the notifiable requirements but to determine the validity of an acquisition based on its potential impact. Such an approach has been criticised to be erratic and time consuming but has reaped benefit for the agency in establishing its foothold post-Brexit.

D. INDIA

In India, Section 5 of the Competition Act 2002 provides for grounds of reviewing a merger. Currently, a merger has to be notified to

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ME/6831/19<https://assets.publishing.service.gov.uk/media/5e3d7c0240f0b6090c63abc8/2020207_-_Roche_Spark_-_non-confidential_Redacted-.pdf> accessed 13 January 2021.

[69] Takeaway.com N.V. / Just Eat plc Completed Merger Inquiry [2020] Competition and Market Authority Decision ME/6881/20 <https://www.gov.uk/cma-cases/takeaway-com-n-v-just-eat-plc-merger-inquiry> accessed 6 January 2021.

[70] Amazon/Deliveroo Merger Inquiry [2020] Competition and Market Authority, Final Report on 4 August 2020 <https://assets.publishing.service.gov.uk/media/5f297aa18fa8f57ac287c118/Final_report_pdf_a_version_-----.pdf> accessed 6 January 2021.

the Competition Commission of India (CCI), only if the share, voting rights, control or assets are above the threshold limit as specified in the Act.[71] Usually, transactions related to nascent acquisitions are outside the purview of the prescribed threshold limits. This is because the business model of companies in digital markets focuses more on establishing a network in the initial years rather than revenue generation.[72] Unlike other jurisdictions, CCI does not have residuary power to review non-notifiable transactions.

Recognizing these inherent limitations, the Government of India set up the Competition Law Review Committee ("CLRC") to suggest amendments to the Competition Act 2002. The CLRC in its report observed that in the digital market, enterprises have lesser turnover and thus, they easily escape from the radar of the competition authorities.[73] The CLRC recommended the introduction of deal value thresholds for detecting acquisitions that do not meet the threshold requirement but have the potential of dampening the competition.[74] Subsequently, the Draft Competition Amendment Bill 2020 ("Amendment Bill") was introduced after considering the recommendations of the CLRC. The Amendment Bill proposes to grant powers to the central government to introduce necessary criteria for evaluation of combinations, after due consultation with the CCI.[75] The intention is to make a move from the traditional turnover-based

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[71] Competition Act 2002, s 5.

[72] Unlocking Digital Competition (n 17).

[73] Report of the Competition Law Review Committee (n 17).

[74] ibid.

[75] Draft Competition (Amendment) Bill 2020 <https://www.cci.gov.in/sites/default/files/whats_newdocument/bill.pdf> accessed 8 March 2021.

threshold to a more dynamic routine. Though the Amendment Bill empowers the government to alter the turnover requirements after due consultation with the CCI, we believe that more substantive efforts in this regard need to be undertaken to tackle the issue of nascent acquisitions and reduced dynamism in the market.

IV. PART III: INVESTIGATION AND ASSESSMENT

So far, we have highlighted the enforcement gaps in the merger control regimes of various jurisdictions. Now, the relevant question is how to resolve the harm posed by nascent acquisitions. Investigation and assessment of mergers play a pivotal role in determining the future course of the transaction, and its subsequent impact on the market. In this part, we will be reviewing the efficacy of plausible solutions for investigating and assessing nascent acquisitions. These suggestions include effective determination of relevant counterfactuals, ex-post analysis of mergers, inclusion of value-based thresholds in the legislative framework and the reversal of the burden of proof.

A. RELEVANT COUNTERFACTUAL

Relevant counterfactual is the assessment of competitive restraints by taking into account predictable future market changes.[76] The assessment of a counterfactual essentially establishes the basis for approval of a transaction and allows the agency to infer the future impact of a transaction. Determination of counterfactual is essential as it allows the agencies to

[76] OECD 'Merger Control in the time of COVID-19' (2020) OECD 25 May 2020 <http://www.oecd.org/competition/Merger-control-in-the-time-of-COVID-19.pdf> accessed 21 October 2020.

arrive at more informed decisions, and in determining the impact of the transaction. While allowing or disallowing a merger, the relevant authority by imagining a post-merger scenario, examines whether the merging entities can abuse their position in the market.[77]

It is important to note that relevant counterfactuals can be determined by multiple ways like critical examination of the available evidence, cost-benefit analysis of the transaction on the market, possibility of the target producing substitutable products, studying the alteration in demand, etc.[78] Thus, by relevant counterfactual, we imply the most accurate deduction that the regulator can make at a given point in time considering the available information/evidence. For instance, to build a counterfactual, an agency may consider whether the nascent firm requires the assistance of a large firm to succeed or whether it is likely to succeed on its own.[79] The finding of this question will help the authority to consider both the situations, i.e., one where the nascent firm can pose significant competition in the future market and another where the nascent firm cannot succeed without its acquisition.

Determining ex-post counterfactual is a challenging task as it is essentially speculative. In cases of nascent acquisitions, there are several factors (as described above) that need to be evaluated in order to assess its potential impact. The uncertainty in these cases is accorded to the future

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[77] Abayomi Al-Ameen, 'On the Value of Counterfactual Assessments in Merger Cases' (2017) 42(2) Journal for Juridical Science 15 December 2017 <https://journals.ufs.ac.za/index.php/jjs/article/view/3376/3232> accessed 19 October 2020.

[78] OECD Secretariat (n 8).

[79] ibid.

prospects of the target product or as its ability to evolve as a future competitor. The success of the firm is not a basis for the assessment of a counterfactual. At the same time just because uncertainties exist with regard to the effect of merger on the future market conditions, the agency cannot disregard the possibility of the competitive harms the transaction might create. Lear, in his report on 'Ex-Post Assessment of Merger Control Decisions in Digital Markets', assessed the merger of *Facebook/Instagram* and *Google/Waze* and concluded that the Competition Commission even after recognizing the potential growth of target firms allowed the mergers on the ground of uncertainty surrounding whether these firms would be able to achieve their potential.[80] The Lear Report (2019) describes these cases as "*missed opportunities for the emergence of challengers to the market incumbents*".[81]

The acquisition of a start-up might result in either a pro-competitive outcome leading to efficiency gains or an anti-competitive outcome leading to distortion of competition. The authorities should adopt a realistic assessment by not undermining the possibility of growth in the case of a nascent firm. Further, the counterfactuals should not only be based on status quo situations but also, on foreseeable future events. In the case of *PayPal/iZettle*, the CMA adopted a dynamic approach and assessed the transaction based on the status quo of the firms and the probable market trends.[82] A counterfactual is determined by the assessment of foreseeable

[80] Ex-post Assessment of Merger Control Decisions in Digital Markets (n 17).
[81] ibid.
[82] David Brenneman and others, 'Killer Acquisitions – Antitrust Agencies Focus on Acquisitions of Nascent Competitors' (2020) Morgan Lewis 20 May 2020

events. The foreseeable time period taken by the agencies (usually 2-3 years) is very short. Because of this short time frame, the impact of nascent mergers is often overlooked by the authorities. This is demonstrated from the cases of *Facebook/WhatsApp* and *Facebook/Instagram* where the impact of the acquisitions started appearing after a period of 6 years and 8 years, respectively.[83] Therefore, it becomes essential to integrate a sufficient time frame to rightfully detect the harm posed by a nascent acquisition.

In conclusion, the assessment of counterfactuals is *unavoidable though inconvenient*[84] because of the existing element of speculation. It is unavoidable because it provides a more plausible scenario, where the mergers can be assessed based on the current market conditions as well the future changes in relation to entry or exit of firms if the merger did not take place. Though not the most error-free method, it enables competition regulators to make informed decisions on the future impact of the transactions.

B. EX-POST REVIEW OF MERGER CONTROL DECISIONS

Authorities around the globe build counterfactuals to forecast possible outcomes of a merger to ensure that competition is not hampered. But sometimes ex-ante counterfactual fails to take into account the changes that take place after the merger. Any incorrect decision can affect competition in several ways including quality, prices, innovation, consumer

<https://www.morganlewis.com/-/media/01279288079944398f22e96c23a3ee44.ashx> accessed 3 November 2020.

[83] OECD Secretariat (n 8).

[84] ibid.

welfare and concentration of the market.[85] Merger control decisions can be unjustified in two different ways. *Firstly*, a decision may erroneously prohibit pro-competitive mergers, i.e., Type I error; and *secondly*, it may erroneously allow anticompetitive merger, i.e., Type 2 error.[86] Till now there have been no cases of Type 1 error as the competition regulators are more concerned about over-enforcement than under-enforcement. In this part, we will analyse whether ex-post analysis can fill the enforcement gap in merger enforcement due to significant under-enforcement in cases of nascent acquisitions.

Ex-post analysis of decisions allows the authorities to correct their possible errors, i.e., Type 1 or Type 2. Ex-post assessment is, thus, a review of a merger post its consummation. It is important as it allows the agencies to evaluate whether their decisions were accurate or not. The duty of the antitrust agencies is not only to adjudicate but also to evaluate the consequences of their decisions.[87] This becomes significant in the assessment of nascent acquisition as the outcome-based evaluation will remove the uncertainties owing to dynamic changes, technological advancements, and uncertainties at the time of the transaction. If the authorities find infirmity in their decision-making after a period of time, it

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[85] Luca Deplano, 'Ex Post Evaluation of EC Merger Decisions: Two Empirical Analysis of Prices and Patents' (2017) EFPIA <https://www.efpia.eu/media/219811/deplano_luca_master_thesis.pdf> accessed 7 March 2021.

[86] Oliver Budzinski, 'Impact Evaluation of Merger Control Decisions' (2012) Vol 17 No 75 Ilmenau Economics Discussion Paper August 2012 <https://www.econstor.eu/bitstream/10419/67109/1/722215983.pdf> accessed 2 November 2020.

[87] Robert Pitofsky and others, 'Roundtable Conference with Enforcement Officials' (2000) 68 Antitrust LJ 581, 593-595.

can then attempt to correct its decisions. In order to identify the appropriateness of the decisions with respect to consumer welfare, authorities compare the market changes post their original decision with the plausible alternative decision.[88]

Countries like the US, Japan, the UK, Brazil, Canada, Hungary, Sweden, Ireland, Lithuania and France have adopted the ex-post review mechanism. Notably, different jurisdictions have different time frames under which ex-post assessment can be commenced. The US is the only country where there is no timeline, and hence, a merger can be reviewed any time after its approval. Recently, the FTC issued Special Orders to Alphabet (including Google), Amazon, Apple, Facebook and Microsoft requiring them to show information related to their past acquisitions (including nascent acquisitions of potential competitors which do not require reporting to antitrust agencies because of the threshold limit) consummated over the past 10 years.[89] This information collection will enable the FTC to examine whether acquisitions that were below the threshold limit of the HSR Act have affected the competition and whether the incumbents are strategizing to eliminate competition by acquiring small firms.[90] This study will help the FTC to scrutinize the competitive

[88] Paolo Buccirossi and others, 'A Short Overview of a Methodology for the Ex-Post Review of Merger Control Decisions' (2008) 156 De Economist 453.

[89] 'FTC to Examine Past Acquisitions by Large Technology Companies' (2020) FTC Press Release 11 February 2020 <https://www.ftc.gov/news-events/press-releases/2020/02/ftc-examine-past-acquisitions-large-technology-companies> accessed 3 November 2020.

[90] Tony Romm, 'FTC will review past mergers by Facebook, Google and other Big Tech companies' *The Washington Post* 11 February 2020 <https://www.washingtonpost.com/te

significance of nascent acquisitions and enable it to come up with fresh measures regulating them. On the other hand, in the UK a merger can only be reviewed within four months.[91] A shorter time period acts as a constraint and in most of the cases of nascent acquisitions, as discussed above, the effects seem to appear only after a period of 3-4 years. The authors recommend *firstly*, the adoption of ex-post assessment and *secondly*, the extension of time period for ex-post assessment of mergers.

The difficulty as Pires (2015) highlights is that the competition agencies do not often perform the ex-post analysis of a decision, without which it would not be possible for them to detect the effects of a nascent acquisition. The reason for this as also discussed above is that the effects of a nascent acquisition start appearing after a period of time. Ex-post evaluation of mergers can be with respect to the development of the target's product, the evaluation of the competitive constraints posed by the transaction or the potential of the target to emerge as a potential competitor sans the merger. A proper ex-post assessment can help the agencies to assess whether their ex-ante counterfactual or hypothesis with respect to the target's performance was sound or not.[92] Several studies indicate that result-oriented evaluation can be an effective tool for public

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chnology/2020/02/11/ftc-will-review-past-mergers-by-facebook-google-other-big-tech-companies/> accessed 3 November 2020.

[91] Joel Bamford, 'Ex-Post Review of Merger Control Decisions: Pros and Cons' (2019) Concurrences Conference 16 October 2019 <https://www.concurrences.com/en/conferences/ex-post-review-of-merger-control-decisions-pros-and-cons-en> accessed 28 October 2020.

[92] William E Kovacic, 'Using Ex Post Evaluations to Improve Competition Policy Authorities' (2006) 31 J Corp L 503, 510 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1983339> accessed 7 March 2021.

administration.[93] We recommend a rule of reason approach by assessing nascent mergers post their consummation, i.e., by doing a cost-benefit analysis of nascent acquisition or by taking into account the competitive constraints as well as the efficiency gains from a transaction. In case of more efficiency gains and less competitive harm, the authorities might consider imposing behavioural remedies to ensure a fair level of competition.

C. VALUE BASED THRESHOLDS

With the rapid technological advancements and the emergence of the digital market, the traditional turnover based threshold fails to recognize the possibility of competition harm associated with the transactions involving nascent firms having negligible turnover, but high corporate value.[94] Nascent firms though do not generate huge revenues but may have a great market value because of their technological efficiencies, number of users, data and degree of innovation.[95] The largest tech companies including

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[93] Jody Zall Kusek & Ray C Rist, 'Ten Steps to a Results-Based Monitoring and Evaluation System' (2004) The World Bank 2004 <https://www.oecd.org/dac/peer-reviews/World%20bank%202004%2010_Steps_to_a_Results_Based_ME_System.pdf> accessed 7 March 2021; Deborah Platt Majoras, 'A Dose of Our Own Medicine: Applying a Cost/Benefit Analysis to the FTC's Advocacy Program' (2005) FTC 8 February 2005 <http://www.ftc.gov/speeches/majoras/050208currebttopics.pdf> accessed 20 November 2020.

[94] Tim Schaper, 'Merger Control Reform: Capturing Transactions in the Digital Markets' (2016) Norton Rose Fulbright November 2016 <https://www.nortonrosefulbright.com/en/knowledge/publications/9eb81dda/merger-control-reformcapturingtransactions-in-the-digital-markets#:~:text=Background%2C%20purpose%20and%20aims%20of,their%20possible%20effects%20on%20competition> accessed 2 November 2020.

[95] 'Introduction of Alternative Merger Control Thresholds-Is it the Way Forward?' (2018) AZB & Partners 30 November 2018 <https://www.azbpartners.com/bank/introduction-of-alternative-merger-control-thresholds-is-it-the-way-forward/> accessed 2 November 2020.

Amazon, Apple, Google, Microsoft and Facebook acquired around 400 companies in the past 10 years and only a few of them were scrutinized by the regulators because of the current laws.[96] Particularly, data has become a significant asset and is seen as a huge entry barrier in the digital market. Some of the transactions that involved data as a factor were *Ola/Taxiforsure*, *Facebook/Whatsapp* and *Snapdeal/Freecharge*.[97]

These acquisitions demonstrated the prevalent enforcement gaps as the current legislative framework failed to investigate or assess these transactions. Other than the digital market, acquisitions related to the pharma industry and patent portfolio acquisitions are also majorly low turnover and high value based.[98]

The discussion regarding the introduction of additional methods alongside the turnover threshold fuelled after the all-cash deal of USD 26.2 billion involving the acquisition of LinkedIn by Microsoft could not be scrutinized because of existing thresholds.[99] This led to the introduction of value-based thresholds in Austria and Germany, where high-value

[96] Unlocking Digital Competition (n 17).

[97] Anuja Chaudhary, 'Deal Value Threshold-Proficient Enough to Make the Indian Merger Control Mechanism More Dynamic?' (2020) Competition & Commercial Law Review 25 August 2020 <https://www.tcclr.com/post/deal-value-threshold-proficient-enough-to-make-the-indian-merger-control-mechanism-more-dynamic> accessed 4 November 2020.

[98] Summary of replies to the Public Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control (n 61).

[99] Richard Waters, 'Microsoft-LinkedIn Deal Raises New Competition Concerns' Financial Times 4 November 2016 <http://www.ft.com/content/d5ceda60-a1e1-11e6-82c3-4351ce86813f> accessed 4 November 2020.

transactions can now trigger merger review proceedings.[100] Stigler Report (2019) also recommended the use of value-based transactions specifically in the case of mergers involving digital platforms and start-ups.[101] Deal Value Thresholds are generally determined through the consideration of the transaction and the substantial presence of the merging entities in the territory of that country.[102] Value of transaction will be significantly impacted by share prices and exchange rates "*between the announcement of a transaction and its closing*".[103] Also, the considerations of the transaction cannot be reduced to assets or the monetary value but other non-price factors such as data should be taken into consideration.

As discussed above, CLRC has also recommended introducing value-based thresholds to ensure that transactions that have an appreciable adverse effect on competition do not escape scrutiny.[104] Following this, the Draft Competition (Amendment) Bill 2020 provided for flexible criteria to evaluate combinations. However, the argument against the transaction value threshold asserts that it will create a disproportionate burden on the

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[100] Silke Heinz, 'Draft guidelines on new transaction value merger thresholds in Germany and Austria' (2018) Kluwer Competition Law Blog 18 May 2018 <http://competitionlawblog.kluwercompetitionlaw.com/2018/05/18/draft-guidelines-new-transaction-value-merger-thresholds-germany-austria/> accessed 1 November 2020.

[101] Stigler Committee on Digital Platforms (n 17).

[102] Bunderskartellamt and Bundes Wettbewerbs Behörde, 'Guidance on Transaction Value Thresholds for Mandatory Pre-Merger Notification' (2018) Bundeskartellamt July <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2> accessed 6 January 2021.

[103] European Commission, 'Consultation on Evaluation of procedural and jurisdictional aspects of EU merger control' (2017) <https://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html> accessed 2 November 2020

[104] Report of Competition Law Review Committee (n 17).

CCI and would lead to a chilling effect on innovation by discouraging investments.[105] But the inferences from the initial experience of Germany and Austria reflect the opposite.[106] It has been reported by Bundeskartellamt that the number of transactions has not radically changed and it received merely 8 and 10 notifications in the year 2017 and 2018 respectively.[107] Similar results were reported in Austria.[108] Undeniably this threshold system comes with its own share of problems but the harm outweighs the benefits of including deal value which is to fill-in the enforcement gaps posed by the digital economy and ensure effective competition in the market.[109] Thus, the inclusion of deal value thresholds is essential for solving the growing concerns related to nascent acquisitions and the governments need to carefully formulate policies to deal with the associated problems.

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[105] Martin Gassler, 'Why the introduction of a new transaction-value jurisdictional threshold for the EUMR has been postponed, at least for now' (2018) Oxford Competition Law 28 June 2019 <https://oxcat.ouplaw.com/page/775> accessed 3 November 2020.

[106] Heinrich Kühnert, 'Joint Guidance on Transaction-Value Thresholds' (2018) 3 Euro Comp & Reg Rev 216 <https://www.dorda.at/sites/default/files/core_2018_03-009_0.pdf> accessed 2 March 2021; Martin Saumermann, 'New merger control guidelines for transaction value thresholds in Austria and Germany' (2018) Competition Policy International 26 July 2018 <https://www.competitionpolicyinternational.com/new-merger-control-guidelines-for-transaction-value-thresholds-in-austria-and-germany/> accessed 2 March 2021.

[107] Martin Sauermann, 'The Transaction Value Threshold in Germany – Experiences with the New Size of Transaction Test in Merger Control' (2019) Competition Policy International, 8 October 2019 <https://www.competitionpolicyinternational.com/the-transaction-value-threshold-in-germany-experiences-with-the-new-size-of-transaction-test-in-merger-control/> accessible 3 November 2020.

[108] Martin Gassler (n 105).

[109] Anuja Chaudhary (n 97).

D. REVERSING THE BURDEN OF PROOF

Under the current framework, merging parties and not the consumers enjoy the benefit of doubt. In the US, under certain circumstances, there is reversal of burden of proof, that is to say that consumers rather than the merging firms would be granted benefit of doubt. Shapiro & Hovenkamp (2018) recommended codifying the presumption established in the case of *United States v. Philadelphia Bank*.[110] This presumption means that a merger which produces a firm that controls the maximum share of the market, results in a significant increase in the concentration of the market and is likely to substantially stifle the competition, must be indicted unless contrary evidence is produced to show that the merger is not likely to diminish competition in the market. Reversal of burden of proof and creation of rebuttable presumptions in cases involving small firms with a view to detecting killer acquisitions has also been proposed by two former chief economists in the EU namely, Professor Valletti and Motta in the Cremer Report,[111] the Stigler Review (2019) and several other scholars like Tim Wu, Fiona Scott-Morton and Scott Hemphill.[112]

Motta and Peitz (2020) also suggested that where the acquirer is a dominant firm, the merging parties should prove that, a) the merger would

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[110] *United States v Philadelphia Bank* (1963) 374 US 321.

[111] Competition policy for the digital era (n 17).

[112] Janith Aranze, 'DG Comp chief economist: Reverse burden of proof to catch killer acquisitions' (2018) Global Competition Review 20 November 2018 <https://globalcompetitionreview.com/dg-comp-chief-economist-reverse-burden-of-proof-catch-killer-acquisitions> accessed 25 October 2020**;** Nascent Competitors (n 1).

not create any anticompetitive effects in the market, or b) the efficiency gains are higher to justify the acquisition.[113] In case of the inability of the firm to provide evidence regarding these claims, the merger will be disallowed. The possible benefit of this reversal of burden will be the availability of data and information related to nascent acquisitions without which it would have been difficult for the consumers to prove the competitive constraints posed by the transaction.

On the contrary, some scholars argue that reversing the burden of proof will be detrimental to the interests of start-ups that are in the need of investment.[114] They further state that the reversal of burden of proof should be only limited to the clear-cut cases; for instance, where market share exceeds the threshold or there is economic research that indisputably establishes the anticompetitive effect.

In our opinion the reversal of burden of proof is not an ideal step because, *firstly*, it will impose unnecessary administrative burden; *secondly*, blanket application of this proposal without identification of clear cut cases and clarity on the rules for such identification would result in ambiguity; and *thirdly*, it would be extremely difficult for the merging entities to produce pieces of evidence that their merger would not harm competition

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113 Massimo Motta and Martin Peitz, 'Competition Policy and European Firm Competitiveness' (2019) Vox EU 20 February 2019 <https://voxeu.org/content/competition-policy-and-european-firms-competitiveness> accessed 3 November 2020.

114 Jacquelyn MacLennan and others, 'Innocent Until Proven Guilty- Five Things You need to know about Killer Acquisitions' (2019) Informa Connect 3 May 2019 <https://informaconnect.com/innocent-until-proven-guilty-five-things-you-need-to-know-about-killer-acquisi-tions/> accessed 3 November 2020.

in future and in the case they are unable to prove the same, this proposal can prohibit several merger activities including those which may generate efficiencies. Instead, we focus on an alternative approach that was formulated by Fletcher (2020) where he suggested that the burden of proof would be reversed only in those scenarios where the agency is able to show "reasonable prospects of harm".[115] For instance, if it is proved that the harm to the competition is 25-30%, only then there would be reversal of the burden of proof and not otherwise. This approach seems to be more flexible as the burden of proof will be reversed only in restrictive circumstances.

V. CONCLUSION

The issue of nascent acquisition has now garnered the attention of competition regulators and researchers around the world.[116] This paper argued for a more flexible merger control arrangement to ensure better protection to the consumers. The idea is to review most of the mergers that have the potential to hinder competition in the present or the future market. We also identified the enforcement gaps and lack of flexibility in merger control regimes of major jurisdictions across the world.

The anti-competitive impact of killer acquisitions or nascent potential acquisitions has also been felt in digital markets. Gautier and Lamesch (2020) examined 175 acquisitions by Google, Amazon, Facebook,

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[115] Amelia Fletcher, 'Video contribution to the OECD roundtable on Start-ups, killer acquisitions and merger control' (2020) OECD 11 June 2020 <https://one.oecd.org/document/DAF/COMP(2020)5/en/pdf> accessed 3 November 2020.

[116] OECD Secretariat (n 8); Elena Argentesi (n 9).

Amazon and Microsoft and found that in 105 cases the brand of the target firms was discontinued within a year of acquisition.[117] The Furman Review (2019) recommended that digital companies that have been accorded with strategic market status should be required to report all their intended acquisitions.[118] We recommend a targeted approach in the assessment of mergers wherein the agencies assess the majority of the nascent acquisitions involving dominant firms. On similar lines, the draft law in France proposed the introduction of a requirement of 'Systemic Companies' to inform the French competition authority about their acquisitions.[119]

This paper also illustrated some of the approaches that can be adopted by the enforcement agencies in dealing with the adverse effect of nascent acquisitions. *Firstly*, we highlighted the losing relevance of turnover based threshold. The same has already been recognised by the Competition Law Review Committee Report in India, which was established with a view to suggest amendments to the Competition Act 2002. In lieu of the same, the Competition (Amendment) Bill 2020 now provides a provision that empowers the central government to alter the notification requirement and existing threshold requirement.[120]

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[117] Alex Gautier and Joe Lamesch, 'Mergers in Digital Market' (2020) CSEifo, Working Paper No 8056 13 January 2020 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3529012> accessed 4 November 2020.

[118] Unlocking Digital Competition (n 17).

[119] Law Proposition no 2701 in the National Assembly of France, art 7 <http://www.assemblee-nationale.fr/dyn/15/textes/l15b2701_proposition-loi> accessed 8 March 2021.

[120] Draft Competition (Amendment) Bill 2020 (n 75).

The shift from turnover based threshold to deal value threshold is one of the primary responses that has been considered by various regulators, the inspiration for which came from the German and Austrian enforcement agencies.[121] The introduction of the deal value threshold is ideal for developed countries with an improved digital economy. However, with respect to India and other evolving economies, the immediate introduction of a deal value threshold might not be the right approach. The reason being that the digital economy is still emerging in developing countries and there is not sufficient empirical study to assess the enforcement gaps in the current merger control regime. Additionally, it may also discourage investments in start-ups and nascent firms, which are essential for developing a digital ecosystem.

Secondly, this paper also focused on the establishment of a relevant counterfactual and ex-post review in assessing killer acquisition and nascent potential acquisitions. We argued that the focus should be to block any acquisition that disturbs the balance of power or tips the market in favour of the incumbents. A correct determination of the counterfactual thus becomes essential. The factors that may be taken into account are dominance of the entity, rationale of the transaction, presence of other competitors, potential of the target firm to emerge as a rival competitor, the possibility of survival of the target in the absence of the merger and the period of time in which the target's product might mature.

[121] Germany and Austria Guidance on Transactional Value Thresholds for Mandatory Pre-merger Notification (n 60).

Lastly, we argued that a reversal of burden of proof in every circumstance as suggested by various pieces of literature might not be a sound legislative action. Inclusion of the presumption against the incumbent in cases of nascent acquisitions will discourage investment. In lieu of this, we align with the views of Fletcher (2020)[122] that is to consider the reversal of burden of proof in restrictive circumstances.

Through this paper, we have tried to provide a synthesis of diverse approaches, to highlight the problem and reach a definite list of suggestions. The central argument remains that the potential for harm in cases of nascent acquisitions should be duly addressed and dealt with in order to ensure continuous innovation in dynamic future markets.

[122] Jacquelyn MacLennan (n 114).

Nitika Bagaria and Vedika Shah, 'Decoding Intra-Party Dissent: The Lawful Undoing of Constitutional Machinery?' (2021) 7(2) NLUJ L Rev 115

DECODING INTRA-PARTY DISSENT: THE LAWFUL UNDOING OF CONSTITUTIONAL MACHINERY?

Nitika Bagaria[*] *& Vedika Shah*[#]

ABSTRACT

The recent political spat between Sachin Pilot and Ashok Gehlot in Rajasthan, and the subsequent legal battle that ensued thereto, has brought about prime focus on the right of intra-party dissent and its permissibility under the Indian Constitution vis-à-vis anti-defection law. The concept of intra-party dissent has barely been discussed and deliberated upon in the Indian context; barring a few media pieces and articles on this topic, the broader Indian legal academic literature has hardly laid any focus on the same. This paper attempts to address this lacuna by analysing various legislative provisions and judicial precedents in India and across the globe. Through this paper, the authors have attempted to discern and unravel the concept of intra-party dissent and showcase the manner in which the concepts of defection and dissent are often wrongly viewed contemporaneously in India. This conceptual intertwining has resulted in the former being used as an apparatus by the political parties to stifle and throttle the latter, resultantly causing the annihilation of intra-party dissent in the Indian democracy. The authors strongly argue that intra-party dissent is an

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intrinsic feature for the survival and growth of an effervescent democracy, purging of which, through extraneous means or otherwise, has a debilitating effect on the Indian democracy. To prevent this, it is extremely vital to clearly delineate the concepts of defection and dissent and put in place adequate mechanisms to safeguard and promote the right to intra-party dissent.

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I. INTRODUCTION

The imbroglio that had engulfed the state of Rajasthan in July 2020, with Mr Sachin Pilot and Mr Ashok Gehlot's camps jousting for power and supremacy, was nothing short of theatrical. Nineteen Members of the Legislative Assembly (MLAs) of the Rajasthan Assembly were on the cusp of disqualification for not attending two meetings of their Party and disobeying the instructions of the Chief Whip of the Indian National Congress ("Congress Party").[1] These actions of the MLAs were succeeded with the Congress Whip filing a disqualification petition against them under paragraph 2(1)(a) of the Tenth Schedule ("Paragraph 2(1)(a)") of the Constitution of India 1950 ("Constitution") before the Speaker of the Rajasthan Legislative Assembly ("Complaint").[2] The Speaker had in turn issued notices to the allegedly delinquent MLAs to show cause against the Complaint within a period of two days.[3]

It was contended by the Gehlot camp that Sachin Pilot and some other MLAs had, by missing party meetings and on the basis of their

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[1] PTI, 'Disqualification Notices against Sachin Pilot, 18 other rebel Congress MLAs: Rajasthan HC likely to pronounce verdict on Tuesday' *The New Indian Express* (Jaipur, 21 July 2020) <https://www.newindianexpress.com/nation/2020/jul/21/disqualification-notices-against-sachin-pilot-18-other-rebel-congress-mlas-rajasthan-hc-likely-to-pr-2172731.html> accessed 13 March 2021.

[2] Outlook Web Bureau, 'As Congress Sends Disqualification Notice to Sachin Pilot, All Eyes set on Leader's Next Move' *Outlook India* (15 July 2020) <https://www.outlookindia.com/website/story/india-news-congress-to-send-disqualification-notices-to-sachin-pilot-other-mlas-for-skipping-clp-meet/356719> accessed 13 March 2021.

[3] Financial Express Online, 'Rajasthan: Sachin Pilot among 19 MLAs to face disqualification from Assembly for defying Congress whip, Speakers issues notices' *Financial Express* (15 July 2020) <https://www.financialexpress.com/india-news/sachin-pilot-disqualification-rajasthan-legislative-assembly-speaker-notice-congress-mlas/2024631/> accessed 13 March 2021.

conduct, voluntarily given up membership of the Congress Party, thus they were liable to disqualification under the anti-defection law, enunciated below.[4] This was strongly opposed by the Pilot camp on the ground that voicing disagreement with certain policies or decisions taken by a party, without any intention to abandon the party and join another political party, does not amount to defection or voluntary giving up the membership of a party.[5] This internal squabble between the Congress Party had also reached the doors of the courts of law, with petitions, *inter alia*, challenging the show cause notice issued by the Speaker filed before the Rajasthan High Court[6] and for stay of proceedings being filed by the Speaker before the Supreme Court of India (SC).[7]

Despite heavily armoured arguments and allegations from both sides, neither the Rajasthan High Court nor the SC conclusively decided the

[4] Harsh Nair, 'Congress To SC: 19 MLAs in collusion with BJP to topple Rajasthan govt, their conduct amounts to defection' *Times Now* (1 August 2020) <https://www.timesnownews.com/india/article/congress-to-sc-19-mlas-in-collusion-with-bjp-to-topple-rajasthan-govt-their-conduct-amounts-to-defection/630401> accessed 13 March 2021.

[5] SNS Web, 'Rajasthan Crisis: HC Verdict on disqualification of Sachin Pilot, 18 rebel MLA's on Friday; no action until then' *The Statesman* (New Delhi, 21 July 2020) <https://www.thestatesman.com/india/rajasthan-crisis-hc-verdict-disqualification-sachin-pilot-18-rebel-mlas-friday-no-action-till-1502910364.html> accessed 13 March 2021.

[6] Scroll Staff, 'Rajasthan crisis: HC to hear Sachin Pilot's plea against his disqualification at 1 pm tomorrow' *Scroll* (16 July 2020) <https://scroll.in/latest/967677/rajasthan-crisis-sachin-pilot-to-file-fresh-plea-against-disqualification-after-hc-grants-time> accessed 13 March 2021.

[7] The Wire Staff, 'Rajasthan Speaker to Move SC over HC's 'Intervention' in Rebel MLA's Disqualification' *The Wire* (Jaipur, 22 July 2020) <https://thewire.in/politics/rajasthan-speaker-supreme-court-mla-disqualification> accessed 13 March 2021.

matter. Subsequently, the two warring factions reached a truce, putting this political scuffle at rest.[8]

The polemic in Rajasthan may *prima facie* seem to be another attempt to topple a democratically elected government through horse-trading and engineered political resignations as in the case of Karnataka in the year 2019[9] and Madhya Pradesh in the year 2020.[10] However, on a closer examination, the Rajasthan constitutional impasse was different. This tussle was not between two rival political parties but between two stalwarts in the Rajasthan political arena belonging to the same political party, *viz.*, the Indian National Congress. The crisis that broke out in Rajasthan has brought to the fore a question fundamental to the basic tenets of the Constitution, i.e., *what are the constitutional contours of intra-party dissent in the Indian democracy?*

Before delving into this question and attempting to decipher it, it would be pertinent to understand the meaning of 'defection' and the law relating to it in India. 'Defection' comes from the Latin word '*defectio*',

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[8] Harsha Kumari Singh, 'Smiles, Handshake as Sachin Pilot, Ashok Gehlot Meet After Congress Truce' *NDTV* (Jaipur, 13 August 2020) <https://www.ndtv.com/india-news/rajasthan-ashok-gehlot-ahead-of-sachin-pilot-meet-spirit-of-forget-and-forgive-2278840> accessed 13 March 2021.

[9] First Post Staff, 'Full timeline of Karnataka Crisis: Congress- JD(S) govt falls as MLAs vote against HD Kumarswamy in delayed trust vote, BJP set to take charge' *First Post* (24 July 2019) <https://www.firstpost.com/politics/full-timeline-of-karnataka-crisis-congress-jds-govt-falls-as-mlas-vote-against-hd-kumaraswamy-in-delayed-trust-vote-bjp-set-to-take-charge-6996101.html> accessed 13 March 2021.

[10] Mukesh Rawat, 'MP govt crisis: Kamal Nath announces resignation, Congress falls and BJP rejoices' *India Today* (New Delhi, 20 March 2020) <www.indiatoday.in/india/story/madhya-pradesh-govt-crisis-floor-test-kamal-nath-congress-bjp-1657768-2020-03-20> accessed 13 March 2021.

meaning conscious abandonment of one's allegiance or duty.[11] Under the Constitution, the law relating to defection has been capsulated in its Tenth Schedule ("Schedule").[12] The Schedule comprises within its fold the following acts which entail disqualification from the House or State Assembly: (i) voluntarily giving up the membership of a party;[13] or (ii) disobeying the directives of the party leadership on a vote.[14]

In the backdrop of the aforesaid provisions, this paper endeavours to decipher the fundamentally intrinsic question pertaining to the scope of intra-party dissent under the Constitution. Through this paper, the authors aim to discern and segregate the concepts of the extant anti-defection regime and the principle of intra-party dissent. Additionally, the authors showcase the manner in which intra-party dissent and anti-defection law, despite being distinct and separate concepts, are often considered as being interlinked, which has a deleterious impact on a democracy such as India. Part II of this paper elucidates upon the meaning and scope of intra-party dissent, delving into the merits thereof. Part III examines the interplay between intra-party dissent and Paragraph 2(1)(a) and 2(1)(b) respectively, showcasing the manner in which dissent is purged in the Indian political arena under the garb of defection. Part IV looks at legislative practice adopted in other democracies of the world, with the view of understanding the nature and extent of intra-party dissent which has been considered viable across the globe. Thereafter, recognising the criticisms that intra-

[11] Law Commission of India, One Hundred Seventh Report on the Electoral Laws (Law Com No 35, 1999) para 5.
[12] The Constitution of India 1950, sch X.
[13] ibid, cl 2(a).
[14] ibid, cl 2(b).

party dissent may potentially face in the Indian parliamentary democracy, the authors put forth their rebuttals to such points of concern as may be raised in Part V hereinbelow, while also providing a suitable approach moving forward, followed by the authors' concluding remarks in Part VI.

II. INTRA-PARTY DISSENT ANALYSED

Dissent is defined to mean "contrariety of opinion"[15] or "differ, especially from the established or official opinion".[16] Justice DY Chandrachud, a sitting Judge of the SC, has recognised dissent as "a symbol of a vibrant democracy".[17] Dissent may take divergent forms; finding expression in the voices of individual citizens who assert their causes against those at the helm of power, or may manifest itself in the form of debate and discussion between disparate political parties on the parliamentary floor. However, there may be times when members belonging to the same political party have differed views on internal party matters, policies, or decisions, which may not fall in line with the opinions expressed by those in the echelons of power.[18] Such variance of opinion among members belonging to the same party or association is termed as 'intra-party dissent'. In many democracies across the world, intra-party dissent is viewed as an extension of the freedom of speech and expression granted to parliamentarians and is recognised as a crucial element that

[15] Henry Campbell Black, 'Dissent', *Black's Law Dictionary* (4th edn, 2011).
[16] Della Thompsom, 'Dissent', *Oxford Dictionary*, (2nd edn, 2011).
[17] *Romila Thapar v Union of India* [2018] AIR 2018 SC 4683 [66] (Chandrachud J).
[18] Christopher Garner and Natalia Letki, 'Party Structure and Backbench Dissent in the Canadian and British Parliaments' (2005) 38(2) Canadian Journal of Political Science 463.

fosters free debate and exchange of ideas in parties,[19] however, the same is not the case in India.

Today, the question of intra-party dissent holds more than mere academic and theoretical importance. In this part, the authors enunciate the multifarious reasons as to why intra-party dissent is vital in theory and in practice. *First*, the authors delve into the advantages of providing intra-party dissent to the party members at an individual level, which is followed by the impact it would have on intraparty relations. *Second*, looking at it from a macro perspective, at the inter-party level, the authors shed light upon the role intra-party dissent plays with regards to improved debates and dialogue in the House, which leads to tabling and formulation of better bills and laws in the country, which in turn has a direct impact on public accountability of party members and on the Indian democratic system in toto.

Moving forward with specific reasons, *first*, encouraging intra-party dissent would progressively impact the role played by individual members in the party. Permitting intra-party dissent gives party members the opportunity to separate their views and opinions from those of the party, giving them an individual voice and allowing them to fearlessly stand for what they believe in. This would, in turn, foster a congenial environment for the promotion of competition, participation, and representation within the party and ultimately in the Houses of the Parliament. Parliamentarians would be more certain that their suggestions, if meritorious, would be

[19] Harsh Nair (n 4).

considered and deliberated upon by their party.[20] Thus, they would be more motivated to engage in the onerous exercise of weighing the relative merits and demerits of alternative strategies and providing carefully calibrated, innovative policies and solutions.

Providing such impetus to members to openly voice their opinion within the party would indirectly counter the menace of largescale fragmentation and polarisation of political parties, as this would create an assurance among members that creating a political party of their own is not the only way in which their voices may be heard, and their vision shared.[21] Often several party members across various parts of the country have felt the need to quit a party which is non-inclusive. A recent example of this can be seen when the Chief of Congress Party in Haryana, Mr Ashok Tanwar, served his resignation letter in 2019, wherein clearly expressed his dissatisfaction over the fact that despite his voice being an expression of the aspirations of millions of staunch Congress Party supporters, voters and local leaders, it had not been paid heed to. This was the case in spite of him exhausting every possible avenue to make himself feel heard, at which point he decided to resign from his responsibilities in various committees of the Congress Party. He also stated that it was excruciating to watch a limited number of individuals within the Congress Party taking all the decisions,

[20] Ruchika Singh, 'Intra-Party Democracy and Indian Political Parties,' (2015) 71, Hindu Centre for Politics and Public Policy 1, 2015.

[21] Pratap Bhanu Mehta, 'Reform political parties first' <https://www.india-seminar.com/2001/497/497%20pratap%20bhanu%20mehta.htm> accessed 13 March 2021.

instead of allowing just, free and fair procedures.[22] Thus, if such members feel heard in the first place, the chances of fragmentation would be minimalized, and members would harness and capitalise on their position in the party itself to achieve their political aspirations.

Second, at the intra-party level, inclusive deliberation on policies could ensure that a larger number of party members being able to contribute to the decision-making or problem-solving process, as opposed to decisions being taken solely by the higher-ups and elites of the party, which are generally smaller, closed groups. When inclusive decision-making is done, it would lead to a greater flow of ideas and perspectives previously not considered. Unlike single-issue pressure groups, political parties are multi-focal, and nuanced divergences are natural within the same ideological frame. Further, diverse and disparate opinions, followed by contemplation and discussions, ensure that balanced and wholistic policies are passed, taking into consideration the needs of all the stakeholders involved.

Third, in addition to the aforesaid, permitting expression of dissent would prevent autocracy from gaining a foothold at the intra-party level. Usually, for the passing of any enactment, the party forming the government depends largely on the majority strength of its own members, rather than on the opposition members. For instance, if a party enjoys the

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[22] PTI, 'Ashok Tiwari resigns from Congress' election committees, says will work as ordinary party worker', *The Economic Times* (New Delhi, 3 October 2019) <economictimes.indiatimes.com/news/politics-and-nation/ashok-tanwar-resigns-from-congress-election-committees-says-will-work-as-ordinary-party-worker/articleshow/71428007.cms?from=mdr> accessed 13 March 2021.

support of more than the halfway mark in the house, they can achieve the simple majority required for passing constitutional amendment bills, finance and ordinary bills at ease, on the strength of their own party members without having to turn to the opposition's support. This effectively eliminates the consequences of external dissent and contrary views. The position is worsened in the absence of intra-party dissent as this leads to laws being passed without any second thought or consideration, with parliamentarians merely adjusting their own preferences to reflect the majority decision they must finally support. On the contrary, intra-party dissent in such circumstances would be crucial, as the ruling party would then have to take into account and satisfactorily address legitimate concerns raised by its members, and even go to the extent of persuading its members on such issues without a misplaced assurance that the law would be passed ultimately without any blockages, as seen in the status quo.

Fourth, it is pertinent to note that inclusivity plays an important role, not merely at the intra-party level, but also at the macro level in a parliamentary setting. One of the foremost reasons for which the Legislature holds primacy and a focal position in a democracy is due to its large size and the varied and divergent interests that it represents.[23] The Legislature is symbolic of the principle that an individual or small group of individuals, no matter how competent or able, are not a substitute for the collective wisdom of hundreds of persons representing multifarious interests, bringing a myriad of experiences to the table. It is for this very

[23] Jeremy Waldron, 'Representative Lawmaking' (2009) 89 Boston University Law Review 335.

reason that the Legislature is entrusted with the task of holding deliberations and formulating enactments for the country. In the absence of intra-party dissent in a country like India, the Lok Sabha even though physically consisting of 543 persons, would effectively consist of only a small-closed group of persons who would have the ability to table and assess all significant decisions being taken, with the remaining legislators acting as mere puppets in the hands of their political party, voting as per the sanction of their party leaders. This essentially reduces the range of problem solvers for the country to a particular category and type of politicians. On the other hand, if intra-party deliberation and crossflow of opinion is encouraged, it would benefit the party, and in turn the Legislature. The party and the Legislature could both draw from the experiences and learnings of a multitude of parliamentarians of varying age, stature, background and ethnicity. This would ensure inclusive deliberation and reflection on a wide spectrum of interests that numerically large legislative chambers were intended to secure.[24] Further, this would largely enhance the quality of debates held in the House, in turn enriching the quality of draft legislations tabled that ultimately form the laws of the country.

Fifth, permitting intra-party dissent would also in the true sense uphold in letter and spirit the primary purpose for which bicameralism has been adopted at the Centre by the Constitution.[25] The bicameral

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[24] Ajay Pandey, 'The Politics of Parliamentary Disruption' *Live Mint* (24 August 2015) <www.livemint.com/Opinion/Vf3anAosbfd9A6TJJiYFHL/The-politics-of-parliamentary-disruption.html> accessed 13 March 2021

[25] Arhend Lijphart, *Democracies: Patterns of majoritarian and consensus government in twenty-one countries* (Yale University Press 1984) 232.

parliamentary system in India aims at securing an additional layer of scrutiny to every bill passed by the Lok Sabha. The Rajya Sabha, even though consisting of only 250 members, plays a vital role as a revising chamber in providing due inputs and recommendations to various bills passed by the Lok Sabha[26] and acts as a check on parties having an absolute majority in the Lok Sabha.[27]

The tangible benefits of having this House will be discernible only if intra-party dissent is permitted to thrive and members of the Rajya Sabha are permitted to effectively fulfil their executive duties and mandate. This protective measure will lose its purpose entirely if members of the Upper House blindly follow, repeat, and reiterate the views and stance of their party leaders. For instance, Udit Bhatia, in his article titled '*Cracking the Whip*',[28] has most succinctly encapsulated this position by stating as follows:

> *"Distinctiveness cannot be simply about the physical presence of two different sets of legislators. If the only permissible view they can voice is the one sanctioned by the party's leadership, and if they lack the capacity to form opinions that differ from that view, then distinctiveness no longer obtains. We, then, lose, what the epistemic case for bicameralism suggests, is the value of having two chambers of parliament."*[29]

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[26] Rajya Sabha Secretariat New Delhi, 'Constitutional Provisions in Respect of the Rajya Sabha' '*Rajya Sabha- Its contribution to Indian Polity'* (Parliament of India, Rajya Sabha, 2018).
[27] Pavan K Verma, 'Why Rajya Sabha is essential: It represents the states and balances an impetuous Lok Sabha' *Times of India Opinion* (India, 26 December 2015) <https://timesofindia.indiatimes.com/blogs/toi-edit-page/why-rajya-sabha-is-essential-it-represents-the-states-and-balances-an-impetuous-lok-sabha/> accessed 13 March 2021.
[28] Udit Bhatia, 'Cracking the whip: The deliberative costs of strict party discipline' (2020) 23 Critical Review of International Social and Political Philosophy 254.
[29] ibid 13.

Sixth, this will bring in more public accountability *vis-à-vis* political parties, as citizens and voters would now be assured that their elected representatives, at the national and local level, are not mere instrumentalities in the hands of their parties but can effectively fulfil their mandate and promote the cause of their constituents, being in tune with public sentiment.[30]

A clear downside of not permitting intra-party dissent was recently witnessed when Dr Shashi Tharoor, Thiruvananthapuram representative to the Lok Sabha, openly opposed the stance taken by his own party, Congress, on the matter of privatisation of construction of an airport in Thiruvananthapuram, an issue riddled with political clout. Tharoor made a public statement clarifying his unwavering position that he will not follow the order issued by his party on this subject, as he staunchly supports privatisation of the airport construction work.[31] The Congress Party leader has faced criticism for not towing the party line on this issue, but he has stuck to his guns, saying his position has been consistent[32] and is in consonance with what is in the best interest of the people of his constituency.[33] Thus, if intra-party dissent is permitted, MLAs will not be

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[30] Stefan Rummens, 'Staging Deliberation: The Role of Representative Institutions in the Deliberative Process' (2012) 20 Journal of Political Philosophy 23.

[31] Fatima Khan, 'Why participate in bidding, then question the game – Tharoor asks Kerala govt on airport' *The Print* (New Delhi, 24 August 2020) < https://theprint.in/politics/why-participate-in-bidding-then-question-the-game-tharoo r-asks-kerala-govt-on-airport-row/487855/> accessed 13 March 2021 .

[32] Nandini Gupta, 'Shashi Tharoor's Reply To Kerala Minister on Centre's Airport Move' *NDTV* (New Delhi, 22 August 2020) <https://www.ndtv.com/india-news/thiruvananthapuram-airport-issue-shashi-tharoors-reply-to-kerala-minister-on-cent res-airport-move-2283584> accessed 13 March 2021.

[33] Express News Service, 'Tharoor embarrasses Congress leaders in Kerala by backing Thiruvananthapuram airport privatisation' *The New Indian Express* (Thiruvananthapuram,

torn between choosing what is best for their constituency and following directions issued by their party, but will in fact be able to harmonise the interest of all the stakeholders involved, while at the same time instilling and retaining public confidence in the party.

Lastly, an inclusive intra-party deliberation on policies could provide for decimation of dynasty politics, a phenomenon commonly observed in the India political arena. Dynasty politics is not specific to any political party in India, as both local and central parties showcase multiple dynasties at various levels of hierarchy. Dynastic politics has a negative impact on party cohesion in particular and the Indian political arena in general. This can be better understood by analysing a recent occurrence of August 2020, where 23 members of the Congress Party wrote a 'dissenting letter' to the Interim President of the party, Sonia Gandhi.[34] In this letter, they expressed strong views against limited members of the party forming a majority, along with their loyalists getting important portfolios and better promotions. It was a cry for internal democracy, honest introspection on issues faced by the party and collective party leadership. The signatories, in various interviews, clarified that their intention was not to target the party or its higher-ups,

20 August 2020) <https://www.newindianexpress.com/states/kerala/2020/aug/20/tharoor-embarrasses-congress-leaders-in-kerala-by-backing-thiruvananthapuram-airport-privatisation-2186080.html> accessed13 March 2021.

[34] OpIndia Staff, 'Read the full text of the letter written by dissenting Congress leaders demanding sweeping changes within the Congress party' *OpIndia* (28 August 2020) <https://www.opindia.com/2020/08/the-full-text-of-congress-letter-written-by-dissenting-leaders-demanding-structural-overhaul-party-leadership> accessed13 March 2021 .

but merely to revive the Congress Party.[35] Amidst this turmoil, a Congress Party meeting was held, wherein the letter was acknowledged, but none of the requests or concerns voiced by these members were actually discussed; in fact, some of these members were also accused of being traitors to their own party.[36] Thus, it is evident that intra-party dissent within such dynastical parties would be greatly beneficial, not just in promoting views of members outside the 'majority within the party', but also in leading to democratic distribution of power and influence within the party, preventing fragmentation of parties.[37]

Thus, it is abundantly clear from the aforesaid that intra-party dissent is the essence of a parliamentary democracy, being indispensable in preventing majoritarianism and authoritarianism, from taking foothold dominance both, within a particular party and in the House. Being a fundamental ethical principle, it can prevent the centralisation of power in the hands of a few people forming the majority. It qualifies as the distinguishing feature of a democratic government and serves as a safety valve for a democracy.

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[35] Rajdeep Sardesai, 'The myth of inner party democracy' *Hindustan Times* (27 August 2020) <hindustantimes.com/columns/the-myth-of-inner-party-democracy/story-xdmcW9Ch0b3CI1wJqpyOCN.html> accessed 13 March 2021.

[36] Manoj C G, 'Kapil Sibal: 'Not one request, concern shown in letter addressed at CWC meet' *Hindustan Times* (New Delhi, 31 August 2020) <https://indianexpress.com/article/india/kapil-sibal-interview-congress-letter-gandhis-6575479/> accessed 13 March 2021.

[37] Swati Chaturvedi, 'As Gandhi Loyalists Are Promoted, Dissenters Say "Told You So' *NDTV* (28 August 2020) <https://www.ndtv.com/opinion/must-fight-for-congress-not-gandhis-say-letter-bomb-signees-2286714> accessed 13 March 2021.

However, the functioning of the Indian parliamentary system, in practicality, has time and again curbed this valuable right of dissent available to its parliamentarians. In the following section, the authors will shed light upon the scope of intra-party dissent under the Constitution, by analysing several significant provisions under the Schedule and judicial pronouncements relating thereto.

III. SYSTEMATIC DISINTEGRATION OF INTRA-PARTY DISSENT IN INDIA

Despite India being the world's largest democracy, intra-party dissent is far from being recognised. Instead, it is seen to be curtailed by various restrictive practices. More often than not, intra-party dissent is stifled under the garb of defection as provided for in the Schedule. The authors aim to deconstruct these practices and provisions at length, by first analysing in Part A, the jurisprudence surrounding Paragraph 2(1)(a) and showcasing the manner in which intra-party dissent and voluntary giving up of membership (encompassed under Paragraph 2(1)(a)) are separate concepts, which are being wrongly entwined by political parties for their benefit. In Part B, the authors assay the loopholes in the Schedule and demonstrate the method by which intra-party dissent is systematically restricted and curbed by the Schedule, despite intra-party dissent escaping the confines of Paragraph 2(1)(a), as shown in Part A. Lastly, in Part C, the authors examine, in light of Paragraph 2(1)(b), the role played by a whip in curtailing intra-party dissent in a parliamentary democracy, and highlight the detrimental impact of providing unrestrained powers to the whip.

A. UNRAVELLING THE NUANCES OF INTRA-PARTY DISSENT IN THE BACKDROP OF PARAGRAPH 2 (1)(A) OF THE CONSTITUTION

Paragraph 2(1)(a) provides that a member of the Lok Sabha or the Rajya Sabha shall be disqualified from being a member of that particular House, if the member voluntarily and/or of his own free will and volition gives up membership of the political party by which he was set up as a candidate for election as a member of the Lok Sabha or the Rajya Sabha, as the case may be. It is pertinent to note that the contours of what amounts to a legitimate avenue of dissent and what amounts to voluntary giving up the membership of a political party under Paragraph 2(1)(a) are extremely blurred. A three-judge bench of the SC in the case of *Ravi S Naik v. Union of India*[38] ("*Ravi Naik*") has explained the scope and ambit of Paragraph 2(1)(a) to mean conduct of any kind by a member of a political party which may lead to an inference that the member has voluntarily given up membership of the party to which he belongs. The act of voluntary giving of membership of a party may be either express or implied, and a formal resignation of membership is not a necessary concomitant thereof. On the basis of the ratio laid down in the *Ravi Naik*, a number of persons including the Speaker of the Rajasthan Legislative Assembly in the Pilot-Gehlot issue have been quick to argue that voicing dissent against one's party or criticising any decisions taken by his party is a scathing attack on the party unity and cohesion and is nothing short of an attempt to challenge the party

[38] AIR 1994 SC 1558.

and government.[39] Thus, as per this school of thought, the conduct of a reprehensible member would rightly amount to voluntary giving up of membership under Paragraph 2(1)(a) and consequently, he should be disqualified from the House.

However, this skewed interpretation of Paragraph 2(1)(a) seems fallacious if jurisprudence surrounding it is delved into. It is true that the term 'voluntary resignation of membership' has been subject to a great amount of judicial scrutiny and discourse. However, most judgments on the subject have dealt with factual matrices involving a member of a political party (explicitly or impliedly) leaving that political party and covertly joining hands with a rival political party.[40]

The facts, *inter alia*, involved in these cases are as follows: In the *Ravi Naik*,[41] two MLAs of the Maharashtra Gomantak Party ("MGP") had met the Governor of Goa in the company of Congress legislators, wherein they had confessed to no longer supporting the MGP, and wishing to extend their support to the Congress Party to form an alternative government. A similar situation had arisen in the case of *Rajendra Singh Rana and Ors v. Swami Prasad Maurya and Ors*,[42] in the Uttar Pradesh Legislative Assembly. Further, in the case of *Jagjit Singh v. State of Haryana*,[43] an MLA of

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[39] ET Bureau, 'Ruling party as opposition' *Economic Times* (28 September 2010) <economictimes.indiatimes.com/opinion/et-editorial/ruling-party-as-opposition/articleshow/6640457.cms> accessed 13 March 2021.

[40] V Venkatesean, 'Why Congress Rebels in Rajasthan are justified in saying dissent is not defection' *The Wire* (25 July 2020) <thewire.in/law/congress-rebel-mlas-rajasthan-dissent-defection-case-law> accessed 13 March 2021.

[41] *Ravi Naik* (n 38).

[42] AIR 2007 SC 1305.

[43] AIR 2007 SC 150.

the Haryana Legislative Assembly, elected on the ticket of the National Congress Party ("NCP"), on the basis of an alleged split in the NCP, joined a political party called Democratic Dal. Shortly after its formation, the party members of the Democratic Dal, including the erstwhile NCP MLA, merged with the Congress Party (the ruling party in the state). In all the aforesaid cases, it is the chicanery tactics of the MLAs that have exposed them to the rigours of Paragraph 2(1)(a) and has ultimately led to courts upholding their disqualification on the ground of defection. The SC has, in all these cases, slammed change of political hues in pursuit of power and pelf, but has not answered the question of whether simple intra-party dissent would amount to the voluntary surrender of membership.

While the SC has failed to give an authoritative finding on this aspect, Justice N. Kumar of the Karnataka High Court, in his dissenting judgment in the case of *Balchandra L Jarkiholi and Ors v. B Yeddyurappa and Ors*,[44] has analysed this question, paving the way for future discourse on this aspect. In this case, 13 MLAs of the Karnataka Legislative Assembly belonging to the Bhartiya Janta Party (BJP) wrote identical letters ("Letters") to the Governor of Karnataka indicating that they had been elected as MLAs on the ticket of the BJP but had become disillusioned with the functioning of the Karnataka Government headed by Shri BS Yeddyurappa, and consequently withdrew their support to his government. Based on the aforesaid Letters, the Governor of Karnataka addressed a letter to Yeddyurappa, requesting him to prove that he continued to command majority support in the House. Subsequently, Yeddyurappa, as

[44] Writ Petition Nos 32660-32670 of 2010 (High Court of Karnataka, 15 November 2010).

the leader of the BJP in the Karnataka Assembly, filed an application before the Speaker seeking disqualification of the 13 MLAs on the ground that they had voluntarily given up their membership of the BJP, and had thus incurred disqualification under the Schedule.[45]

The thirteen MLAs had, all throughout the proceedings before the Speaker, maintained that their intention was not to withdraw their support to the BJP, but only to the Government headed by Yeddyurappa, as they believed his Government to be corrupt. They maintained that withdrawing support to the Yeddyurappa Government did not fall within the scope of defection under Paragraph 2(1)(a), emphasising that *prima facie* 'defection' means leaving one party and joining another party, which was not the case with the MLAs since they had not left the BJP at all. It was repeatedly asserted by them that "*as disciplined soldiers of BJP they would continue to support any Government headed by a clean and efficient person who could provide good governance to the people of Karnataka*".[46] The Speaker of the Karnataka Assembly, however, held that the 13 MLAs had voluntarily given their membership of BJP by withdrawing their support to the Government headed by Yeddyurappa.[47]

Following this, the disgruntled MLAs filed an appeal from this decision before the Karnataka High Court, where a majority of judges upheld the decision of the Speaker.[48] However, Justice N. Kumar, in his dissenting opinion, differed with the views given by the majority bench on

[45] [2011] 10 SCR 877 [3], [4] (Kabir J.).
[46] ibid 10.
[47] ibid 13-18.
[48] ibid 19-23.

interpretation of Paragraph 2(1)(a)[49], holding that the act of the MLAs expressing no confidence in the government formed under a particular leader does not amount to voluntarily giving up party membership. Justice N. Kumar further drew a fine distinction between what amounts to abandoning the leader of political party who has formed a state government, as opposed to acts amounting to deserting the particular political party in its entirety. The two acts are not synonymous in any manner and are in fact starkly different. What constitutes defection under Paragraph 2(1)(a) is deserting the political party as a whole and does not cover within its ambit the act of forsaking the government led by a particular member of that political party.[50] He recognised intra-party dissent as a legitimate exercise of the freedom of free speech and expression granted to parliamentarians and held that the Schedule merely prohibits acts of defection, not genuine and honest dissent. Lastly, it was held that, "*[t]he right to dissent is the essence of democracy, for the success of democracy and democratic institutions honest dissent must be respected by persons in authority.*"[51] In light thereof, Justice N. Kumar held that the order of the Speaker was required to be set aside.

On appeal thereof, the SC held, as regards the question of whether the MLAs had voluntarily given up their BJP membership, that the contents of the Letters clearly showcased that the MLAs had not withdrawn their support to the BJP, but had merely expressed their lack of confidence in the Yeddyurappa government, and were willing to support any BJP

[49] ibid 24.
[50] *Balchandra L Jarkiholi* (n 44) 45-46, (Kumar J).
[51] ibid.

government headed by another leader.[52] The SC went on to recognise that by the actions of the MLAs, the BJP had not been deprived of an opportunity to form a government in the state of Karnataka; they could still by all legitimate means, along with the support of the MLAs, form a BJP led government in Karnataka by changing their chief ministerial candidate.[53] Further, without delving into the nuances of dissent and based only on the material before it, the SC came to the conclusion that the Speaker had acted in a partisan manner and the proceedings conducted by him did not meet the twin tests of natural justice and fair play.[54] In view thereof, the SC quashed the decision of the Speaker disqualifying the 13 MLAs from their membership under Paragraph 2(1)(a). Further, it also set aside the majority judgment passed by the Karnataka High Court.[55]

Balchandra L Jarkiholi and Ors v. B Yeddyurappa and Ors is one of the foremost judgments where a distinction has been drawn between intra-party dissent and defection covered under the Tenth Schedule of the Constitution. Though the SC did not elucidate upon the concept of intra-party dissent in detail, the minority judgment of Justice N. Kumar has lucidly and in a holistic manner reinforced the fact that parliamentarians' right to dissent is sacrosanct in a democracy, denial of which would itself be tantamount to throttling parliamentary democracy. Intra-party dissent, however shrill it may be, cannot solely amount to disqualification under

[52] ibid 74 (Kabir J).
[53] ibid 76.
[54] ibid 91.
[55] ibid 94.

Paragraph (2)(1)(a) unless it is accompanied by other acts such as 'crossing the floor' or 'supporting a rival party'.

The position propounded by Justice N. Kumar that it is vital to draw a distinction between what amounts to permissible dissent and what transcends to become defection had previously been recognised by a five-judge Constitutional bench of the SC in the case of *Kihoto Hollohan v. Zachillu and Ors*[56] ("*Kihoto*") to a great extent. In this case, while deciding on the question of the constitutionality of the Schedule, the Bench stated:

> *"The distinction between what is constitutionally persmissible and what is outside the purview of the tenth schedule is marked by a 'hazy gray-line' and it is the Court's duty to identify, 'darken and deepen' the demarcating line of constitutionality… There is no single litmus test of constitutionality."*

Not stopping at this and staying true to their earlier statement, the SC, though not particularly in the paradigm of Paragraph 2(1)(a), went on to hold that the provisions of Paragraph 2(1)(b) of the Schedule, which deal with disqualification of a member from the House on failure to vote according to party directions, must be construed in such a manner to not unduly impinge on the freedom of speech given to a Member of Parliament by virtue of Article 105[57] of the Constitution. The provisions of Paragraph 2(1)(b) must be construed harmoniously with the other provisions, and its wording must be appropriately confined in its scope by keeping in view the objects and purpose underlying the Schedule, namely, to curb the evil or

[56] AIR 1993 SC 412.
[57] The Constitution of India 1950, art 105.

mischief of political defections motivated by the lure of office or other similar considerations.[58]

Taking a cue from the rationale given for the interpretation of Paragraph 2(1)(b), it would, as an obvious corollary, follow that provisions of Paragraph 2(1)(a) which precede the provisions of Paragraph 2(1)(b) must also be harmoniously construed in order to ensure that the Schedule as a whole does not encroach upon the freedom of speech granted to parliamentarians. Resultantly, the words '*voluntary giving up of membership*' would necessarily require to be construed strictly in order to ensure that it does not cover within its ambit cases of genuine and free dissent which is the hallmark of a true democracy. Thus, *Kihoto* makes it incumbent upon the speaker and the courts of law to distinguish between cases of bona fide dissent and defection camouflaged as dissent, safeguarding the former, while crushing the later with an ironclad hand.

In summation, it can be said that even though the SC has on occasions impliedly indicated that Paragraph 2(1)(a) should not be used as a medium to trample upon intra-party dissent, due to the absence of an authoritative ruling on this aspect, political parties have capitalised on this ambiguity and have time and again viciously used the machinery laid down in this provision to trample upon intra-party dissent, and create fear of disqualification in the minds of their party members. Thus, given the critical role played by intra-party dissent in a democracy, it is absolutely imperative for either the Legislature or the Judiciary to clear the ambiguity surrounding

[58] *Kihoto* (n 56) 49.

the scope of voluntary giving up of membership under Paragraph 2(1)(a), to open the parliamentary and party doors to intra-party dissent, enabling parliamentarians to voice their opinion, either on the floor of the House or within a political party, without any kind of trepidation or fear.

B. DOES BEING SAFEGUARDED FROM DEFECTION UNDER PARAGRAPH 2(1)(A) REALLY ENSURE FREEDOM OF SPEECH?

One may be inclined to believe that if intra-party dissent is determinately held to fall outside the scope of Paragraph 2(1)(a), parliamentarians may be able to exercise and assert their freedom of speech and expression to the fullest, leading to free and fearless discussions on the parliamentary floor and amongst political parties. Unfortunately, this myth would soon be busted if one takes a closer look at the Schedule as it stands today. Under the Schedule, even if a person manages to escape the rigours of Paragraph 2(1)(a), his party may still, by taking benefits of the loopholes in the Schedule, place a furtive finger on the lips exercising unwanted freedom of expression and dissent. This position can be better understood by the means of an illustration to elucidate the provisions under the Schedule.

Assuming, Mr A was elected to the Legislative Assembly of a particular state as a member of X political party for a period of 5 years. During his tenure, Mr A realises that the chief minister of the state, also belonging to political party X, is indulging in corrupt activities. Mr A protests against such corruption and refuses to attend party meetings. The members of party X may first try to get Mr A disqualified from the House on the ground that he has voluntarily resigned from his membership under

Paragraph 2(1)(a). Mr A may be able to escape the rigours of Paragraph 2(1)(a) on the ground that he was only expressing his genuine and honest dissent against the chief minister, and such intra-party dissent does not qualify as a ground for defection under the Schedule. However, this victory of Mr A might be short-lived, as members of party X may avenge their defeat against Mr A by expelling him from the party on the ground that he has violated the rules of party X, *inter alia*, relating to discipline or attendance of meetings. Further, Mr A, despite being expelled from party X, would continue to remain subject to the whims and fancies of the president of party X if he wishes to retain his seat in the Legislative Assembly, due to the deeming provisions contained in explanation (a) to Paragraph 2 of the Schedule of the Constitution ("Explanation") and its subsequent interpretation by the SC in the case of *G Vishwanathan v. Hon'ble Speaker Tamil Nadu Legislative Assembly, Madras and Ors*[59] ("*G Vishwanathan*").

The Explanation, *inter alia*, states that "*an elected member of a House shall be deemed to belong to the political party, if any, by which he was set up as a candidate for election as such member*". Basis the deeming fiction contained in this paragraph, the SC in *G Vishwanathan* had held that an elected member would continue to belong to the political party that set him up as a candidate for the election notwithstanding the fact that he or she had been expelled from that party. He will continue to belong to that political party even if he is treated as unattached.[60] The SC has essentially held that a member expelled from his political party, albeit not from the house, would within

[59] (1996) 2 SCC 353.
[60] ibid 11.

the house continue to remain subject to the directions of the party which in fact has debarred him. Moreover, in the event such a member joins another party or disobeys any direction of the whip of the party that expelled him, he will be liable to incur defection under the Schedule.[61]

Thus, in the aforementioned example, Mr A despite being expelled from party X, would continue to be subject to the directions of party X within the House, and would have to comply with their orders and directions even if he strongly objects to the same, as not complying with such orders would entail disqualification from the house. In all, his right to dissent, though probably rescued from the sweep of Paragraph 2(1)(a), has been completely throttled by *G Vishwanathan* and the Explanation.[62]

At this juncture, it is pertinent to refer to the parliamentary debates relating to the Constitution (52nd Amendment) Bill 1985[63] ("Bill") by which the Schedule was introduced in the Constitution. The Bill in addition to Paragraph 2(1)(a) and (b) (which have been incorporated into the Schedule) also consisted of a clause (c), which provided that if a member were expelled from a political party, the said member would be disqualified from the House. Clause (c) was specifically deleted whilst passing the Bill. In such circumstances, the intention of the Parliament is amply clear that no disqualification would attach to a member who has been expelled by his political party and hence, no act of his post expulsion would expose him to

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[61] ibid 12.

[62] Venu Sundaram, 'Amar Singh Expulsion Case: SC Misses Chance to Interpret Anti-Defection Law', *The Wire* (5 August 2016) <https://thewire.in/law/amar-singh-expulsion-case-scs-refusal-interpret-anti-defection-act-missed-opportunity> accessed 13 March 2021.

[63] Constitution (52nd Amendment) Bill 1985, cl 2(c).

disqualification under Paragraph 2(1)(a) or (b). Furthermore, speeches made by eminent parliamentarians, including, by Sharad Dighe make it clear that clause (c), which sought to disqualify persons who were expelled from their party for conduct outside the House, was expressly done away with as the said clause, if left outstanding, would create several practical problems such as making ministers subject to the arbitrary decisions of party leaders.[64] Professor Madhu Dandavate, during the discussion surrounding the Bill, had in support of the deletion of clause (c) stated that "*there are enough instances in this political life of our country where merely for the expression of political dissent from a leader, people have been expelled*".[65]

G Vishwanathan is in the teeth of the aforesaid legislative intent and has in fact brought in, through the back door, that which was explicitly sought to be excluded from the ambit of the Schedule. Furthermore, the Supreme Court in *Kihoto* has, as iterated before, expressly stated that the provisions of the Schedule have to be read in consonance with and in light of the objects and purpose for which the Schedule was enacted, which was never in any manner to engulf expelled members of a party within its ambit.

Moreover, a Division Bench of the SC, in the case of *Amar Singh v. Union of India*[66] shed tremendous doubt on the correctness and applicability of *G Vishwanathan*, having regard to the legislative history of introduction of the Schedule, parliamentary debates in relation thereto and the ultimate exclusion of clause (c) in the Schedule. The SC has gone ahead to observe

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[64] LS Deb 30 January 1985, vol 1 no 11, series 8.
[65] ibid.
[66] (2011) I SCC 201.

that "*what was sought to be excluded by the legislature has now been introduced into the Tenth Schedule by virtue of the said decision*". In light thereof, the judges referred certain questions of law, *inter alia*, including whether the provisions of the Schedule would apply to a member who had been expelled from the party which set him up for election as a candidate and whether the view taken in *G Vishwanathan* concerning the status of expelled members was in harmony with the provisions of the Schedule to a larger bench of the SC. However, a three-judge bench of the SC ultimately declined to rule on these questions, as the petitions had become infructuous at that point of time by virtue of the petitioner having completed his tenure in the Rajya Sabha during the pendency of the matter.

Interestingly, the same matter has once again come up before a Division Bench of the SC,[67] as the petitioner was re-elected to the Rajya Sabha, and this time his tenure being up to 2022. This Bench had also referred the questions raised earlier for consideration to a larger bench of the SC. While an authoritative ruling of the SC in this matter is intently awaited, it is abundantly clear that inflicting punishment on parliamentarians who are bold enough to stand up for what they believe in, even at the expense of inviting expulsion from their party and suffering humiliation and vilification at the hands of their fellow party members, is draconic and disproportionate.

[67] *Amar Singh v Union of India* [2017] SCC Online SC 405.

C. ROLE OF THE WHIP VIS-À-VIS PARAGRAPH 2(1)(B)

In addition to the aforesaid, it would be apposite to study Paragraph 2(1)(b). Under this provision, a member may be disqualified on the grounds of defection if he votes or abstains to vote in the House contrary to any direction issued by the political party to which he belongs, or by any person or authority authorised by it in this behalf, without obtaining the prior permission of such party. This provision is absolute, with only the exception of prior permission, and even if a member puts forth a meritorious opposing opinion, the same would not be permitted under this Schedule. Here, the '*authorised person*' refers to the party whip.

The term 'whip' refers to an official of a political party who acts as the party's 'enforcer' inside the Legislative Assembly or House of Parliament, who is responsible for the party's discipline and behaviour on the floor of the house.[68] Thus, essentially a whip is the parliamentary functionary who issues orders and instructions that must be mandatorily followed by parliamentarians, and in turn, ensures attendance of members and voting according to party lines. Neither the Rules framed under the Tenth Schedule nor the Rules of Procedure and Conduct of Business in the Lok Sabha/Council of States provide for or regulate the issuance of whip.[69] Paragraph 2(1)(b) is the sole enabling provision for the powers of a whip. The whip is entrusted with paramount powers, but there are no

[68] BS Web Team, 'Explained: What is a whip and what happens if it is disobeyed in the house?' *Business Standard* (27 November 2019) <https://www.business-standard.com/article/politics/explained-what-is-whip-in-indian-politics-and-what-does-it-do-what-happens-if-it-s-disobeyed-119112600362_1.html> accessed 13 March 2021.
[69] Harsh Nair (n 4).

corresponding checks and balances on the use of this authority. This unfettered power conferred on the whip is often used as a means of exercising complete control by the ruling party, curtailing the free will of its members.

There exist innumerable instances in India where the whip has issued a mandate to the parliamentarians to act in a certain way, as directed by the ruling party. This covers instances such as whips to attend meetings, vote in favour of majority opinion, preventing meeting persons from other parties, and so on. While this is aimed to be a disciplinary action, it tends to be used as an authoritarian means of stifling dissent by members. Such whips, as a result of the Explanation and *G Vishwanathan*, can also be issued to expelled members.

Different political parties have often used the whip to satisfy their own political agendas. For example, the Karnataka Assembly provided a sordid instance of the same when certain BJP members were disqualified for defying a party whip directing them to vote in favour of a particular member for the post of Speaker of the Assembly.[70] Mamta Banerjee from the Trinamool Congress had, a few years back, issued an informal whip to her party members to vote in favour of Dinesh Trivedi, the Trinamool candidate for the Rajya Sabha, failing which they would suffer disqualification.[71] The most recent example of the whip being used to curtail freedom of speech, is the whip issued by Mayawati Prabhu Das of

[70] *D Sudhakar v DN Jeevaraju* [2011] 3 Kant LJ 437.

[71] 'Trivedi's Problem' *India Today* (16 March 2002) <https://www.indiatoday.in/india/north/story/dinesh-trivedi-is-bound-to-obey-trinamool-congress-whip-96118-2012-03-16.> accessed 13 March 2021

the Bahujan Samaj Party ("BSP") to 6 expelled MLAs of Rajasthan, who had been elected to the Rajasthan Legislative Assembly on the ticket of the BSP, but had subsequently been expelled from the Party. Despite the expulsion, they were directed to vote against the Gehlot Government in the event of a trust vote being held in the Rajasthan Assembly.[72] Thus, it is evident that while the whip is an essential means of maintaining discipline in the House, it is often used as a medium to exploit constitutional machinery and can undo an essential pillar of democracy, *viz.*, free speech in parliament.

Such exercise of unbridled power by the whip has come under the scanner at multiple occasions. For instance, the 170th Law Commission Report on Electoral Laws[73] has lamented the fact that the whip was being used in the Indian Parliament at every possible stage, leaving no room for dissent. It stated as follows:

> "*It would be appropriate if it is provided that a whip shall be issued only on occasions when the voting is likely to affect the existence or continuance of the government and not on each and every occasion. Such a course would safeguard both the party discipline and the freedom of speech and expression of the members.*"

[72] Abhinav Sahay, 'BSP issues whip to 6 Rajasthan MLAs who merged with Congress, instructs to vote against Gehlot govt' *Hindustan Times* (27 July 2020) <https://www.hindustantimes.com/india-news/bsp-issues-whip-to-6-rajasthan-mlas-who-merged-with-congress-instructs-to-vote-against-gehlot-govt/story-lPJ3edfTlIwp6JnxolHi7L.html> accessed 13 March 2021.

[73] Harsh Nair (n 4).

A similar view was also taken in the Dinesh Goswami Report of 1990.[74] Further, this position received judicial backing in *Kihoto*, where the SC commented that disqualification imposed by Paragraph 2(1)(b) due to non-compliance with the instructions issued by the whip must be permitted only in the following cases: (i) where a change of Government is likely to be brought about or prevented, or (ii) where the motion under consideration relates to a matter which forms an integral policy and programme of the political party. Further, the SC also clarified that, where such a direction is being issued in the form of a whip, the disobedience of which would amount to disqualification, the consequence must be clearly worded to ensure the member has fore-knowledge thereof. However, neither the recommendations of the Law Commission nor the judicial clarification has been incorporated in the Schedule, and the whip continues to enjoy a free hand to quell even the slightest form of dissent expressed by a member.

Thus, a combined and harmonious reading of the aforesaid pronouncements and provisions of the Schedule amount to systematically crippling dissent at every stage and in every form, in the bargain, crumbling democracy and free speech. While the restrictions imposed in Paragraph 2(1) (a), the Explanation and *G Vishwanathan* case have a deleterious impact on dissent, Paragraph 2(1)(b) may very well be the death knell of it.

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[74] Government of India, *Report of Committee on Electoral Reforms* (Ministry of Law and Justice, Legislative Department, 1990) <https://www.legislative.gov.in/reports-on-electoral-reforms> accessed 13 March 2021.

Further, it would also be pertinent to clarify at this point that while the authors recognise the importance of anti-defection law in maintaining parliamentary discipline and party cohesion, they are strictly opposed to it being used an apparatus to stifle and throttle intra-party dissent in the country. It is understandable that the primary intention of enacting this anti-defection law was to tackle hurdles such as maintaining strict party discipline in a time when India was a fairly young democracy, with a recently codified constitution. At that stage, intra-party dissent was not a pressing priority in the larger scheme of things. However, in the thirty-six years since, the political scenario in India has evolved largely. Owing to this, the unintended ramification of such anti-defection law has been the stripping away of individual conscience and discretion of parliamentarians which the authors strongly object to.

IV. LESSONS FROM AROUND THE GLOBE: INTERNATIONAL PERSPECTIVE ON INTRA-PARTY DISSENT

Various countries around the world follow different regimes regarding intra-party dissent in the House. Notably, various countries including, *inter alia*, the US, UK, Malawi and Australia permit intra-party dissent, voting against the party's ideals and floor-crossing.

In the UK, a member of the House has the freedom to vote for any bill without fear of disqualification from either his party or the House.[75] The lack of restrictive regulation on expressing dissent has been beneficial in promoting debate in the House and allowing meaningful discussions at

[75] English Bill of Rights 1869, art 9.

the time of framing policies. For example, at several stages of discussions and voting on Brexit, the UK Parliament saw internal discord. The former Conservative Party Prime Minister, David Cameron, was engaged in a bitter discourse with his party leaders, pre-eminently Boris Johnson and Michael Gove over the Brexit debate.[76] None of these instances was seen as acts of disobedience of the party. Members that were unwilling to support the majority approach could defect and sit as independent parliamentary members. This goes to show the extent of freedom enjoyed by members of the UK Parliament, who cannot be compelled to get in line with the party's stance only due to their political affiliation with it.[77]

Further, in the UK there three types of whips which can be issued, as follow: (i) one-line whip, being merely advisory, (ii) two-line whip, being instructive, and (iii) three-line whip, being mandatory,[78] which is the position loosely followed in India. The three-line whip is only issued sparingly by the parties, on critical issues such as votes of no-confidence, unlike in the case of India, where such a whip is issued by a party at the drop of a hat.

Similarly, the US also follows a relatively liberal political system, with no legal framework on defection. Every member of the House is ensured freedom of speech under the US Constitution, and this right

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[76] Bhopinder Singh, 'Political Dissent' *The Statesman* (29 July 2016) <https://www.thestatesman.com/opinion/political-dissent-157097.html> accessed 13 March 2021.

[77] Joe Marshall, 'The whipping system and free votes' *Institute for Government* (6 March 2019) <https://www.instituteforgovernment.org.uk/explainers/whipping-system-and-free-votes> accessed 13 March 2021.

[78] ibid.

extends to the right to speak or not speak in favour of something and to the right of association or not associating, freely and as per the will of the member.[79] The American judiciary has also played an integral role in ensuring that this right does not remain merely on paper but does in fact see the light of the day. For example, in the landmark ruling of *Julian Bond v. James Floyd,*[80] where a legislator was prevented from taking oath in the House and reprimanded for his reservations on certain US foreign policy implemented by his own party, Supreme Court of the United States (SCOTUS) held that a legislator cannot be disqualified for expressing legitimate concerns about foreign or national policies of the country. In fact, the US Supreme Court went to the extent of holding that legislators had an obligation to take a stance on controversial issue and to freely participate in discussions on policies of governance, ensuring that they best represent the interests of their constituency.

Further, in the case of *Gewertz v. Jackman*,[81] the US District Court held that the right of freedom of expression conferred on a parliamentarian is so eminent that a disqualification in response to criticism or concerns raised in the House would be vindictive and in violation of a parliamentarian's constitutional rights. Taking the aforesaid proposition further, another District Court in the case of *Barley v. Luzerne County Board of Elections,*[82] has specifically clarified that if a legislator chooses to oppose the views of his political party on a matter, he is categorically protected

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[79] *Washington Legal Foundation v Massachusetts Bar Foundation* 993 F2d 962, 976 (1st Circuit, 1993).
[80] 385 US 116 (1966).
[81] 467 F Supp 1047 (DNJ 1979).
[82] 937 F Supp 362 (MD Pa 1995).

from disqualification. He may be excluded from the political party but not the House itself. Thus, through a plethora of legislative enactments and judicial pronunciations in the US, parliamentarians are ensured utmost freedom to express their views in the House, which in turn is beneficial for fostering better discussions and well-analysed policies.

Several examples of expression of internal party dissent have been seen in the USA during the presidential tenure of Former President Donald Trump. For instance, Senator John McCain differed with Trump and his fellow Republicans as much as seventeen percent of the time during votes in the Senate,[83] while Texas Senator Ted Cruz openly refused to endorse fellow Republican Trump as the presidential nominee at the Republican national convention.[84] Furthermore, his radical ideas on the economy, healthcare and foreign policy[85] have not been welcomed with open arms, and in fact several Republican leaders have openly criticised his take on issues like the coronavirus outbreak and 'Black Lives Matter' movement, to the extent of opposing his 2020 bid for re-elections.[86] However, the

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[83] Mohamed Zeeshan, 'India's anti-defection law needs changes to promote party-level dissent on issues like CAA' *The Print* (17 March 2020) <https://theprint.in/opinion/indias-anti-defection-law-needs-changes-to-promote-party-level-dissent-on-issues-like-caa/382505/> accessed 13 March 2021.

[84] Reid J Epstein, 'Despite boos, Ted Cruz Won't Endorse Donald Trump' *The Wall Street Journal* (21 July 2016) <https://www.theguardian.com/us-news/2016/sep/24/ted-cruz-donald-trump-president-endorsement> accessed 13 March 2021.

[85] Leigh Ann Caldwell and Josh Lederman, 'Trump's foreign policy faces growing dissent in Congress' *NBC News* (1 February 2019) https://www.nbcnews.com/politics/congress/trump-s-foreign-policy-faces-growing-dissent-congress-n965641> accessed 13 March 2021.

[86] David Smith, 'Republicans criticism of Trump grows – but will it make a difference at the polls?' *The Guardian* (9 June 2020) <https://www.theguardian.com/us-news/2020/jun/09/republicans-donald-trump-protests-election-2020> accessed 13 March 2021.

dissenting parliamentarians of both Houses have neither had to bear the brunt of expressing a contrary opinion nor have they had to face dire consequences such as disqualification. In all these instances, the dissenting parliamentarians can hold on to their personal positions and their dissent has not translated to disloyalty to their parties.[87]

Likewise, the position in Malawi concerning intra-party dissent is noteworthy. The Constitution of Malawi expressly gives party members an absolute right to exercise a free vote in any and all proceedings of the House, and such member's seat shall not be declared vacant solely on account of his voting in contradiction to the directive of the party.[88] Further, a member expelled from a political party for reasons other than crossing the floor does not lose his seat and can continue independently in the House,[89] in stark contrast to the position followed in India owing to the Explanation and *G Vishwanathan*.

Further, the position that exists in Australia in relation to intra-party dissent is remarkable. Despite there being a lack of a clear legislation pertaining to intra-party dissent, the Australian Government has not only permitted it, but has also tackled the issues arising due to allowance of intra-party dissent through internal policies and practices.[90] In the Australian Parliament, dissent is often ironed out internally in party rooms, at its initial

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[87] Report of Committee on Electoral Reforms (n 74).
[88] Constitution of Malawi 1994, art 65(2).
[89] Lok Sabha Secretariat Mr GC Malhotra *Report of Anti-defection Law in India and the Commonwealth* (2005).
[90] Department of the Senate Occasional Lecture Series at Parliament House *Trends in the Australian Party System* (20 April 2007) <https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/~/~/link.aspx?_id=E75719D0B64F4166A0FFF3E61F0DAC53&_z=z.>accessed 13 March 2021.

stage, and not heard or seen to cause chaos in the House.[91] This helps in presenting a united front and solidarity within the party members in front of the public, and at the same time safeguarding and securing the right of the members of a party to freely express themselves.

Thus, from the aforesaid, it is evident that several countries have dealt with the issue of party cohesion *vis-à-vis* intra-party dissent in a wholistic manner, through legislative or judicial sanctions, customs, and practices. This indicates that there exists an interplay between conceptual intra-party dissent and its practical applicability, which is seen to be supported by the governments of various countries. The political structure and constitutional enshrinements in these countries lay down the gold standard on free speech as a crucial facet of democracy, which is glaringly distinct from the position followed in India, where dissent not only goes unrecognised but is also prevented and censured.

V. TACKLING THE ISSUE

The practical functioning of the Indian Parliament, coupled with the attitude of the political parties and leaders, clearly demonstrates that the concept of intra-party dissent has been resisted consistently in India. In this part, the authors seek to deliberate on the possible defences against permitting intra-party dissent in the Indian parliamentary democracy. Following an analysis of the basic arguments that may be raised against intra-party dissent, the authors seek to rebut the premises of such

[91] ibid.

arguments which may be advanced, with the view of establishing an alternate narrative.

The key potential arguments put forth by the opponents of intra-party dissent are that permitting intra-party dissent would entail the following consequences:

A. POTENTIAL MISUSE OF THE RIGHT TO DISSENT BY PARTY MEMBERS

The right to intra-party dissent in India may face backlash due to the perceived apprehension of it being used to the disadvantage of the party. Those arguing along this line of reasoning may stress that party members may pass a dissenting view or vote with a *mala fide* intention to stall the deliberation process and create deadlocks and chaos within the party or the House. Some may also contend that party members may misuse this right to connivingly hold the party at ransom to accept their terms and conditions.[92]

There is a four-pronged rebuttal which we present against the possible misuse of the right to voice intra-party dissent:

First, just because something can be potentially misused cannot be a reason for rejecting its introduction within the legal framework,[93] especially considering its relevance;

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[92] José Maria Maravall, 'The political consequences of internal party democracy' in José Maria Maravall and Ignacio Sanchez-Cuenca (eds), *Controlling Governments: Voters, Institutions, and Accountability* (Cambridge University Press 2007).

[93] Law Commission of India, *Section 498A IPC* (Report No 243, 2012) para 7.1, wherein it has stated that "*Its object and purpose cannot be stultified by overemphasizing its potentiality for abuse*

Second, at the public level, if a member is seen to dissent frequently on every stance taken by his party, the electorate is likely to see him is an unreliable candidate, lowering the possibility of re-election. Such parliamentarians would also come under the public scanner, coming off as unsuitable representative of the people with low credence.[94] Further, the higher the position occupied by a member in the party hierarchy, the more he is subject to media glare and public opinion. Public accountability of the party members can thus be said to increase at every stage in the party hierarchy and it can safely be assumed that parliamentarians would be mindful and conscientious while expressing dissent, not going overboard and harming party solidity;

Third, it is important to realise that after all, even dissenters within partisan camps remain partisans. Members are attracted to a particular party because they share the vision and perspective of the party on several, if not all, political issues. Thus, on essential issues, such as vote of confidence or no-confidence or integral policies and manifestos on which the party has come to power, which resonate with the party ideology and vision it may be assumed that members would toe the party line in support.[95] Further, in order to have complete certainty on this aspect, parties could enact internal regulations and procedures, laying down key instances, such as the aforementioned, in which they can compel members to vote in favour of the party's stances. However, it is pertinent to remember that such

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or misuse. Misuse by itself cannot be a ground to repeal it or to take away its teeth wholesale. The re-evaluation of §498A merely on the ground of abuse is not warranted".

[94] Brian J. Gaines & Geoffrey Garrett, 'The Calculus of Dissent: Party Discipline in the British Labour Government, 1974-1979' (1993) 15(2) Political Behaviour 113.

[95] Jeremy Waldron (n 23).

regulations should not be akin to unbridled powers exercised by the whip for any issue, irrespective of the magnitude and scale of the issue. Instead, such regulations should be formulated in a streamlined manner to cover only specific instances and must be exercised by the party sparingly and with caution.

Fourth, at the party level, several internal safeguards can be put in place within the party itself, to ensure that the right is not misused. For instance, only recalcitrant members who, according to the opinion of majority party members, are seen to dissent for *mala fide* reasons or for the purpose of maliciously impeding the policies and programs of the party, could be appropriately dealt with. They could face penalties within the parties ranging from lighter sanctions including censure, slower progression in the party or losing party perks such as accommodation and staff, to more severe penalties ranging from providing fewer resources for re-election campaign to withdrawing support for the politician in the next election, depending on the severity of the misuse undertaken by the party member. Hence, procedural safeguards and internal regulations such as the aforesaid can be developed to curb the possibility of misuse of the right to dissent instead of refusing to accord it with legal validity altogether.

B. DEMOLITION OF PARTY COHESION

Opponents of intra-party dissent would be quick to argue that if members of political parties are allowed to publicly voice concerns or vote against the decisions being taken by, or bills tabled by their party in the Parliament, it may signal that the government lacks the support of its own

members and would create doubt amongst the voters as to whether the government is capable of delivering on its promises.[96]

With respect to this potential loss of party cohesion, the authors argue that stifling the right to dissent of the party members is not the optimal means of obtaining party unity. Instead, it is possible for parties to achieve deliberative cohesion, which most voters regard as valuable and look at as a symbol of a truly cohesive party, by permitting and encouraging such dissent.[97] When open debate and discussion is discouraged and quelled within a political party, there is a tendency for disagreements within the party to spill out in the public domain, with each side then making virulent allegations against the other, which actually undermines party cohesion and reputation in the eyes of the public. The Rajasthan fiasco,[98] the unpleasant incident of Yashwant Sinha of the BJP writing an open letter to his fellow party members calling upon them to stand up against their party and its failures,[99] the aforementioned dissenting Letters addressed by Congress leaders to Sonia Gandhi,[100] are all befitting examples of the result which ensue when dissenting opinions in a party are attempted to be suppressed. On the contrary, if free communication and open conversation is practised, members would not feel repressed by their party leaders anymore, but

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[96] Indridason Indridi, 'To Dissent or not to Dissent? Informative Dissent and Parliamentary Governance' (2008) 9(4) Economics of Governance 363.
[97] John Parkinson and Jane Mansbridge, *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge University Press 2012).
[98] SNS Web (n 5).
[99] National Herald Webdesk, 'Yashwant Sinha wins kudos for letter asking BJP to "speak up"' *National Herald* (17 April 2018) <https://www.nationalheraldindia.com/india/yashwant-sinha-wins-kudos-for-letter-asking-bjp-mps-to-speak-up-in-national-interest> accessed 13 March 2021.
[100] *Ruchika Singh* (n 20).

rather would feel valued as an integral part of the party. This kind of inclusive and open atmosphere would make it easier to reach an internal consensus in the party and co-partisans members would be more likely to back a certain position after a mutual give and take of reasons, while also successfully displaying a more stable and long-lasting party unity in the Parliament and in the eyes of the public, as opposed to the current eyewash of party cohesion, which may crumble with the slightest blow of dissent by party members.

C. DISRUPTION AND INFIGHTING IN THE HOUSE OF THE PARLIAMENT

Another possible concern may be that permitting intra-party dissent would create inroads for internal discord between party members to find its way into the house of the parliament.[101] There may be situations where party members may raise their dissent or conflicting opinion for the first time in the house of the parliament, which may then be potentially misapplied by the opposition party to create more roadblocks in reaching a final decision and in the path of the government.

This apprehension and fear can arguably be put to rest by putting in place adequate procedural safeguards and policies which clearly demarcate the timeframe and the procedure for raising dissenting views and concerns, thus providing a structured opportunity to shares one's opinions with his colleagues within the party. This may first be done in internal party meetings, which if not found to be sufficient or fruitful, may be raised in

[101] David Hoffman, 'Intra-party Democracy: A Case Study' (1961) 27(2) Canadian Journal of Economics and Political Science 223.

Parliament, on taking permission from the Speaker, in an orderly fashion. This regulatory framework may be further substantiated with the support of internal policies, such as handbooks laying down the general practice surrounding dissenting opinions and votes, along with the manner of expressing it in the House and the consequences of creating unnecessary interruptions or disruptions. These guidelines may be laid down by parties for their internal meetings and by the Speaker for parliamentary debates.

D. DELAY IN PASSING LEGISLATIONS

Lastly, extended timelines for passing of legislations, delay due to several rounds of debate and contrariety of opinion may be used as arguments against permitting the right of intra-party dissent. This argument is particularly important given the fact that, as per surveys and presentations, the Indian Parliament on an average takes approximately 261 days[102] to pass bills and enact them as laws, in status quo when the right of intra-party dissent is practically absent in the Indian democracy. In these circumstances, intra-party dissent, if permitted, could further impede and slow down the passage of bills and policies in the House.

The concerns with respect to undue delay in passing of bills and on arriving at a consensus both intraparty and within the House can be addressed in a two-fold manner. *First*, the House and the country would immensely benefit from well-calibrated and thought-through policies which would result if intra-party dissent is permitted, as iterated earlier in the

[102] Devanik Shah, '261 days: The time it takes laws approved by Parliament to be enforced' *Hindustan Times* (7 February 2017) <https://www.hindustantimes.com/india-news/261-days-the-time-it-takes-laws-approved-by-parliament-to-be-enforced/story-eZm70hsqRFCTSD84Gisa7K.html> accessed 13 March 2021.

paper. The trade-off between slightly extended timelines and full proof laws needs to be examined in light of the benefits arising, which would greatly outweigh the potential shortcoming of delay. Better planned and scrutinised laws would be more concrete, requiring lesser future amendments, thus enhancing the quality of the legislative product. *Second*, it would act as an effective check on rash and hasty decisions being taken by a small group of parliamentarians, promoting transparency and preventing backdoor dealings.[103]

In all, we recognise the fact that enabling intra-party dissent in the Parliament may come with its own set of apprehensions and issues. However, it is important to remember that these teething issues can be tackled by various measures such as, *inter alia*, enactment of legislative framework and guidelines, as well as judicial promptness on addressing the issue by clearly laying down the instances and broadheads under which intra-party dissent is to be permitted. The aforesaid, coupled with putting in place a harmonious structure consisting of checks and balances on parliamentary powers *versus* duty and responsibility at various levels, would ensure that intra-party dissent be recognised and legitimised in India, while also effectively tackling the accompanying potential concerns. Without prejudice to the aforesaid recommendations, it is also important to keep in mind that this goal may better be achieved if controls and limitations are

[103] Harsh Gupta, 'Defecting from anti-defection' *Live Mint* (7 June 2009) <https://www.livemint.com/Opinion/wtY0yGwCtxQ7URWxrlfXpL/Defecting-from-antidefection.html> accessed 13 March 2021.

imposed on the unbridled powers of party whips, by means of legislative or judicial intervention on the issue.

VI. CONCLUDING REMARKS

During presidential elections, Bernie Sanders of the US Democratic Party had categorically stated "*[i]t is no secret that Hillary Clinton and I disagree on a number of issues; that is what this campaign has been about. That is what democracy is about*".[104] This statement by Bernie Sanders in essence encapsulates what a democracy should espouse: equality, inclusiveness and tolerance towards views differing from one's own. It further propounds two essential facts: *First*, that intra-party dissent is not synonymous with criticism and disruption but is merely the act of bringing about new and fresh perspectives to a given issue.; and *second*, a democracy without the right to dissent and express oneself freely, where a position contrary to that decided by the party leaders is unacceptable, is nothing more than a farcical democracy.

These tenets, when viewed in the context of the Indian political arena, lead one to realise that the Indian political parties in particular and the House *in toto* seem to be lacking on all the aforesaid counts. In fact, in India, the ultra-sensitivities, insecurities and institutionalized intolerance to a view different from the party has virtually eliminated intra-party dissent. Further, from the instances mentioned in this paper, it is apparent that the lines between defection, voluntary giving up membership and dissent in the Indian constitutional regime are unreasonably blurred, which has led to the

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[104] Colleen Elizabeth Kelly, *A Rhetoric of Divisive Partisanship: The 2016 American Presidential Campaign Discourse of Bernie Sanders and Donald Trump* (Lexington Books 2018).

former two being used as a garb to penalise the latter. The Yeddyurappa and Rajasthan fiascos are merely a couple of illustrations of such a phenomenon. The root cause of these cases is largely the ambiguity surrounding the concept of voluntarily giving up membership, due to which most acts of parliamentarians not appreciated by the majority party are hurled under the wide ambit of the Schedule.

Further, one of the most cogent reasons for such instances being problematic is that post media outrage dying out, the petitions alleging disqualification of the member under the Schedule disappear into thin air, either because they become infructuous due to the impugned member completing his tenure in the Parliament, or because of the matter being settled internally between the party members, owing to which legislative and judicial elucidation on this fundamental issue has been extremely limited. Consequently, this gives rise to political parties exploiting constitutional machinery, covertly thwarting intra-party dissent and going to the extent of castigating it. These tactics are not specific to a particular state or political party but are being employed at large as a means to manoeuvre constitutional due procedure. All these events have widely exposed the hollowness of the Indian parliamentary democracy.

Notwithstanding the aforesaid, it is vital to remember that the strength and authenticity of democratic principles world over are defined by the constitutional mandates laid down, read with the events that test the resilience of the democracy. In an age where intra-party dissent is systematically crippled, vital cogs of parliamentary democracy structurally dismantled, principles of freedom, discretion and creative genius of

members stifled, the time could not be riper to effectively recuperate and transform the Indian Parliament from an oligarchy to a true and effective democracy.

Siddhi Gupta, 'Menstrual Leave – A Step Towards Substantive Equality' (2021) 7(2) NLUJ L Rev 166

MENSTRUAL LEAVE - A STEP TOWARDS SUBSTANTIVE EQUALITY

Siddhi Gupta[*]

ABSTRACT

This paper looks at menstrual leave policies from the lens of discrimination law and argues that such policies promote substantive gender equality. There is a need for providing menstrual leave to improve India's falling female labour force participation rate as well as to recognize the inherent physiological differences between men and women and accommodate for the same. A gender-neutral sick leave policy would not be more suitable than a gendered policy to fulfil these objectives because it would still lead to unequal outcomes and opportunities for women. The equal treatment principle in the case of menstrual leave would also encounter the problem of having no suitable male comparator for menstruation, as for pregnancy. Accordingly, there is a need to move beyond the formal approach to equality, i.e., mere gender neutrality or gender blindness, and adopt the substantive approach to gender equality, which takes into account the special needs of women. Further, menstrual leave does not breach the anti-stereotyping principle under sex discrimination law because it fits into the principle's exception that classifications can be made based on the real differences between men and women for legitimate objectives such as promoting

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equality of opportunities for women. Nonetheless, measures must be taken to address the possibilities of any stigma or other disadvantages women may face while availing the menstrual leave, like ensuring their privacy and dignity, shifting some of the cost of paid menstrual leave from the employers to the State, and designing a flexible menstrual policy which can accommodate all women's diverse menstruation experiences.

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I. INTRODUCTION

Menstrual leave is commonly provided in many Asian countries like Japan, South Korea, Indonesia, and Taiwan since as early as 1947.[1] In India, the first menstrual leave policy with 2 days a month paid leave was introduced by the Bihar government in 1992.[2] Almost thirty years since, the policy has been running smoothly, without any hurdles or perceived disadvantages for the women.[3] Subsequently, menstrual leave policies were introduced by some start-up companies like Culture Machine and Gozoop as well, which also recorded an overwhelmingly positive response from the women working in those companies.[4]

Further, in 2017, a Private Member's Bill was introduced in the Lok Sabha for the provision of two days a month paid menstrual leave for all women working in the public and private sector.[5] However, there was major pushback against the policy by both men and women, due to concerns that such a policy could result in employers' bias against women in hiring, promotions and pay scales, and the possible perpetuation of stigma against menstruating women. It was argued that a special menstrual leave would be

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[1] AJ Dan, 'The Law and Women's Bodies: The Case of Menstrual Leave in Japan' (1986) 7 Health Care for Women International 1.

[2] Urvashi Prasad, 'India Needs a Menstrual Leave Policy' *The Hindu Business Line* (New Delhi, 7 June 2018) <www.thehindubusinessline.com/opinion/india-needs-a-menstrual-leave-policy/article24105589.ece#> accessed 16 September 2020.

[3] Ankita Dwivedi Johri, 'When Lalu Prasad gave nod for leave during menstruation' *The Indian Express* (New Delhi, 31 August 2020) <https://indianexpress.com/article/opinion/columns/when-bihars-women-got-period-leave-6575393/> accessed 29 September 2020.

[4] Jessica L Barnack-Tavlaris and others, 'Taking Leave to Bleed: Perceptions and Attitudes towards Menstrual Leave Policy' (2019) 40 Health Care for Women International 1, 2.

[5] The Menstruation Benefits Bill 2017, 249 of 2017.

a setback for gender equality, and thus, the Private Member's Bill could not be passed.

Now in 2020, online restaurant guide and food delivery application, Zomato's policy to grant an additional ten-day period leave to its women employees[6] has re-ignited this debate on whether providing menstrual leave to women is a step towards or away from gender equality.

While much has been said about the issue from a feminist angle, this paper attempts to look at menstrual leave policies from the lens of discrimination law. It will be argued that providing special menstrual leave to women is a positive step towards substantive gender equality, and it does not infringe the anti-stereotyping principle under sex discrimination law.

Accordingly, this paper has been broadly divided into four sections. The *first* section will discuss the need for granting menstrual leave from the perspective of the reducing female labour force participation rate in India as well as the substantive law considerations of redressing disadvantages and accommodating differences. Next, the *second* section will provide arguments on why a gender-neutral sick leave policy is not better suited than a gendered policy to fulfil the intended objectives of providing menstrual leave. Further, the *third* section will determine if menstrual leave breaches the anti-stereotyping principle under the sex discrimination law. American as well as Indian jurisprudence on the principle will be dealt with for the same. In the abovementioned sections, all major arguments made

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[6] PTI, 'Zomato Introduces 'Period Leave' For Employees' *The Hindu* (New Delhi, 9 August 2020) <www.thehindu.com/news/national/zomato-introduces-period-leave-for-employees/article32308642.ece> accessed 18 September 2020.

against menstrual leave policies will be countered. Lastly, the *fourth* section will lay out some policy solutions for addressing any disadvantages that women may face while taking menstrual leave.

This paper is particularly relevant in the context of the need to openly talk about menstruation and to design policies around it in the best possible way. The paper attempts to provide a new perspective from which menstrual leave policies ought to be looked at.

II. NEED FOR PROVIDING MENSTRUAL LEAVE

According to the recent World Bank estimates, the female labour force participation rate in India has fallen to its lowest level since 1990 and is among the lowest worldwide.[7] One of the most significant barriers to the entry of women into the workforce is the lack of access to basic sanitation and hygiene facilities such as clean toilets,[8] which can be problematic especially during menstruation. Even where women do participate, the workplaces are not modified to accommodate their specific needs,[9] leading to absenteeism and laying off.

It is also estimated that India can potentially boost its gross domestic product by USD 770 billion by 2025 by getting more women to

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[7] World Bank, Labor Force, Female (% of Total Labor Force) – India <https://data.worldbank.org/indicator/SL.TLF.TOTL.FE.ZS?locations=IN> accessed 16 September 2020.

[8] Garima Sahai, 'Period Leave: Gender Blindness is Never the Same as Gender Equality' *The Wire* (11 September 2020) <https://thewire.in/women/period-leave-zomato-women-gender-blindness> accessed 16 September 2020.

[9] Neha Banka, 'Period Leaves is Really About Giving Women the Freedom to Choose' *The Indian Express* (New Delhi, 16 August 2020) <https://indianexpress.com/article/lifestyle/health/period-leaves-is-really-about-giving-women-the-freedom-to-choose-6556933/> accessed 16 September 2020.

work.[10] In this light, it is crucial for all the stakeholders – the government, private sector, civil society – to recognize women as vital economic accelerators and work towards targeted interventions to retain them in the workforce.[11] Granting paid menstrual leave is one such intervention because of the significant impact that premenstrual symptoms have on the quality of life of women; over 35% women of the reproductive age have their daily life activities moderately to severely impacted because of premenstrual symptoms.[12] Further, working through menstrual symptoms, such as pain and heavy bleeding, can result in 9 days of lost productivity per year for women on average.[13] Thus, paid menstrual leave not only compensates women for the failure to provide them with suitable public infrastructure[14] but also increases their comfort level and job contentment. The latter can potentially increase women's productivity too, hence encouraging employers to hire more women. This would give effect to the

[10] McKinsey Global Institute, The Power of Parity: Advancing Women's Equality in Asia Pacific [Focus: India] (May 2018) <www.mckinsey.com/~/media/McKinsey/Featured%20Insights/Gender%20Equality/The%20power%20of%20parity%20Advancing%20womens%20equality%20in%20India%202018/India%20power%20of%20parity%20report.pdf > accessed 16 September 2020.

[11] Mitali Nikore, 'Where are India's Working Women? The Fall and Fall of India's Female Labour Participation Rate' *LSE South Asia Blog* (22 October 2019) <https://blogs.lse.ac.uk/southasia/2019/10/22/where-are-indias-working-women-the-fall-and-fall-of-indias-female-labour-participation-rate/> accessed 16 September 2020.

[12] L Dennerstein and others, 'The Effect of Premenstrual Symptoms on Activities of Daily Life' (2010) 94 Fertility & Sterility 1059, 1064.

[13] ME Schoep and others, 'Productivity Loss Due to Menstrual Related Symptoms: A Nation-wide Cross-sectional Survey Among 32748 Women' (*BMJ Open*, 12 March 2019) <https://menstrualhygieneday.org/wp-content/uploads/2019/08/MenstruationProductivityStudyNetherlands_2019.pdf> accessed 28 December 2020.

[14] Sahai (n 8).

State's duty to provide just and humane conditions of work to everyone under Article 42 of the Constitution of India[15] as well.

Further, providing menstrual leave is a much-needed recognition of the inherent physiological differences among the workforce and accommodation of that difference through a structural change that modifies the workspace as per the specific needs of women.[16] Currently, women disproportionately bear the cost of menstruation by either working through pain, leading to unproductivity and health issues,[17] or taking unpaid leaves, leading to loss of income. Grant of paid menstrual leave would re-distribute these costs of menstruation in a fairer manner and de-masculinise the workspaces.[18] Such transformation is crucial for achieving genuine and substantive equality, and not formal equality which strives for mere gender blindness.

Nonetheless, an argument made against menstrual leave policies is that since all women do not need leave during their menstruation, a special policy for the same is over-inclusive and unnecessary. However, a legitimate affirmative action policy can benefit just a single member of a protected group and does not have to target all its members.[19] Moreover, the

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[15] The Constitution of India 1950, article 42.

[16] Vrinda Aggarwal, 'Leave to Bleed: A Jurisprudential Study of the Policy of Menstrual Leaves' (2017) 8 Journal of Indian Law and Society 1, 12; *Banka* (n 9); The Ladies Finger, 'Period Leave Isn't Radical; It's Simply Making the Workplace Amenable to the People Who Work In It' (*First Post*, 12 August 2020) <www.firstpost.com/india/period-leave-isnt-radical-its-simply-making-the-workplace-amenable-to-the-people-who-work-in-it-3817151.html> accessed 16 September 2020.

[17] *Banka* (n 9).

[18] Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) International Journal of Constitutional Law 712, 734.

[19] Tarunabh Khaitan, *A Theory of Discrimination Law* (OUP 2015) 219.

alternative to an over-inclusive policy is a need-based policy, in which women will be required to prove their menstruating status and incapacity to work to claim leave. This alternative would impinge on the privacy and dignity of women and would perpetuate more stigmas against women who take menstrual leave, thus undermining the intended benefits of the policy itself. In fact, these were the precise reasons for the failure of menstrual leave policies in many countries such as Japan and Indonesia.[20]

Another argument made against menstrual leave policies is that they could lead to discrimination against women with regard to hiring, pay-scale, promotions and the type of work assigned to them.[21] These were some of the primary arguments made against the Menstrual Benefits Bill, 2017. Similarly, in *Vasantha R v. Union of India*[22] ("*Vasantha*") and *Triveni KS v. Union of India*[23] ("*Triveni*"), allowing women to work during night shifts in factories - and holding Section 66 of the Factories Act, 1948[24] unconstitutional - was resisted, since the same could lead to sexual harassment and other security breaches against women. In *Anuj Garg v. Hotels Association of India*[25] ("*Anuj Garg*") as well, permitting women to be employed at places where alcohol was served was resisted for the same 'security' reasons. However, in all these cases, the courts held that such

[20] Kuntala Lahiri-Dutt and Kathryn Robinson, '"Period Problems" at the Coalface' (2008) 89 Feminist Review 102, 108.
[21] Barkha Dutt, 'I'm a Feminist. Giving Women a Day Off for Their Period is a Stupid Idea' *The Washington Post* (Washington, 4 August 2017) <www.washingtonpost.com/news/global-opinions/wp/2017/08/03/im-a-feminist-but-giving-women-a-day-off-for-their-period-is-a-stupid-idea/> accessed 17 September 2020.
[22] [2001] II ILJ 843.
[23] [2002] III ILJ 320.
[24] The Factories Act 1948, s 66.
[25] [2008] 3 SCC 1.

social realities should not be used as grounds to further disadvantage women. Rather, the State has a positive obligation to alter that reality and remedy the discrimination,[26] so that women can enjoy their fundamental right to equality. Hence, all the possible biases against women resulting from menstrual leave policies are social constructs that would be further allowed to flourish if such a policy is not introduced. Nonetheless, numerous ways to reduce the possibility of any biases against women due to menstrual leave policies have been discussed in the last section of this paper.

III. WOULD BROADER GENDER-NEUTRAL SICK LEAVE POLICIES BE MORE SUITABLE?

Even when the need for menstrual support is recognized, many scholars argue that having a more robust gender-neutral sick leave policy would be better suited to fulfil the desired objectives, as it would not lead to any stigma against menstruating women.[27] However, this approach suffers from numerous drawbacks, as discussed below.

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[26] *Anuj Garg* (n 25); *Vasantha* (n 22*)*; *Triveni* (n 23); Gautam Bhatia, 'Sex Discrimination and the Constitution - X' *Indian Constitutional Law and Philosophy* (29 August 2015) <https://indconlawphil.wordpress.com/2015/08/29/sex-discrimination-and-the-constitution-x-the-culmination-of-the-anti-stereotyping-principle-in-anuj-garg/> accessed 16 September 2020.

[27] Radhika Santhanam, 'Should Women be entitled to Menstrual Leave?' *The Hindu* (New Delhi, 21 August 2020) <www.thehindu.com/opinion/op-ed/should-women-be-entitled-to-menstrual-leave/article32407772.ece> accessed 17 September 2020.

A. ACHIEVEMENT OF FORMAL EQUALITY, NOT SUBSTANTIVE EQUALITY

A gender-neutral sick leave policy follows the formal approach of equality, according to which merely *treating* everyone alike is enough to achieve equality. Such an approach fails to recognize that starting points may not be alike for all due to historical, structural or physiological disadvantages faced by them, like by women, *Dalits*, Muslims, etc. Due to the failure to recognize this, equal treatment of unequal classes often leads to unequal outcomes, i.e., indirect discrimination, which rather entrenches the antecedent disadvantages.[28] For instance, requiring individuals with different socio-economic classes and education levels to pass the same test for a government job based entirely on merit would inevitably favour the upper class, thus perpetuating the class differences among the candidates. Similarly, policies that award a monthly bonus or coveted work assignments to employees with a 100% attendance record would disproportionately affect women who may be absent for a day or two due to their menstruation. Hence, formal equality fails to consider the impact an equal treatment policy can have on unequal classes of individuals.

In light of such concerns, there has been a consistent move from a formal conception of equality towards a more substantive conception of equality. As per the Supreme Court of India (SC) in *Anuj Garg*, the substantive approach to equality requires taking into account the actual

[28] Fredman (n 18) 718.

effects of a legislative policy as well.[29] Further, substantive equality aims to redress the disadvantages and accommodate the differences among unequal classes by levelling the starting points of the people involved.[30] For this purpose, Article 15(3) of the Constitution of India[31] empowers the State to make special provisions to increase women's status economically, socially, and politically. Hence, substantive equality ensures equality of opportunities rather than mere equality of treatment, so that the inherent differences among people are acknowledged as well as accommodated within the policy framework.[32]

The SC has also held in numerous cases that recognizing the existing inequalities in society and overcoming the same through measures like reservations and affirmative action is crucial for effecting substantive equality.[33] Even the European Court of Human Rights (ECHR) has consistently held that States' obligations under the right against discrimination include treating differently situated individuals differently.[34] Similarly, the Supreme Court of the United States (SCOTUS) has recognized that formal equality is insufficient to protect women against sex

[29] *Anuj Garg* (n 25); Jenny Goldschmidt, 'New Perspectives on Equality' (2017) 35(1) Nordic Journal of Human Rights 1, 3.
[30] Fredman (n 18) 727.
[31] The Constitution of India 1950, article 15(3).
[32] Margaret Davies, *Asking The Law Question* (Thomson-Reuters 2017) 230; Prerna Dhoop, 'Remaking the Indian Military for Women' (2020) 55(20) EPW 18, 20; Santhanam (n 27).
[33] *Government of Andhra Pradesh v P B Vijayakumar* [1995] 4 SCC 520; *B K Pavitra and Ors v Union of India* [2012] 7 SCC 1; *National Legal Services Authority v Union of India* [2014] 5 SCC 438.
[34] *Thlimmenos v Greece* [2000] ECHR 162.

discrimination.[35] Therefore, recognizing that equality does not necessarily mean sameness is critical for moving towards substantive equality.[36]

In this light, having alike sick leave policies for men and women despite their unalike physiological status would not be in line with substantive equality. This is because even though broader gender-neutral sick leave policies would cover menstrual care on the face of it, they would not provide adequate relief to women as per their specific requirements and would still result in inequality in effect.

B. INADEQUATE RELIEF TO WOMEN DUE TO THE MALE COMPARATOR TEST

The principle of equal treatment employs a comparator test, wherein a person or a class of persons is compared to a similarly placed person or a class or persons and it is ensured that the treatment accorded to both is equal.[37] However, such a comparator-based approach wrongly presumes that a suitable comparator is available in all circumstances.[38] For instance, concerning conditions specific to women, like pregnancy and menstruation, the comparator test would inevitably fail because there simply are no male comparators available for a pregnant or menstruating female. Then, treating a pregnant or menstruating woman as being similarly placed as a man, and according to her the same treatment even in the face

[35] *Nevada Dept of Human Resources v Hibbs* 538 US [721], [738] [2003].
[36] Sandra Fredman, *Human Rights Transformed* (OUP 2008) 8; Fredman (n 18) 717; Goldschmidt (n 29) 3.
[37] Fredman (n 18) 719.
[38] ibid.

of such differences would not adequately recognize and accommodate the needs specific to the woman.[39]

Even with regard to pregnancy, efforts were initially made to bring it within the fold of the equal treatment principle by equating a pregnant woman to an 'ill' man.[40] Resultantly, pregnancy was covered under gender-neutral leave policies, which did not entitle women to adequate relief as per their requirements. For instance, it is still covered under a gender-neutral Family and Medical Leave Act in the United States, under which all eligible employees, including pregnant women, are entitled to get only 3 months of unpaid leave per year for the birth of a child, to take care of a close relative or for self-care in certain cases.[41] However, with time, it was realized in many other jurisdictions that covering something as specific to women as pregnancy under gender-neutral laws does not protect women's rights appropriately.[42] This is because they do not grant enough duration of leave or a paid leave, stigmatise pregnancy as a 'sickness', and do not give the space required to develop a system of pregnancy rights independent of the sick leave entitlements.[43] Therefore, special legislations for pregnancy leave came to be enacted around the world, including in India, which provide at least 4 months of paid leave to pregnant women.[44] Hence, women could

[39] Carol Bacchi, 'Do Women Need Equal Treatment or Different Treatment?' (1992) 8 Australian Journal of Law and Society 80, 86.
[40] Sandra Fredman, 'Reversing Roles: Bringing Men into the Frame' (2014) 10 International Journal of Law in Context 442, 444.
[41] The Family and Medical Leave Act 1993, 29 USC s 2612(a)(i).
[42] Fredman (n 18) 719.
[43] Fredman (n 40) 445.
[44] Fredman (n 40) 450.

achieve suitable pregnancy rights only when the policymakers moved beyond the male comparator test.[45]

Similarly, if menstruating women are compared to sick men and a gender-neutral sick leave policy is broadened to cover menstruation within it, the employers can just provide minimal unpaid sick leaves to both men and women. As a result, women might get only 5 additional leaves in a year, that too unpaid, to accommodate menstruation. That would be inadequate to take care of the sixty days of menstruation that women experience in a year on average.[46] On the contrary, under gendered menstrual leave policies, women would get ten to twenty-four days of additional paid leave in a year, as under the special policies of Zomato and the Bihar government respectively.[47] That would go a long way in redressing the disadvantages that women face on account of menstruation.

Hence, there is a need to discard the comparator test and formulate special policies for conditions that are specific to a particular class, such as menstruation. Even otherwise, conceiving gender equality as mere gender neutrality is highly problematic because it deems a non-neutral status quo constructed around the needs and convenience of men as acceptable and worth striving for.[48]

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[45] Fredman (n 18) 719.
[46] Hiralal Konar (ed), *DC Dutta's Textbook of Gynaecology* (6th edn, 2013) 82.
[47] J Jagannath, 'Zomato introduces 'period leave' of up to 10 days per year for employees' *Livemint* (8 August 2020) <https://www.livemint.com/companies/news/zomato-introduces-period-leave-of-up-to-10-days-per-year-for-employees-11596898781696.html > accessed 1 March 2021; Urvashi Prasad, 'India needs a menstrual leave policy' *Hindu Business Line* (7 June 2018) <https://www.thehindubusinessline.com/opinion/india-needs-a-menstrual-leave-policy/article24105589.ece#> accessed 16 September 2020.
[48] Bacchi (n 39) 82.

C. INEQUALITY IN EFFECT

Further, a gender-neutral sick leave policy does not take into account women's special need for menstrual leaves apart from the leaves available for actual sickness. This is because while women would have to accommodate sickness plus menstrual care within their limited number of sick leaves, men would just need to fit in sickness within the same. Gender-neutral sick leave policies would still amount to inequality in effect. Therefore, only a special menstrual leave policy would ensure equality of opportunities and level the playing field.

D. 'MEDICALIZATION' OF MENSTRUATION

Lastly, covering menstrual discomfort under 'sick' leave would equate menstruation with sickness and medicalise it.[49] This would in turn further the stigma of women being the weaker sex and menstruation as something unhealthy which makes women unfit to work. On the other hand, a special menstrual leave policy has the space to say that menstruation is just different – not a disease or a disability incapacitating women – but an inherent physiological difference that warrants special accommodation for them.

Hence, while gender-neutral sick leave policies may reduce the possibility of stereotyping against women, they definitely do not further substantive equality for them.

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[49] Fredman (n 40) 445.

IV. MENSTRUAL LEAVE POLICIES AND THE ANTI-STEREOTYPING PRINCIPLE

One of the strongest oppositions to menstrual leave is that such a policy would reinforce stigmas towards menstruation.[50] In light of the opposition, it is important to determine whether it breaches the anti-stereotyping principle under sex discrimination law.

As per the anti-stereotyping principle, some legislations perpetuate the subordination of women as they are based on certain stereotypes against them and should be thus held unconstitutional.[51] This is because while these policies are touted as being for the benefit of women, in actuality they entrench skewed gender realities[52] and harm women's prospects for equality. For instance, policies restricting women from working during night shifts[53] or from working in places where alcohol is served[54] stem from the State's idea of 'romantic paternalism'[55] and harm women's right to equality of opportunities instead of 'protecting' them.

However, it is important to understand that while the anti-stereotyping principle strives for equality of opportunity for women in

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[50] Katie Forster, 'Chinese Province Grants Women Two Days "Period Leave" A Month' *The Independent* (18 August 2016) <www.independent.co.uk/news/world/asia/china-period-leave-ningxia-women-two-days-month-menstruation-a7197921.html> accessed 17 September 2020; Dutt (n 21).

[51] Unnati Ghia and Dhruva Gandhi, 'The Anti-Stereotyping Principle: A Conundrum in Comparative Constitutional Law' *IACL-AIDC Blog* (5 May 2020) <https://blog-iacl-aidc.org/2020-posts/2020/5/5/the-anti-stereotyping-principle-a-conundrum-in-comparative-constitutional-law> accessed 17 September 2020.

[52] ibid.

[53] *Vasantha* (n 22).

[54] *Anuj Garg* (n 25).

[55] *Frontiero v Richardson* 411 US 677 [1973].

education, employment, and civic participation without them having to face any barriers built upon stereotypes against them,[56] it does not necessarily seek 'identical' treatment with men in all situations.[57] Accordingly, in the landmark judgment of *United States v. Virginia*[58] ("*Virginia*"), the SCOTUS had held that sex classifications based on 'real' differences between men and women, like the ability to get pregnant, cannot be used to reinforce gender stereotypes against women and to perpetuate their social, legal and economic inferiority.[59] However, classifications based on these 'real' differences can be employed for a legitimate end, such as "*to compensate women for particular economic disabilities [they have] suffered, to promot[e] equal employment opportunity, [and] to advance full development of the talent and capacities of our Nation's people*."[60] Therefore, rather than overlooking inherent differences between the sexes, the anti-stereotyping principle serves to check the State's regulation of those differences.[61]

Subsequently, in *Nevada Department of Human Resources v. Hibbs*[62] ("*Hibbs*") as well, the SCOTUS furthered the reasoning given in *Virginia*. It recognized that since workplaces are modelled around the needs and conditions of men only, they disadvantage women when they do not fit into

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[56] Pauli Murray and Mary Eastwood, 'Jane Crow and the Law: Sex Discrimination and Title VII' (1965) 34 George Washington Law Review 232, 239.
[57] Cary Franklin, 'The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law' (2010) 85 NYU Law Review 83, 120.
[58] 518 US 515 [1996].
[59] Courtney Cahill, 'Abortion and Disgust' (2013) 48 Harvard Civil Rights-Civil Liberties Law Review 409, 446.
[60] *Virginia* (n 56) 533-534.
[61] *Franklin* (n 57) 145-146.
[62] *Hibbs* (n 35).

this mould, like when they are pregnant.[63] Thus, the SCOTUS held that substantive forms of legal intervention and structural changes need to be made to re-design the workspaces and truly enforce women's right to equality.[64]

Then, in the case of menstrual leave policies, employing sex classification does not infringe the anti-stereotyping principle because the same is done for the legitimate objective of promoting equal employment opportunities for women. Rather, such a policy is a great example of the kind of substantive entitlements needed to reshape a male-oriented workspace as *Hibbs* had advocated for.

In the Indian context, the SC judgments in *Anuj Garg* and *Secretary, Ministry of Defence v. Babita Puniya*[65] ("*Babita Puniya*") constitute the jurisprudence on the anti-stereotyping principle. *Anuj Garg* had recognized that policies based on stereotypical notions against women are unconstitutional because they discriminate against them in effect.[66] Further, *Babita Puniya* had held that even policies that rely on the "*inherent physiological differences between men and women*" are unconstitutional because they are based on the stereotypical notions about the strength or weakness of both the sexes.[67] Thus, as per the *Virginia* standard, the SC here has recognized that real differences cannot be used to disadvantage women. However, the SC's analysis lacks the further nuance under *Virginia* – of considering situations

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[63] *Hibbs* (n 35) 734; *Franklin* (n 59) 152.
[64] ibid.
[65] [2020] 7 SCC 469.
[66] *Anuj Garg* (n 25) [46].
[67] *Babita Puniya* (n 65) [69].

where inherent physiological differences can be legitimately used to benefit women, like under pregnancy and menstrual leave policies, and holding that these would not be unconstitutional. It is hoped that Indian courts draw this important distinction soon and then include menstrual leave policies within its fold.

Further, even if menstrual leave policies are held to be against the anti-stereotyping principle, they should not be held unconstitutional. This is because the legitimate objectives of the policy should be balanced against the goal of not reinforcing the alleged stereotype it perpetuates.[68] In doing so, the considerations of redressing disadvantage against women and accommodating their real differences should weigh over the anti-stereotyping goal. Moreover, if the fear of stigma on granting menstrual leaves still persists, various methods to address and reduce the same can be employed, rather than resorting to gender-neutral policies.

V. BALANCING THE DIFFERENT DIMENSIONS OF SUBSTANTIVE EQUALITY

While menstrual leave policies do not breach the anti-stereotyping principle, there is a need to acknowledge that granting such leaves might lead to a stigma against women in reality and to take steps to redress the same. Failure to do so might undercut the intended objectives of the policy as women might be discouraged to take the leave itself.[69]

[68] Ghia and Gandhi (n 51).
[69] Fredman (n 18) 737.

Firstly, the privacy and dignity of women availing the menstrual leaves should be protected at all costs. They should not be answerable to anyone regarding when they take the leave or have to justify taking it by proving they are menstruating or suffering from pain. The absence of such needless scrutiny is the reason why the Bihar government's menstrual leave policy has been running successfully since 1992.[70] Lack of privacy while availing a menstrual leave and the consequent fear of sexual harassment are also the reasons for the reluctance of most Japanese women to exercise their menstrual rights.[71] Possible measures to ensure the privacy of the leave-takers can be marking the leave records of an employee as confidential, restricting the access to such records to only a female superior officer, and imposing liability upon them for divulging these confidential leave records to anyone.[72] Further, the leave-taking process can be automated, such as that at Gozoop, where employees simply need to apply for menstrual leave on an online portal and it is approved automatically.[73] The organization has seen over 75% of its women employees using menstrual leave since its implementation.[74]

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[70] Santhanam (n 27).

[71] Justin McCurry, 'Period Leave in Asia: Time Off May Be Seen as a Sign of Weakness' *The Guardian* (New York, 4 March 2016) <www.theguardian.com/lifeandstyle/2016/mar/04/period-policy-asia-menstrual-leave-japan-women-work> accessed 1 January 2021.

[72] Aggarwal (n 16) 23.

[73] MW Staff, 'Meet the Pioneers Who Have Implemented Menstrual Leave Policy in their Companies' *Man's World India* (14 July 2017) <www.mansworldindia.com/uncategorized/in-conversation-with-the-pioneers-who-have-implemented-menstrual-leave-policy-in-their-organisations/> accessed 1 January 2021.

[74] Rachel B Levitt and Jessica L Barnack-Tavlaris, 'Addressing Menstruation in the Workplace: The Menstrual Leave Debate' in C Bobet et al (eds), *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave Macmillan, Singapore, 2020) 564.

Secondly, steps should be taken to make hiring women less costly than hiring men, to the maximum extent possible, so that employers are not discouraged from employing more women. This can be done by shifting some of the cost of providing paid menstrual leave from the employers to the State,[75] like by providing tax benefits for hiring women, as is done in various countries in the European Union.[76]

Thirdly, since the extent of menstrual discomfort varies widely across women, a flexible menstrual benefit policy should be designed, such that it allows women to take a paid leave as well as have the option to work from home.[77] Wherever work from home is not feasible, in cases such as where women are incapacitated from even working from home during their menses, other types of menstrual flexibility measures can be explored. For instance, a policy can allow women to take leave during their menstruation, but require them to compensate for a specified percentage, say 50%, of the work missed due to the same on other days of the month.[78] Such a policy would reduce the possibility of employers' bias against women concerning their hiring, salaries, promotions, etc., as well as address any stereotypes

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[75] Fredman (n 40) 448.

[76] European Commission, 'Stimulating Job Demand: The Design of Effective Hiring Subsidies in Europe' European Employment Policy Observatory Review (2014) <www.ec.europa.eu/social/BlobServlet?docId=11950&langId=en> accessed 18 September 2020.

[77] Prasad (n 2).

[78] Lara Owens, 'Why We Need School and Workplace Policies for Menstruation & Menopause' *Lara Owen* (March 2016) <http://laraowen.com/articles/why-we-need-school-and-workplace-policies-for-menstruation-menopause> accessed 30 September 2020.

against women at workplaces, like them misusing menstrual leaves just to not have to work.

Lastly, women often do not avail menstrual leave out of the fear of being blamed for disruption of work and being accused of putting additional burden on their co-workers.[79] Accordingly, contingency planning can be done, such that someone can temporarily fill in for the women on menstrual leave on a reciprocal basis.[80] This was introduced by Co-Exist, a social enterprise organization in the UK, where women made a list of employees who could take over their role when needed.[81] As a result, 7 out of 13 women make use of the menstrual leave policy in the organization.[82] Moreover, even the male employees of Co-Exist appreciated that menstruation was discussed openly and felt that such an environment also allowed them to adjust their working days as per their bodies' needs.[83]

In any case, employers should actively engage with and seek feedback from their employees while formulating a menstrual policy. It would not only help in designing a truly workable policy as per the specific requirements of women but also provide an opportunity to address any concerns men may have which might later turn into resentment against their women co-workers. The ultimate goal should be to formulate an

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[79] Jung Min-ho, Kim Bo-eun and Bahk Eun-ji, 'Menstrual Leave – An Entitlement Men Reject' *The Korea Times* (30 December 2012) <www.koreatimes.co.kr/www/news/culture/2014/04/399_123535.html> accessed 1 January 2021.
[80] Lara Owens, 'Menstruation and Humanistic Management at Work: The Development and Implementation of a Menstrual Workplace Policy' (2018) 25(4) e-Organizations & People 23, 28.
[81] ibid.
[82] Levitt and Barnack-Tavlaris (n 74) 563-564.
[83] Owens (n 78) 28.

effective menstrual leave policy such that it gives adequate space to women to take the leave if needed, but not have to be disadvantaged for that in any manner.

VI. CONCLUSION

There is a need for providing menstrual leave to women to retain them in the workforce and to improve India's dismal female labour force participation rate. It is further needed to satisfy the important substantive equality law consideration of recognizing the biological differences between the sexes and accommodating for the same through structural change and targeted intervention. Such policies re-distribute the costs of menstruation more fairly and try to re-model the otherwise masculinised workspace. Arguments as to the possible discrimination against women with regard to hiring, pay-scale and promotions due to menstrual leave policies cannot be used to dislodge the very need for the same, and rather obligate the State to address such possibilities in practice.

Further, a gender-neutral sick leave policy would not be better suited than a gendered policy because it fails to move beyond the gendered status quo tilted against women and encounters the problem of having no suitable comparator for menstruation in the case of their male counterparts, as for pregnancy. It may also lead to unequal outcomes and opportunities for women, which only a gendered policy can account for. A gender-neutral leave policy may additionally lead to levelling down, leaving women with far lesser leaves than what they may need and which a special leave policy can provide for. Lastly, covering menstrual care under sick leaves would equate menstruation with sickness and thus further the stigma against

menstruation rather than reducing it and creating a safe environment for women.

As for the anti-stereotyping principle, it allows for sex classifications based on the real differences between the sexes, such as menstruation, if it is done for legitimate objectives like promoting equality of opportunities for women. Menstrual leave policies fit into this exception and rather work as much-needed structural changes required to enforce women's right to equality. Even if they are held as a breach of the anti-stereotyping principle, they should not be held unconstitutional by balancing the legitimate objectives behind them against the anti-stereotyping objective.

Nonetheless, all efforts must be made to address the possibilities of any bias or stigma against women for taking menstrual leave, such as ensuring their privacy and dignity, shifting the cost of the paid menstrual leave from the employers to the State, and modelling a flexible policy design which can accommodate all women's menstruation experiences.

Dr. Ambily P & Ashna D, 'Faulty Foundations: A Socio-legal Critique of the Regulation of Forensic Science Laboratories in India' (2021) 7(2) NLUJ L Rev 191

FAULTY FOUNDATIONS: A SOCIO-LEGAL CRITIQUE OF THE REGULATION OF FORENSIC SCIENCE LABORATORIES IN INDIA

Dr. Ambily P[*] & Ashna D[#]

ABSTRACT

The forensic science discipline in India is in a state of crisis. With the rapid advancement of science and interdisciplinary technology, investigations today demand complex evidence collection processes and crime scene analyses to arrive at scientifically precise and unbiased conclusions. At present, the low utilisation of forensic evidence in the Indian criminal justice system is well known. Further, most policy reforms put forth over the past several decades have centred around the enactment of formalistic legislation and policies to remedy structural inadequacies in the field. This paper focusses on the existing regulatory concerns facing Indian forensic science laboratories. Upon comparison of the Indian framework with systems in place in foreign jurisdictions, a severe defect comes to light: there is a significant dearth of empirical research and scholarship on the internal functioning of forensic science laboratories and the different kinds of scientific methodologies they employ. Ultimately this paper argues that the

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regulatory measures suggested to govern laboratories thus far, albeit relevant, have not been comprehensively evaluated from time to time. This has resulted in an incorrect contextualisation of the many challenges faced by our justice delivery mechanisms from the pre-trial to the sentencing stage and the increasing reliance on unreliable and flawed forensic evidence by judicial decision-makers.

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I. INTRODUCTION

"The man of science in the law is not merely a bookworm. To a microscopic eye for detail, he must unite an insight which tells him what details are significant. Not every maker of exact investigation counts, but only he who directs his investigation to a crucial point."

– Justice Oliver Wendell Holmes[1]

Due to the increasing reliance on scientific methodologies in criminal investigations, forensic science laboratories in India are facing mounting workloads.[2] Forensic science laboratories play a pivotal role not only in gathering useful scientific evidence but also in presenting timely results of their findings to various stakeholders in the criminal justice system. These findings perceived as accurate, transparent and objective, are, in turn, analysed and interpreted by courts of law to establish the guilt of suspected offenders beyond a reasonable doubt or exonerate the innocent. An ideal forensic laboratory must be equipped with advanced and reliable methods of collecting information at a source and must make use of the highest quality scientific techniques to examine the material. These laboratories must actively engage and influence decision-makers in the criminal justice system by pushing them to adopt the most reliable forensic

[1] Oliver Wendell Holmes, 'Law in Science and Science in Law' (1899) 12(7) Harvard Law Review 443.

[2] ANI, 'India's state forensic labs expanding infrastructure on back of rising demand for DNA Testing' *Business Standard* (16 May 2019) <business-standard.com/article/news-ani/india-s-state-forensic-labs-expanding-infrastructure-on-back-of-rising-demand-for-dna-testing-119051600921_1.html> accessed 31 October 2020.

and socio-legal research practices.[3] However, the isolated working of forensic laboratories from other stakeholders has resulted in a knowledge gap and a consistent failure to weed out obsolete scientific evidence and unsuitable testing practices.[4] As a consequence, the potential of these laboratories to revolutionise testing methods and evidentiary procedures is left untapped. They have been unable to arrive at trans-disciplinary solutions with the help of public and private bodies, as well as academic research.[5]

In 2019, the Supreme Court of India (SC) acquitted six men in Maharashtra who had been wrongfully sentenced to death for a crime they did not commit.[6] After having spent nearly sixteen years in prison, the SC observed that the prosecution had 'miserably failed' to prove the rape using cogent forensic evidence. Even multiple trials across appellate courts could not reveal the glaring inconsistencies in the DNA samples and fingerprint evidence presented before them. The root cause of this problem can be traced to a tendency among courts to perceive science as a symbol of conclusive reasoning and consequently assign incontestable value to scientific evidence that is scrutinised in the courtroom. As a result, courts

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[3] Joseph L Peterson and others, 'Forensic Science and the Courts: The Uses and Effects of Scientific Evidence in Criminal Case Processing' (1986) National Institute of Justice January 1986 <https://www.ncjrs.gov/pdffiles1/pr/102387.pdf> accessed 31 October 2020.

[4] Eoghan Casey and others, 'The Kodak Syndrome: Risks and Opportunities Created by Decentralization of Forensic Capabilities' (2018) 64 (1) Journal of Forensic Sciences 7, 8.

[5] Erin Murphy, 'The Mismatch Between Twenty-First-Century Forensic Evidence and Our Antiquated Criminal Justice System' (2014) 87 Southern California Law Review 633.

[6] *Ankush Maruti Shinde v State of Maharashta 2019 SCC* OnLine *SC* 317; Mansi Thapliyal, 'Five Murders, Six Men and 16 years of Stolen Lives' *BBC News* (23 June 2019) <bbc.com/news/world-asia-india-48578767> accessed 31 October 2020.

have a propensity to brush aside the flaws of forensic evidence and treat it as an exact science.[7]

The Central Forensic Science Laboratories (CFSLs), State Forensic Science Laboratories (SFSLs) and District Forensic Science Laboratories (DFSLs) handle many kinds of evidence and have separate divisions for ballistics, toxicology, serology, narcotics, general chemistry, explosives, forensic pathology, DNA and computer forensics.[8] At present, India does not have a uniform or comprehensive legislative framework to oversee their functioning or ensure that they adhere to strict standard operating procedures and protocols. We argue that there is a growing disconnect between the work done in the fields of law, sociology, forensic science and criminology, as professionals in each field continue to work in separate departments, often unacquainted with the challenges and research practices of their peers in other disciplines.[9]

This paper will first discuss how the dearth of empirical research on the regulation of forensic science and the forensic processes used in laboratories has severely affected their functioning. As a result, the Indian forensic science framework today is comparable to a house of cards built

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[7] Eadaoin O'Brien and others, 'Science in the Court: Pitfalls, Challenges and Solutions' (2015) 370 Philosophical Transactions of the Royal Society B 1, 2; *Mukesh and Another v State (NCT of Delhi) and Ors* (2017) 6 SCC 1; *Santosh Kumar Singh v State through Central Bureau of Investigation* (2010) 9 SCC 747; Re Assessment of the Criminal Justice System in Response to Sexual Offences Suo Moto Writ (Criminal) No 04 of 2019.

[8] Ministry of Home Affairs, Directorate of Forensic Sciences 'Forensic Sciences Institutions' <dfs.nic.in/aboutCfsl.html> accessed 31 October 2020; Central Forensic Science Laboratory, 'About Us' <cbi.gov.in/cfsl/about.htm> accessed 31 October 2020.

[9] Katharine Browning, 'Social Science Research on Forensic Science: The Story Behind One of NIJ's Newest Research Portfolios' (2015) National Institute of Justice Journal 1, 3.

on invalidated hypotheses and unsubstantiated or non-existent data.[10] The second section of this paper will analyse the gaps in existing regulation, focussing particularly on the differences in the functioning of public and private labs. This section seeks to identify which regulatory model would be most suitable to govern the Indian forensic lab framework. The third section of this paper will analyse the nature of the deficiencies in the functioning of forensic laboratories, highlighting administrative, bureaucratic, financial, resource-based, and research-related problems. In the final section of this paper, we will highlight the need to explore interdisciplinary solutions to address the three main challenges vis-à-vis the governance of forensic science, namely – empirical research, regulation and laboratory practices. We argue that there is a need for socio-legal solutions to bridge the gap between the working of forensic laboratories, law enforcement agencies, judicial professionals, sociologists and academics. The recommendations proposed will draw from domestic and international best practices that foster a science-led, trans-disciplinary approach to overcome the obstacles facing India's fractured forensic laboratory framework.[11]

II. CONTEXTUALISING THE PROBLEM: A FLAWED SYSTEM OF GOVERNANCE

[10] Chris M Fabricant and William Tucker Carrington, 'The Shifted Paradigm: Forensic Science's Overdue Evolution from Magic to Law' (2016) 4(1) Virginia Journal of Criminal Law 1.

[11] Claude Roux, Olivier Ribaux and Frank Crispino, 'Forensic Science 2020 – The End of Crossroads?' (2018) 50(6) Australian Journal of Forensic Sciences 607, 615.

In this section, we argue that the existing problems in the governance of forensic science in India can be attributed to three major policy failures: A) The absence of a strong research culture in these forensic laboratories in the form of lacking empirical data, inadequate formal training in research methodologies, and a lack of transparency in information-sharing on internal research practices;[12] B) A largely fragmented and unregulated forensic science framework of public and private laboratories; C) The systematic failure to increase funding for laboratory infrastructure, formulate standardised research practices and invest in professional training for laboratory staff. We highlight that these three issues are interlinked and a failure to address them in tandem raises serious concerns about institutional accountability, the reliability of forensic lab reports and the progress of advanced forensic science research in the country.

A. THE ABSENCE OF EMPIRICAL RESEARCH IN FORENSIC SCIENCE

The reasons for the continued absence of empirically backed forensic science are many. In the past, forensic science was far less advanced, making laboratories ad hoc service providers. The infrequent reliance on forensic specialists offers one explanation as to why no serious efforts were made to scrutinise their techniques. The reports submitted by laboratories were anecdotal and could not even be characterised as science.[13] However, due to whirlwind advancements in science and

[12] Jonathan Koehler and others, 'The need for a research culture in the forensic sciences' (2011) Faculty Working Papers 26.
[13] Paul C Giannelli, 'Forensic Science: Why No Research', 38 Fordham Urb L J 506 (2010).

technology, today, laboratories are permanent service providers that play a central role in determining outcomes in criminal trials.

Various studies recognise how a failure to question the reliability of existing forensic practices using empirical data can disastrously impact justice delivery systems, primarily when advances in science have led to cases whose outcomes may hinge on a single microscopic piece of evidence.[14] This makes empirical testing crucial as it helps determine the validity and accuracy of forensic methods, thereby recognising error-prone and outdated forensic evidence.[15] Another reason for the failure to carry out empirical research is because most laboratories cannot afford to invest in good quality empirical research as this is both expensive and time-consuming.[16] Courts have also contributed to the dearth of research as they often impulsively accept most kinds of forensic techniques as valid, without questioning their premises.[17]

Testing existing research practices in the forensic discipline using empirical data can help forensic practitioners distinguish between hunches or anecdotal claims and practices backed by a substantial body of scientific

[14] Brandon L Garrett and Peter J Neufeld, 'Invalid Forensic Science Testimony and Wrongful Convictions' (2009) 95 (1) Virginia Law Review 1; Nadine M Smit, Ruth M Morgan and David A. Lagnado, 'A Systematic Analysis of Misleading Evidence in Unsafe Rulings in England and Wales' (2018) 58(2) Science & Justice 128; Tim J Wilson, 'Forensic Science is in Crisis – and This Could Have Critical Effects on UK Legal System' *The Conversation* (4 April 2019) <theconversation.com/forensic-science-is-in-crisis-and-this-could-have-critical-effects-on-uk-legal-system-113873> accessed 31 October 2020.
[15] Suzanne Bell and others, 'A call for more science in forensic science' (2018) Proc Natl Acad Sci USA 115(18): 4541–4544.
[16] Giannelli (n 13) 508.
[17] ibid 509.

data.[18] Further, a lack of empirical research affects the process of standardising forensic techniques. Instead of discussing forensic techniques from a general standpoint, empirical research can yield practical findings on how these techniques are carried out and whether there are procedural flaws.[19] For instance, quality assurance studies can help policymakers identify the variations in testing fingerprint evidence across jurisdictions, and what points of comparison researchers are using while matching fingerprints.[20]

Thus, at the heart of a fragmented forensic science framework is the shortage of updated research at the micro and macro levels. At the micro-level, the deficit of information pertains to the kinds of forensic methods used by laboratories, quality assurance studies, the existence of good-quality infrastructure, and the presence of professional and ethical practice standards. At the macro level, the dearth of knowledge affects legislative and policy considerations relating to the demographic distribution of forensic labs across the country, the kinds of services offered, case pendency rates, and budgetary problems. The absence of sufficient data at both these levels is detrimental to the public's trust in crime investigation reports and the future development of the forensic science industry in India.

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[18] Koehler (n 12) 19.
[19] James MacDonald, 'How Scientific Is Forensic Science?' *Jstor Daily* (2 April 2019) <daily.jstor.org/how-scientific-is-forensic-science> accessed 31 October 2020.
[20] ibid.

B. A FRAGMENTED FRAMEWORK OF LABORATORIES & THE PUBLIC-PRIVATE DIVIDE

For a long time, forensic laboratories across the world have remained mostly unregulated, with self-imposed standards and limited public investment to carry out specific research.[21] One explanation for the absence of regulation is the fragmentation of the forensic science framework. Forensic laboratories are broadly of two types - state or government laboratories and private laboratories. The minimal regulation of these labs has resulted in a scattered distribution of forensic facilities across demographics, with different types of services offered and varying models of governance. Fragmentation occurs in forensic science when there are large disparities in the functioning of laboratories in different parts of the country. These disparities could relate to unevenness in funding, quality of standard practices, access to adequate infrastructure, the availability of skilled forensic specialists, and certification.[22] Fragmentation could also stem from a 'piecemeal approach' to forensic science, wherein different segments of the forensic science process are distributed between law enforcement agencies, forensic scientists, and courts.[23] When each of these actors undertakes different roles ranging from collecting samples,

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[21] Linzi Wilson-Wilde, 'The International Development of Forensic Science Standards – A review' (2018) 288 Forensic Science Intl 1, 3.

[22] National Academy of Sciences, 'Badly Fragmented' Forensic Science System Needs Overhaul' (2009) Science Daily 19 February 2009 <sciencedaily.com/releases/2009/02/090218135119.htm> accessed 31 October 2020.

[23] Ruth Morgan, 'Why forensic science is in crisis and how we can fix it' *World Economic Forum* (12 September 2019) <weforum.org/agenda/2019/09/why-forensic-science-is-in-crisis-and-how-we-can-fix-it> accessed 31 October 2020.

analysing them and establishing their evidentiary value, it could lead to a cumulative lack of oversight, accountability[24] and cooperation.

In the context of regulating forensic laboratories, it is important to understand that the functioning of different labs is intricately linked with their government and non-governmental affiliations. Therefore, it becomes essential to understand the unique set of challenges faced by both public and private laboratories. Public laboratories often lack administrative independence as they work closely with law enforcement agencies and are exposed to bureaucratic pressures and corruption.[25] Paul Giannelli notes that the decisions of forensic laboratories affiliated with law enforcement agencies are often influenced by several biases in adversarial settings due to a tendency to produce 'right results' that fulfil their role of helping prosecutors and the police.[26] Further, well-trained personnel employed in public labs may also be incentivised to take up better-paying positions in private labs, leading to vacancies.[27] Turning a blind eye to budgetary support

[24] ibid.

[25] Dr TR Baggi, 'Why is Forensic Science Stunted and Static in India?' *The Hindu* (11 September 2011) <thehindu.com/opinion/open-page/why-is-forensic-science-stunted-and-static-in-india/article2442491.ece> accessed 31 October 2020; Richa Banka, 'FSL Officials in Dock for Fake DNA Report' *Hindustan Times* (New Delhi, 1 August 2019) <hindustantimes.com/delhi-news/fsl-officials-in-dock-for-fake-dna-report/story-WmNVrCUKvrKhbit6WPatgL.html> accessed 31 October 2020; Ashlin Mathew, 'Delhi violence: Police, Forensic Lab Under State Govt Delay DNA Testing of Bodies' *National Herald* (India, 21 March 2020) <nationalheraldindia.com/india/delhi-violence-police-forensic-lab-under-state-govt-delay-dna-testing-of-bodies> accessed 31 October 2020.

[26] Paul C Giannelli, 'Independent Crime Laboratories: The Problem of Motivational and Cognitive Bias' (2010) 603 Faculty Publications 247, 248, 252, 257.

[27] William P McAndrew, 'Is Privatization Inevitable for Forensic Science Laboratories?' (2012) 3(1) Forensic Science & Policy Management: An International Journal 42, 44.

training has also increased the pendency rates in these labs, consequently spilling over into an overburdened judicial system.[28]

Concerning private laboratories, although these labs usually function independent, hasten the forensic process, and provide better quality services, they primarily function for commercial purposes, resulting in biased reports and increased costs.[29] Such labs could potentially face difficulties in procuring the required information from executive functionaries and may also go unsupervised, thereby affecting the quality of services. Reports from other jurisdictions also suggest that they are more likely to experience financial difficulties, thus making them unsustainable providers in the long run.[30] The hurdles in both these spheres could increase political and bureaucratic pressures on forensic experts and result in increased chances of biased reporting, especially in cases that receive significant media attention.

The obvious question then becomes: how should forensic laboratories be regulated? Different jurisdictions have adopted contrasting views. For example, the United Kingdom has tilted in favour of a regulated government approach after recent studies concluded that private labs could

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[28] Press Trust of India, 'DCW Issues Notice to FSL Seeking Details of Pendency of Cases' *Business Standard* (New Delhi, 3 April 2019) <business-standard.com/article/pti-stories/dcw-issues-notice-to-fsl-seeking-details-of-pendency-of-cases-119040301035_1.html> accessed 31 October 2020; Siraj Qureshi, 'Over 5000 Criminal Cases Pending in UP Due to Lack of Forensic Labs' *India Today* (Agra, 2 August 2019) <indiatoday.in/india/story/over-5000-criminal-cases-pending-in-up-due-to-lack-of-forensic-labs-1576590-2019-08-02> accessed 31 October 2020.

[29] McAndrew (n 27) 45.

[30] Hannah Devlin, 'Forensic Labs on the Brink of Collapse, Warns Report' *The Guardian* (1 May 2019) <theguardian.com/science/2019/may/01/forensic-science-labs-are-on-the-brink-of-collapse-warns-report> accessed 31 October 2020.

not meet high demands and arrive at impartial findings.[31] This move came after reports indicated that the privatisation of forensic laboratories had resulted in the police putting pressure on private laboratory scientists to tamper with results and secure more convictions. Thus, experts in the United Kingdom were opposed to the idea of government laboratories losing experienced forensic scientists to private players that they believed prioritised commercial interests over the fundamental need to ensure due process in the criminal justice system.[32] On the contrary, in the United States, national forensic authorities have called for the establishment of labs that function independent of law enforcement administrators to avoid sacrificing advanced forensic methodologies[33] for the sake of expediency or adversarial biases.[34] In India, a few attempts have been made to introduce certain institutional structures to regulate certain sub-disciplines in forensic science using legislation. However, these interventions have either not been implemented or suffer from several flaws.

For example, the DNA Technology (Use and Application) Regulation Bill 2019 ("DNA Bill") was introduced in the Lok Sabha in July

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[31] Steve Thomas, 'Dubious Forensic Evidence? That's What Happens When We Sell Off Public Services' *The Guardian* (27 November 2017) <theguardian.com/public-leaders-network/2017/nov/27/dubious-forensic-evidence-privatisation-public-services> accessed 31 October 2020.

[32] ibid.

[33] President's Council of Advisors on Science and Technology, 'Report to the President: Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods' (2016) Executive Office of the President September 2016 <crime-scene-investigator.net/PDF/forensic-science-in-criminal-courts-ensuring-scientific-validity-of-feature-comparison-methods.pdf> accessed 31 October 2020 (PCAST Report).

[34] Subcommittee on Forensic Science, 'Strengthening the Forensic Sciences: A Path Forward Committee on Identifying the Needs of the Forensic Sciences Community' (2014) National Science and Technology Council 2 May 2014 <https://www.ncjrs.gov/pdffiles1/NIJ/251422.pdf> accessed 31 October 2020.

2019.[35] This proposed law attempts to regulate the use of DNA technology through the establishment of a DNA Regulatory Board to supervise the maintenance of DNA Data Banks that create profiles of suspected offenders and crime scene indices based on fixed criteria at the national and regional level.[36] The DNA Bill envisages a broader ambit for the application of DNA profiling to include offences under the Indian Penal Code 1860, the Immoral Traffic (Prevention) Act 1956, Medical Termination of Pregnancy Act 1971, Protection of Civil Rights Act 1955 and the Motor Vehicles Act 1988. The Schedule of the proposed law also lists the various civil matters for which DNA profiling can be used.[37]

While the proposed legislation is well-intentioned, its execution requires efficiency of the highest order. Experts have repeatedly raised concerns about the low level of training and expertise of DNA analysts, investigation agencies, laboratories, and lawyers as well as a high risk of using improperly collected, stored or analysed samples.[38] The DNA Bill also pushes forward a skewed narrative that acknowledges the use of DNA evidence only as a tool to be employed by the prosecution to convict offenders but not by the defence to release wrongfully convicted

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[35] The DNA Technology (Use and Application) Regulation Bill (2019) (DNA Technology Bill).
[36] ibid.
[37] ibid sch pt C.
[38] Shambhavi Naik and Murali Neelakantan, 'DNA Technology Bill: Why the Standing Committee Has Its Work Cut Out' *The Wire* (1 November 2019) <thewire.in/government/dna-technology-bill-2018-databank-parliamentary-standing-committee-privacy-consent> accessed 31 October 2020; The Wire Staff, 'Amid Opposition Criticism, Government Tables DNA Technology Bill in Lok Sabha' *The Wire* (8 July 2019) <thewire.in/government/dna-technology-regulation-bill-lok-sabha> accessed 31 October 2020.

individuals languishing in jails.[39] What is more concerning is the overriding power granted to a Magistrate to collect samples in cases where an individual refuses to consent. It uses a vague standard to allow the Magistrate to insist on a sample if she is "*satisfied that there is reasonable cause to believe*" that the sample "*may confirm or disprove*" the involvement of a suspect in the commission of an offence.[40] The reliance on such an ambiguous standard that does not call upon the Magistrate to mandatorily specify the reasoning behind an order is particularly problematic because the Bill leaves much of the procedural formalities vis-à-vis erasing DNA profiles to executive discretion.[41] The SC, in its landmark ruling in *Justice KS Puttaswamy v. Union of India*, [42] has also expressed apprehensions about the retention and misuse of DNA profiles that could result in invasions into the private lives of individuals.

Another missed opportunity for policymakers to regulate the Indian forensic science framework is the Forensic Regulatory and Development Authority of India (FRDA) Bill ("FDRA Bill").[43] The FDRA Bill, which has gone into cold storage since 2011, seeks to establish a central authority to regulate, standardize and accredit forensic science services in India,

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[39] Gerald Laporte, 'Wrongful Convictions and DNA Exonerations: Understanding the Role of Forensic Science' (2018) National Institute of Justice Journal 1.
[40] DNA Technology Bill (n 35) s 21.
[41] ibid s 31.
[42] (2017) 10 SCC 1.
[43] Dr Gillian Tully, 'Annual Report 17 November 2018 – 16 November 2019' (2020) 25 Forensic Science Regulator 25 February 2020 <assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/877607/20200225_FSR_Annual_Report_2019_Final.pdf> accessed 31 October 2020; Forensic Regulatory and Development Authority of India (FRDA) Bill (2011).

including the working of forensic science practitioners.[44] There is little clarity on the interoperability of the FRDA Bill and the DNA Bill vis-à-vis the institutional actors under the two proposed laws, the delineation of their functions and the standards for regulation. Further, while the FRDA Bill emphasises the need to 'cooperate' with the private sector and non-governmental organisations (NGOs), it does not clearly outline how such cooperation will be achieved and which laboratories will be regulated.[45] Without first putting in place a regulatory framework to standardise, accredit and streamline forensic science services, both these bills have missed the forest for the trees. This problem is only worsened in the absence of a sound data protection legislation to remedy potential breaches of privacy.[46]

At present, the Indian forensic science framework has both public and private laboratories offering different quality services but subjected to scanty regulation and oversight. This public-private divide, coupled with a legal vacuum, has made it extremely difficult to develop a coordinated strategy to regulate the industry. Further, a growing demand for forensic science services has led to the hurried establishment of freelance or self-proclaimed forensic experts in the private sector who can be hired for a fee.[47] This is highly problematic as an increase in the number of forensic

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[44] ibid FRDA Preamble.
[45] FRDA (n 43).
[46] Rekha Dixit, 'DNA Technology Bill Raises Serious Concerns Over Right to Privacy' *The Week* (9 January 2019) <theweek.in/news/india/2019/01/09/dna-technology-bill-raises-serious-concerns-over-right-to-privacy.html> accessed 31 October 2020.
[47] Dr Gopal J Mishra and Dr C Damodaran, 'Perspective Plan for Indian Forensics' (2010) Ministry of Home Affairs, Government of India, July <http://dfs.nic.in/pdfs/IFS(2010)-FinalRpt_0.pdf> accessed 31 October 2020.

laboratories within an already fragmented laboratory framework could come at the cost of greater backlogs, rampant errors and quality control failures.[48]

C. INADEQUACIES VIS-À-VIS INFRASTRUCTURE, STANDARDISATION, RESEARCH AND TRAINING

Any forensic laboratory tasked with delivering accurate scientific results must have standard infrastructure accompanied by professionally trained and qualified staff.[49] Indian forensic experts have raised specific concerns regarding the varying quality of services offered by forensic labs situated in different geographical regions.[50] These apprehensions mainly arise due to the differences in professional training, infrastructure, availability of resources nearby, employment conditions, population size, as well as the nature and volume of crime in different regions.[51]

Available studies from Uttar Pradesh have highlighted issues such as the underutilisation of procured equipment, and problems in the procurement of mobile forensic vans for strengthening forensic services at the district level.[52] Inordinate delays in sanctioning and executing building

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[48] Brandon L Garrett, 'The Costs and Benefits of Forensics' (2020) 57 Houston Law Review 593, 600-602.

[49] United Nations Office on Drugs and Crime, 'Staff Skill Requirements and Equipment Recommendations for Forensic Science Laboratories' (2011) United Nations <unodc.org/documents/scientific/Ebook_STNAR_02Rev1_E.pdf> accessed 31 October 2020 (UNODC Staff Skills Report).

[50] Mishra and Damodaran (n 47).

[51] ibid.

[52] Government of Uttar Pradesh, 'Modernisation of Forensic Science Laboratories' (Report No 3 of 2017 - Office of the Comptroller and Auditor General of India, 31 March 2016) <agup.gov.in/pag/en/docs/rep-03-of-2017-MPF-Eng.pdf> accessed 31 October 2020 (Government of Uttar Pradesh Report).

work to provide necessary infrastructural facilities in regional laboratories, including important specialisations such as cybercrime labs, have only intensified the problem.[53] The study found that nearly 44% of these laboratories' constructions were incomplete, with tenders having lapsed, budgets left unspent, and district field units lacking important modern equipment.[54] Further, there was a steep decline in technical workforce availability over the years, resulting in junior lab assistants with inadequate qualifications being posted to different forensic units to make up for the massive pendency in sample examination.[55]

Cumulatively, these failures led to the increased workload of the aged or senior staff, the improper collection and analysis of samples, poorly maintained stock and records, and rampant delays in investigations.[56] Research shows that it is not uncommon for many CFSL scientists to be sent for crime scene investigations on an ad-hoc basis, after being chosen from a pool of scientists from different labs, thereby eating away time from urgent cases.[57] While there is no official record of the exact number of

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[53] Murari Shetye, 'No Takers: Government Invites Bidders to Set Up Cyber Forensic Lab for Third Time' *Times of India* (Panaji, 26 September 2020) <https://timesofindia.indiatimes.com/city/goa/no-takers-govt-invites-bidders-to-set-up-cyber-forensic-lab-for-third-time/articleshow/78325674.cms> accessed 31 October 2020.

[54] Government of Uttar Pradesh Report (n 52).

[55] ibid.

[56] Devesh K Pandey, '75 Cases in 100 days at India's First Pvt. Forensic Lab' *The Hindu* (New Delhi, 7 December 2009) <thehindu.com/news/cities/Delhi/75-cases-in-100-days-at-Indiarsquos-first-pvt.-forensic-lab/article16851973.ece> accessed 31 October 2020.

[57] Dr C Damodaran and others, 'Report on Scientific Performance Audit of DFSS HQ and its CFSLs' (2011) Scientific Performance Audit Committee, Ministry of Home Affairs, October 2011 <dfs.nic.in/pdfs/SPAC%20REPORT%20(FINAL).pdf> accessed 31 October 2020 (SPA Report); Dr Justice VS Malimath and others, 'Committee on Reforms of Criminal Justice System' (2003) Ministry of Home Affairs March 2003

pending cases in each of these laboratories, estimates indicate that thousands of cases remain pending annually, in both central and regional labs.[58]

A health crisis such as the COVID-19 pandemic has further worsened the situation due to intermittent lockdowns which have hampered work and the shutting down of some labs as a result of lab staff testing positive for the virus.[59] In Maharashtra, nearly 61,000 cases remain pending, with a reduced workforce left to handle urgent cases on a priority basis.[60] Regulatory and functional gaps are compounded by the lack of operational principles and standardisation procedures in forensic laboratories. A recent audit that analysed the CFSLs in India found that most of them fell short in their scientific performance credibility even though they were overseen by quality control bodies.[61] The study found

<mha.gov.in/sites/default/files/criminal_justice_system_2.pdf> accessed 31 October 2020.

[58] ANI, 'India's State Forensic Labs Expanding Infrastructure on Back of Rising Demand for DNA Testing' *Business Standard* (16 May 2019) <business-standard.com/article/news-ani/india-s-state-forensic-labs-expanding-infrastructure-on-back-of-rising-demand-for-dna-testing-119051600921_1.html> accessed 31 October 2020.

[59] Dhaval Kulkarni, 'Coronavirus impact in Maharashtra: Forensic science department says 61,000 pending cases remain' *Free Press Journal* (Mumbai, 25 July 2020) <freepressjournal.in/mumbai/coronavirus-impact-in-maharashtra-forensic-science-department-says-61000-pending-cases-remain> accessed 31 October 2020; HM Chaithanya Swamy 'Forensic lab sealed after staff tests Covid-19 positive' *Deccan Herald* (Bengaluru, 9 July 2020) <deccanherald.com/city/life-in-bengaluru/forensic-lab-sealed-after-staff-tests-covid-19-positive-858784.html> accessed 31 October 2020; Ashish Bhosale 'Central Forensic Science Lab in Hyderabad closed after 3 of its employees test +ve' *News Meter* (Hyderabad, 4 August 2020) <newsmeter.in/central-forensic-science-lab-in-hyd-closed-for-two-days-after-3-of-its-employees-test-ve> accessed 31 October 2020.

[60] ibid Dhaval Kulkarni.

[61] SPA Report (n 57).

that the chain of custody was not maintained while documenting and analysing evidentiary material, and many final reports were inconclusive.[62]

These seemingly small errors become manifestly clear when they trickle into the trial process and are relied on by judges in adjudicating cases. This becomes particularly troubling in criminal cases when judges rely on the disputed testimony of experts to make vital decisions in a case. For instance, in the Arushi Talwar case, there was blatant mishandling of critical crime scene evidence by the investigation officers.[63] The SC drew its conclusions based on questionable forensic testimony by a government genetics scientist. The lack of awareness on the part of the SC and the expert about the relatively rare technique used led to the dismissal of a request to collect and analyse fresh evidence.[64]

A rise in heinous crimes, particularly sexual offences, has resulted in a substantial increase in the use of DNA profiling and other biological techniques, which many labs are ill-equipped to handle.[65] Certified

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[62] ibid.

[63] Pranjal Kshirsagar, 'Aarushi Trial: A Double Murder of Forensics and Investigation' *Firstpost* (26 November 2013) <firstpost.com/india/why-the-aarushi-trial-was-a-double-murder-of-forensics-investigation-1250025.html> accessed 31 October 2020.

[64] Press Trust of India, 'Aarushi Murder Case: Talwars' Plea for Forensic Expert's Cross-Examination Rejected' *NDTV* (Ghaziabad, 25 September 2013) <ndtv.com/ghaziabad-news/aarushi-murder-case-talwars-plea-for-forensic-experts-cross-examination-rejected-535715> accessed 31 October 2020.

[65] PTI, 'Need of the hour: Stepping up DNA technology in India to combat surge in rape cases' *Economic Times* (2 June 2020) <economictimes.indiatimes.com/news/science/need-of-the-hour-stepping-up-dna-technology-in-india-to-combat-surge-in-rape-cases/role-of-forensic-dna-technology-in-fighting-crime/slideshow/76151396.cms> accessed 31 October 2020; The logical Indian Crew, 'Samples Taken After 11 Days: Experts Question State Forensic Lab's "No Rape" Claim In Hathras Case' *The Logical Indian* (Uttar Pradesh, 5 October 2020) <thelogicalindian.com/humaninterest/hathras-forensic-report-24152> accessed 31 October 2020.

reference materials to guide specialists are unavailable, and unduly lengthy standard operating procedures are not followed.[66] A failure to lay down standard ethical codes diminishes objectivity in testing processes.[67] This could result in increased unethical practices such as the misuse of professional positions, misinformation, increased reliance on private players and the exploitation of clients.

Thus, it becomes clear that there are several structural and implementation problems in the day-to-day functioning of forensic laboratories in India. A failure to urgently address these concerns threatens the very foundations of our criminal justice system.

D. THE FAILURE OF COURTS TO REGULATE FORENSIC SCIENCE

As a general trend, Indian criminal courts substantially rely on oral witness testimony, confessions, and circumstantial evidence, shockingly, even in cases involving capital punishment.[68] Over the years, Indian courts have failed to clearly enunciate the weightage to be assigned to forensic evidence in criminal law proceedings. Further, discussions on scientific evidence have been largely confined to the opinions of experts under Section 45 of the Indian Evidence Act 1872 and other provisions under the

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[66] SPA Report (n 57).

[67] JC Upshaw and Anjali Ranadive Swienton, *Ethics in Forensic Science* (ch 4, Academic Press 2012) 81-135.

[68] Law Commission of India, *Expeditious Investigation and Trial of Criminal Cases Against Influential Public Personalities* (Law Commission No 239, 2012); Bikram Jeet Batra and others, 'Lethal Lottery: The Death Penalty in India' (2008) Amnesty International (May 2008) <amnesty.org/download/Documents/52000/asa200072008eng.pdf> accessed 31 October 2020; Nita Bhalla, 'Analysis: How India's Police and Judiciary Fail Rape Victims' *Reuters* (New Delhi, 16 January 2013) <in.reuters.com/article/india-delhi-gang-rape-women-safety-polic/analysis-how-indias-police-and-judiciary-fail-rape-victims-idINDEE90F0AY20130116> accessed 31 October 2020.

Code of Criminal Procedure 1973. These provisions are archaic and outdated in comparison to the rapid developments taking place in the forensic discipline. Courts have also been reluctant to proactively rely on forensic evidence and dynamically interpret these provisions.[69] Till date, Section 45 of the Indian Evidence Act determines the admissibility of scientific evidence provided by experts.[70] This provision was drafted at a time when there was little advancement in the field of forensic science and does not empower courts to order parties to provide physical samples such as blood, semen, saliva and hair for the purpose of scientific examination.[71] Further, Section 45 does not provide any guidance to courts on how to examine the scientific validity of forensic evidence given by experts.[72]

There are also practical impediments to the implementation of various provisions. For instance, Section 164-A of the Code of Criminal Procedure makes it mandatory for victims to be examined by a registered medical practitioner under consent within twenty-four hours of receiving the complaint.[73] However, in practice, court convictions hinge on the presence of genital or bodily injuries and do not scrutinise other relevant

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[69] The Indian Evidence Act 1872, s 45; Subhash Chandra Singh, 'DNA Profiling and the Forensic Use of DNA Evidence in Criminal Proceedings' (2011) 53 (2) Journal of the Indian Law Institute 195, 217; NV Krishna Kumar, 'Prudent to Use Forensic Evidence, to Decide Cases Justly and Conclusively' *The Leaflet* (18 November 2020) <theleaflet.in/prudent-to-use-forensic-evidence-to-decide-cases-justly-and-conclusively> accessed 23 November 2020.

[70] The Indian Evidence Act 1872, s 45.

[71] Malimath Committee Report (n 57) 123.

[72] Shreya Rastogi and others, 'Forensic Science In The Dock: The Questions We Are Not Asking' *LiveLaw* (12 August 2020) <livelaw.in/columns/forensic-science-in-the-dock-the-questions-we-are-not-asking-161313> accessed 31 October 2020.

[73] Code of Criminal Procedure 1973, s 164.

medical evidence or refer to the findings of forensic reports.[74] Similarly, Section 293 of the Code of Criminal Procedure does not make it mandatory for courts to examine the author of a forensic report that is used as evidence in a criminal trial to test the veracity of their claims.[75] Recent judgments have reiterated that these reports are admissible if they are merely tendered in evidence by a witness and that the contents of such reports do not need to be proved in the course of the trial.[76]

Further, even while admitting expert evidence, courts have been sceptical of their value and characterised them as 'weak' and unsafe to rely upon without 'substantial corroboration'.[77] For example, in a case involving footprint evidence, the SC observed that although the identification of footprints is not a fully developed science, if the evidence presented on footprints is found to be 'satisfactory' it can be given 'sufficient weightage' only to reinforce conclusions drawn from other evidence.[78]

Courts have even held that unless there is an irreconcilable conflict between medical evidence and 'reliable' ocular or oral evidence, the latter should be preferred.[79] The SC has observed that a court cannot surrender

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[74] Anupriya Singh, 'Medical Evidence in Rape Cases and Poor Court Outcomes' *The Leaflet* (19 October 2020) <theleaflet.in/medical-evidence-in-rape-cases-and-poor-court-outcomes> accessed on 31 October 2020.

[75] Code of Criminal Procedure 1973, s 293.

[76] *Dharampal and Anr v State* [2011] Criminal Appeal No 140/1999; *Chhotu Kumar v State (Govt of NCT of Delhi)* [2021] Criminal Appeal No 331/2017.

[77] *S Gopal Reddy v State of Andhra Pradesh* (1996) 4 SCC 596; *Magan Bihari Lal v State of Punjab* (1977) 2 SCC 210.

[78] *Mohd Aman and Anr v State of Rajasthan* AIR 1997 SC 2960; *Pritam Singh v State of Punjab* AIR 1956 SC 415.

[79] *Ram Swaroop v State of Rajasthan* [2008] Appeal (criminal) 548 of 2008; *State of Uttar Pradesh v Hari Chand* (2009) 13 SCC 542; *Malappa Sidappa Alakumar v State of Karnataka* [2009] AIR SC 2959.

its own judgment by delegating its authority to experts who provide 'inadequate' or 'cryptic' testimonies.[80] In none of these cases did the courts clarify what the terms 'reliable', 'inadequate' or 'cryptic' meant. Instead, an expert's opinion is treated as advisory in nature, leaving it for the court to form its own judgment based on the scientific material.[81] Thus, by and large, courts have been silent on the standards used to judge the credibility of forensic evidence.

Most recently in the Hathras gangrape incident, reports have shed light on how the egregious mishandling of crime scene evidence and attempts to jeopardise the forensic investigation often go unnoticed by courts.[82] When judges show 'de factor deference' to the weight assigned to forensic science, be it in the form of expert testimony, scholarly literature or laboratory reports they base their rulings on mere intuitions and deductions. In the process, complex questions of reliability, and ethical or human rights considerations may be ignored.[83]

The above cases indicate that Indian courts are unwilling to rely on expert testimony without independent corroboration and consequently determine outcomes in criminal trials based on the subjective intuitions of

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[80] *Mahindra v Sajjan Galfa Rankhamb & Ors* [2017] AIR SC 2397.
[81] *Madan Gopal Kakkad v Naval Dubey and Anr* 1992 3 SCC 204; *Kishan Chand v Sita Ram* AIR 2005 P&H 156.
[82] The Wire Staff, 'Hathras Case: PIL Seeks Action Against Government Officials for "Destroying Evidence"' *The Wire* (14 October 2020) <thewire.in/law/hathras-gangrape-pil-sc-evidence-destruction> accessed 31 October 2020.
[83] Micheal Brennan and others, 'Finding and Researching Experts and Their Testimony' White Paper, May 2009 22; Paul W Grimm, 'Challenges Facing Judges Regarding Expert Evidence in Criminal Cases' (2018) 86 (4) Fordham Law Review 1601, 1612.

judges[84]. The reluctance of courts to challenge and meaningfully engage with forensic evidence is all the more concerning in light of the problems highlighted in the previous sections.

III. BEST PRACTICES: ADOPTING A PARTICIPATORY APPROACH TO FORENSIC SCIENCE

A. FOSTERING A STRONG RESEARCH CULTURE

Countries with far more advanced forensic science research periodically carry out comprehensive data collection studies or proficiency tests to identify limitations in the functioning of their labs, with a particular focus on quality assurances.[85] Updated empirical data can avoid tendencies among practitioners to focus on biased forensic data that confirm preconceived expectations.[86] For example, studies on forensic odontology confirm that bite-mark evidence changes with time and is easily distorted, resulting in a high potential for bias on the part of experts who may be persuaded into matching a bite wound with the teeth of a known suspect.[87] When forensic scientists are trained with updated empirical research, they are far less likely to provide erroneous testimony.

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[84] *State of Uttar Pradesh v Krishna Gopal and Anr* AIR 1988 SC 2154.

[85] Andrea M Burch and others, 'Publicly Funded Forensic Crime Laboratories: Quality Assurance Practices, 2014' (2016) Bureau of Justice Statistics 22 November 2016 <bjs.gov/index.cfm?ty=pbdetail&iid=5828> accessed 31 October 2020.

[86] Eric H Holder Jr and others, 'The Impact of Forensic Science Research and Development' (2015) National Institute of Justice April 2015 <ncjrs.gov/pdffiles1/nij/248572.pdf> accessed 31 October 2020.

[87] Erik Eckholm, 'Mississippi Death Row Case Faults Bite-Mark Forensics' *The New York Times* (15 September 2014) <nytimes.com/2014/09/16/us/mississippi-death-row-appeal-highlights-shortcomings-of-bite-mark-identifications.html?module=Search&mabReward=relbias%3Ar&_r=0> accessed 31 October 2020.

Conducting such studies within laboratories is also a good way to identify whether forensic analysts have access to updated techniques and relevant technical standards while analysing samples or relying on invalidated research.[88] In-depth research exercises undertaken in other jurisdictions painstakingly document crime rates, population levels, police force strength, lab management systems and how the nature of crime labs and their governance affects productivity.[89]

Other studies show how cognitive biases may be formed in the minds of examiners at the crime scene and within labs; how judicial actors interpret evidence and how laboratories can eliminate unconscious biases before arriving at conclusions.[90] There are also empirical findings based on the results of crime lab surveys on the nature of cases handled by central, state and private laboratories, case pendency rates, types of examinations carried out, number of employees and budget allocation.[91] A periodic study carried out by the Bureau of Justice Statistics in 2014 revealed that the backlog in crime labs in the United States had declined by nearly 33% in comparison to 2009 and that there was a 10% increase in the outsourcing

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[88] Koehler (n 12) 48, 50; Giannelli (n 13) 510.

[89] James M Anderson and others, 'The Unrealized Promise of Forensic Science: An Empirical Study of its Production and Use' (2018) RAND Justice, Infrastructure, and Environment/Justice Policy Working Paper, <rand.org/content/dam/rand/pubs/working_papers/WR1200/WR1242/RAND_WR1242.pdf> accessed 31 October 2020.

[90] Jonathan J Koehler and John B Meixner Jr, 'An Empirical Research Agenda for the Forensic Sciences' (2016) 106 (1) Journal of Criminal Law and Criminology 1, 21.

[91] Nicole S Jones and Erica-Fornaro, '2020 National Institute of Justice Forensic Science Research and Development Symposium' (2020) RTI Press Publication No CP-0012-2003 March 2020 <rti.org/rti-press-publication/2020-nij-rd-symposium/fulltext.pdf> accessed 31 October 2020; Matthew R. Durose and others, 'Publicly Funded Forensic Crime Laboratories: Resources and Services, 2014' (2016) NCJ 250152 November 2016 <ojp.gov/library/abstracts/publicly-funded-forensic-crime-laboratories-resources-and-services-2014> accessed 31 October 2020.

of forensic facilities by publicly funded crime labs to private labs or other public facilities in order to meet increasing demands.[92] Similarly, the National Institute of Justice in the United States regularly shares the results of empirical research to inform forensic science specialists about the reliability and accuracy of different kinds of forensic examinations (e.g., firearm and toolmark examinations).[93] These surveys provide policymakers with key information on the internal functioning of forensic labs and the gaps in implementing standardised work norms. In India, apart from a handful of pertinent studies undertaken by experts in the past,[94] there is little empirical data on the working of forensic science laboratories. This raises several questions about the reliability of the reports they produce and whether laboratory practices are grounded in updated empirical findings or obsolete research.

In India, particularly in the nascent stages of conducting empirical research, the process should involve institutional oversight. Researchers tasked with carrying out these studies should be highly qualified forensic specialists who possess casework experience and possess the required knowledge to oversee the process and interpret results.[95] A good model to emulate is the performance audit carried out in forensic science laboratories in Uttar Pradesh under the oversight of the Comptroller and Auditor

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[92] ibid Matthew R Durose.
[93] Burch and others (n 85); Holder Jr and others (n 86).
[94] National Human Rights Commission, 'Annual Report 1999-2000' (NHRC, 2000) <nhrc.nic.in/annualreports/1999-2000> accessed 31 October 2020; Mishra and Damodaran (n 47); Government of Uttar Pradesh (n 52); SPA Report (n 57); Malimath Committee Report (n 57).
[95] ANZPAA and NFIS, 'Empirical Study Design in Forensic Science' (2019) 2 Australia New Zealand Policing Advisory Agency.

General's office in collaboration with the Directorate of Forensic Science.[96] Such a model takes care of funding and time constraints as they are carried out by independent authorities. However, these studies must be carried out not as litmus tests alone but as periodic verification and quality control tests in all states.[97]

As a general practice, encouraging researchers to share available data on existing laboratory practices can help acknowledge errors and develop future research.[98] Creating spaces within laboratories to critically analyse forensic practices using data can also change the way courts approach forensic evidence. For example, when forensic odontologists are trained to justify their expert testimonies using updated research in the field, they will be required to highlight the high error rates in the analysis of bitemark evidence as proved by recent studies.[99] In such a situation, courts will focus less on the experience or level of training of the expert and more on the reliability of existing forensic practices, based on actual forensic casework.[100] Adopting a research-oriented culture in the field of forensic science will significantly improve the reliability of laboratory practices and lay the foundation for an accountable criminal justice system.

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[96] SPA Report (n 57); Malimath Committee Report (n 57).
[97] Rajesh Kumar Singh, 'Uttar Pradesh's forensic science labs fail CAG's litmus test' *Hindustan Times* (Lucknow, 24 July 2017) <hindustantimes.com/lucknow/uttar-pradesh-s-forensic-science-labs-fail-cag-s-litmus-test/story-or0VQhFyy4zhkR2dAvcQWK.html> accessed 31 October 2020.
[98] Koehler (n 12) 20.
[99] Erica Beecher-Monas, 'Reality Bites: The Illusion of Science in Bite-Mark Evidence' (2009) 30(4) Cardozo Law Review 1369.
[100] Koehler (n 12) 22.

B. ADOPTING A COMPREHENSIVE REGULATORY MODEL: BRIDGING THE PUBLIC-PRIVATE DIVIDE

While devising the most suitable model of governance, Indian policymakers must seek to balance the advantages and disadvantages of public and private forensic laboratories. Since forensic science laboratories work so closely with state agencies, it is extremely difficult to entirely separate the two entities. However, a great level of independence can be secured by putting in place certain checks on the accountability of all actors. As Professor Giannelli notes, "*there is a difference between working with someone extensively and working with someone who is a superior within the same organisation*". The latter is what commonly leads to the police and prosecutors putting pressure on forensic professionals to manipulate laboratory findings to favour the state. That said, purely independent laboratories might suffer from limitations in the form of a shortage of funds. To strike a balance between the two models, Professor Max M Houck, an international forensic expert argues in favour of a hybrid model involving both public and private laboratory professionals that function within an internal-external framework.[101]

Within such a framework the governance of forensic science laboratories is substantially free from administrative oversight by law enforcement agencies and each independent laboratory must be keenly aware of its operations, goals and values.[102] The internal laboratory

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[101] Max M Houck, 'What does independence mean for a forensic laboratory?' *Evidence Technology Magazine* <evidencemagazine.com/index.php?option=com_content&task=view&id=1385> accessed 31 October 2020.
[102] ibid.

framework will be governed by the autonomous decisions taken by laboratory staff with respect to forensic protocols adopted, budgetary matters, values and goals of the laboratory and the overall architecture of the laboratory.[103] Within this framework, forensic scientists will be able to carry out independent examinations of the evidence thereby reducing various biases among forensic experts that tend to favour the outcomes desired by law enforcement professionals.[104] The erasure of these biases in state investigations will also help expand forensic science services to defendants who are otherwise reluctant to seek out such services fearing manipulated reports.[105] Leadership at senior levels of forensic laboratories must be taken up by strong professional bodies that include a scientist or forensic professional to safeguard scientific integrity in regulation.[106]

The external laboratory framework shall consist of a carefully negotiated agreement between independent forensic specialists and allied stakeholders such as the police, courts, and governments.[107] The rationale behind this model is to set clear boundaries between a laboratory's relationship with aligned agencies to accommodate the differences between scientific and administrative roles. For instance, an administrative laboratory director lacks scientific training in comparison to a DNA profiler. Yet, both individuals play a major role in ensuring the quality of

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[103] ibid.
[104] Kavita Pillai, 'Another Competitive Enterprise: A Balanced Private-Public Solution to North Carolina's Forensic Science Problem' (2011) 90 NCL Rev 253, 266.
[105] ibid 274, 275.
[106] James Robertson, 'Should Forensic Science Services Be Independent of Policing - A Critical Reflection' (2012) 24 Current Issues Crim Just 131, 134, 136.
[107] Evidence Magazine (n 101).

evidence and its ultimate utilisation by stakeholders. Professor Houck notes that all stakeholders working together within the internal-external framework (independent forensic professionals and law enforcement agencies) must put scientific truth first while managing their resources and operations.[108]

Such a public-private partnership model combines the independence of the private sector with strict government regulation.[109] Similarly, it provides a stable source of public funding but also ensures cost-savings arising out of competitive and profit-maximising private incentives.[110] The argument favouring some form of external regulation takes into account the risks of unsupervised commercially exploitative labs making use of self-proclaimed experts.[111] By infusing innovative ideas from private business models, FSLs can develop field-deployable, user-friendly, time-saving forensic tools like breath analysers or rapid DNA profile testing kits.[112]

Within the external framework, strategic oversight can be ensured by setting up independent forensic science commissions for each state that set standards for labs in line with national legislation and approved international standards.[113] With regard to accreditation, these commissions must follow the standards laid down by reputable organisations in the field (e.g., the International Organization for Standardization, or other nationally

[108] ibid.
[109] Pillai (n 104) 265.
[110] ibid 287.
[111] Casey (n 4).
[112] O'Brien (n 7).
[113] Garrett (n 48) 615.

reputed bodies).[114] In the Indian context, national regulatory bodies such as the Indian Council for Medical Research (ICMR) and the FDRA must lay down the minimum standards for testing norms, amend and supervise police manuals in different states and also define key portfolios.[115] State-level forensic science commissions must encourage collaborations between forensic research institutes, law schools and independent forensic professionals while framing policies for state laboratories.[116] They can also study the validity of various forensic techniques, carry out regular audits, and ensure inter and intrastate information-sharing on identified errors and positive scientific advancements.[117] This model may be further decentralised to ensure the timely deployment of forensic science services to areas that might otherwise be unable to access these services.[118]

To truly ensure laboratory independence within the public-private model, the identity of suspects, clients and the side they represent (prosecution or defence) must be kept confidential.[119] Similarly, forensic examiners must not be allowed to extend the scope of their testimonies beyond what they have recorded in their reports to prevent any chance of manipulation of their statements by lawyers.[120]

An example in India that somewhat resembles the proposed model is Truth Labs, which is a non-profit, non-government public-private

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[114] Pillai (n 104) 278.
[115] Malimath Committee Report (n 13); Mishra and Damodaran (n 47).
[116] Pillai (n 104) 280.
[117] Garrett (n 48) 615-616; Pillai (n 104) 288.
[118] Aaron O Amankwaa, 'Forensic science in Ghana: A review' (2019) 1 Forensic Science Intl Synergy 151, 158.
[119] Giannelli (n 26) 263.
[120] ibid 265.

partnership project that has been set up by an ex-government official.[121] The lab works closely with national agencies such as the National Investigation Agency, Central Bureau of Investigation, state governments, high courts, district courts, corporates, law firms, universities, hospitals, banks and private individuals.[122] The rationale of this project is to set up an independent FSL that disburses speedy justice and eases the huge burden of case pendency in India.[123] However, while expanding the number of independent forensic laboratories in India, policymakers must implement the above-mentioned suggestions.

In the Indian context, it is critical for the government to pass the FDRA Bill and the DNA Bill and meaningfully engage with the responses from medical, forensic and legal professionals as well as the general public while making the necessary amendments. DNA databases are no doubt beneficial in crime scene investigations, but it is naïve to frame simplistic legislation, dodge regulatory controversies and expect faultless results.[124] Worldwide, DNA regulators are working towards addressing the complex questions that crop up while regulating DNA evidence. For instance, in the United Kingdom, years of research helped shed light on the resource

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[121] HT Correspondent, 'In city: A forensic lab for common people' *Hindustan Times* (New Delhi, 27 August 2009) <https://www.hindustantimes.com/delhi/in-city-a-forensic-lab-for-common-people/story-OMCny7mwjQDNCXid2PjEiP.html> accessed 30 October 2020.

[122] 'About Us' Truth Labs <https://www.truthlabs.org/about-us/> accessed 31 October 2020.

[123] 'FAQs' Truth Labs <https://www.truthlabs.org/faqs/> accessed 31 October 2020.

[124] Samuel Hodge, 'Current Controversies in the Use of DNA in Forensic Investigations' (2018) 48 (1) University of Baltimore Law Review 39, 61; Giannelli (n 26) 59.

restrictions of forensic regulators and the fallibility of established accreditation systems while sharing DNA evidence.[125]

Thus, in answering questions concerning technical standards, limiting access, independent oversight, and corroborative mechanisms involved in DNA databases, researchers first need to perform comparative studies of the best practices and limitations in the models being adopted by other countries.[126] As observed by the Law Commission of India, the use of DNA evidence involves scientific concerns such as quality assurances, adherence to acceptable laboratory practices, and questions of reliability of identifications and false positives.[127] While collecting and using DNA evidence, authorities must respect each individual's right to privacy, dignity and bodily integrity.[128] Tampering may also take place during the transfer of samples from investigating officers to forensic labs.[129] There is a strict duty to maintain confidentiality and to use the evidence only as per

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[125] Carole Mccartney and Emmanuel Nsiah Amoako, 'The UK Forensic Science Regulator: A Model for Forensic Science Regulation?' (2018) 34(4) Georgia State University Law Review 945, 973.

[126] Forensic Genetics Policy Initiative, 'Establishing Best Practice for Forensic DNA Databases' *FGPI* (September 2017) <http://dnapolicyinitiative.org/report/> accessed 31 October 2020.

[127] Law Commission of India, Human DNA Profiling – A Draft Bill for the Use and Regulation of DNA-Based Technology (Law Commission No 271, 2017).

[128] ibid; Mairi Levitt, 'Forensic Databases: Benefits and Ethical and Social Costs' (2007) 83 (1) British Medical Bulletin 235, 245; Margarita Guillén and others, 'Ethical-legal Problems of DNA Databases in Criminal Investigation' (2000) 26 Journal of Medical Ethics 266, 267.

[129] United Nations Office on Drugs and Crime, 'Crime Scene and Physical Evidence Awareness for Non-Forensic Personnel' United Nations (2009) <https://www.unodc.org/documents/scientific/Crime_scene_awareness__Ebook.pdf> accessed 31 October 2020; Vikram Dodd, 'Forensic Science Failures Putting Justice At Risk, Says Regulator' *The Guardian* (25 February 2020) <https://www.theguard__ian.com/science/2020/feb/25/forensic-science-failures-putting-justice-at-risk-says-regulator> accessed 31 October 2020.

prescribed guidelines.[130] Therefore, Indian authorities must work to plug regulatory loopholes in the status quo and create a framework that functions in sync with each of its parts.

C. STANDARDISING INTERNAL LABORATORY MANAGEMENT PRACTICES

i. Uniform Testing and Accreditation Systems

Within each laboratory's internal regulation, there is a need to adopt uniform testing methods and accreditation systems for all FSLs (both public and private), which are in line with established international standards.[131] At present, the standards being developed by the International Organization for Standardization (ISO) are well accepted and respected by forensic practitioners worldwide.[132] These international standards ensure a greater degree of reliability, transparency and consistency in the forensic science community and benefit the police, lawyers, as well as the public.[133] Evaluations of quality assurance in labs must focus on multi-jurisdictional peer review and comparative analysis rather than self-assessment.[134] For this, it is important to first study the effectiveness and validity of newly introduced technologies in the Indian context and identify viable alternatives on a case-by-case basis in each laboratory. It is essential to understand that the power of standardisation lies in its continuous

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130 Wilson-Wilde (n 21).
131 Law Commission No 271 (n 127).
132 NAS 2009 Report (n 22); Wilson-Wilde (n 21) 301.
133 'Forensic Sciences - Part 1: Terms and definitions' ISO <https://www.iso.org/obp/ui/#iso:std:iso:21043:-1:ed-1:v1:en> accessed 31 October 2020.
134 Leslie Myles, 'Quality Assured Science: Managerialism in Forensic Biology' (2009) 35(3) Science, Technology & Human Values 283, 290.

implementation.[135] Therefore, these testing and accreditation systems must be supervised by a national regulator and reviewed periodically. For example, in the United States, standard reference material popularly known as the 'gold standard' is issued by the National Institute of Standards and Technology (NIST) to guide laboratories to test out different calibration methods before arriving at an acceptable standard for individual labs.[136] A similar standard must be adopted in India by the Directorate of Forensic Science in collaboration with experienced professional bodies such as the Indian Council for Medical Research as well institutions carrying out advanced research in the discipline like the Lok Nayak Jayaprakash Narayan National Institute of Criminology and Forensic Science.

ii. Developing Quality Infrastructure & Avoiding Bureaucratic Delays

There can be no straightjacket plan while designing laboratories. Each lab must be constructed according to specific needs, including the functional requirements of the envisaged forensic disciplines engaged in and the equipment to be procured.[137] Experts note that environmental

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[135] Simon A Cole, 'Who Will Regulate American Forensic Science?' (2018) 48(3) Seton Hall Law Review 563, 580.

[136] Robert L Zimmerman Jr, '10 Best of Good Laboratory Practices for Forensic Facilities: A Key to Satisfying Daubert's Gatekeeper and Rule 702' (2011) 2(4) Forensic Science Policy & Management 187, 191.

[137] National Institute of Justice, 'Needs Assessment of Forensic Laboratories and Medical Examination/Coroner Officer' (2019) Office of Justice Programs <https://www.ncjrs.gov/pdffiles1/nij/253626.pdf> accessed 31 October 2020; National Institute of Justice, 'Education and Training in Forensic Science: A Guide for Forensic Science Laboratories, Educational Institutions, and Students' (2004) Office of Justice Programs, <https://www.ncjrs.gov/pdffiles1/nij/203099.pdf> accessed 31 October 2020; Mishra and Damodaran (n 47).

conditions such as adequate lighting, energy sources and clean rooms with proper temperature conditions must be secured and unwanted interferences should be avoided.[138] In order to maximise organisational efficiency without compromising on safety needs, different stages may be considered by the planning team in order to account for changing costs as a function of time, future relocation of blueprints and a dynamic needs assessment.[139] Procedures to delineate different administrative and scientific departments, provide standard waste disposal systems, and efficiently record and store data must be put in place.[140] The high number of vacancies in public laboratories[141] can be reduced if department heads periodically review the staff strength and workloads of their respective department and take immediate measures to fill vacant posts.[142]

The Law Commission of India in its 239th Report identified that bureaucratic delays within individual forensic science laboratories result in frequent court delays.[143] In order to improve efficiency in the internal

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[138] Mishra and Damodaran (n 47); UNODC Staff Skills Report (n 49).
[139] National Institute of Standards and Technology, 'Forensic Science Laboratories: Handbook for Facility Planning, Design, Construction, and Relocation' (2013) US Department of Commerce, June <https://tsapps.nist.gov/publication/get_pdf.cfm?pub_id=913987> accessed 31 October 2020.
[140] Mishra and Damodaran (n 47); UNODC Staff Skills Report (n 49).
[141] 'NHRC Webinar on Forensic Science Setup Dominates the Sentiment that the Country Lacks the Adequate Number of Forensic Laboratories and Manpower to Handle Them' *National Human Rights Commission* (11 August 2020) <https://nhrc.nic.in/media/press-release/nhrc-webinar-forensic-science-setup-dominates-sentiment-country-lacks-adequate> accessed 31 October 2020.
[142] 'Revised Work Norms of National Forensic Science Laboratories and Government Examiners' (2002) Ministry of Home Affairs, Government of India, November <http://dfs.nic.in/pdfs/worknorms2002.pdf> accessed 31 October 2020 (2002 Work Norms).
[143] Law Commission No 239 (n 68).

functioning of forensic science laboratories, the 2002 Revised Work Norms of Forensic Science Laboratories issued by the Ministry of Home Affairs provides clear guidance to labs on how to efficiently allocate work to designated laboratory officers, each with specific tasks to complete in their respective sub-disciplines.[144] For example, the Work Norms stipulate that Deputy Directors of the Biological Science Wing can supervise the work of Assistant Directors and other technical staff.[145] Similarly, having a separate administrative section can save the time of technical lab officers and avoid duplication of work, with each laboratory creating a system of oversight within departments.[146] There is also a need for improved coordination of forensic laboratories with the police force. A relevant example is the SVP National Police Academy in Hyderabad, where police officers are regularly trained in forensic science procedures, thus reducing the workload on laboratory scientists.[147] Laboratories must devise seamless communication channels and systems of data management in order to avoid delays in sending medical reports to investigating officers and keep pace with the changing nature of crimes.[148] Similarly, law enforcement authorities must reduce disruptive bureaucratic procedures that result in frequent transfers of investigating officers.

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[144] 2002 Work Norms (n 142).
[145] ibid.
[146] ibid.
[147] Mishra and Damodaran (n 47).
[148] Micheal Schlicht, 'Recommendations for a Best Practices Model for Communication among Forensic Analysts and Crime Scene Processors in Multidisciplinary Criminal Investigations' (Seminar Paper presented to the University of Wisconsin – Platterville, November 2016); Leone M Howes and Nenagh Kemp, 'Discord in the Communication of Forensic Science: Can the Science of Language Help Foster Shared Understanding?' (2016) Journal of Language and Social Psychology 1, 4.

iii. Staff Training and Empirical Testing Practices

Indian forensic science laboratories must introduce blind proficiency tests as a part of their daily work. During blind proficiency tests, laboratory staff are provided samples as if they are real cases and are not aware that they are being tested.[149] The results of these tests are then evaluated to identify levels of accuracy, biases, and error rates, and discussed with staff to help improve their performance.[150] Experience from the Houston Forensic Science Center reveals that formulating efficacious blind testing systems significantly helps determine error rates and preconceived biases in existing laboratory practices.[151] These systems also help identify the distinct challenges a laboratory is facing vis-à-vis how evidence is collected, cases are sorted and categorised and results are being interpreted and documented while issuing final reports.[152] Another suggestion is to make use of a process called 'sequential unmasking' which requires keeping some information hidden from forensic scientists to reduce inappropriate biases and untrustworthy analyses.[153] For example, while identifying whether the DNA type of a suspect matches a sample extracted from the crime scene, the reference sample from the crime science is kept hidden until the forensic analyst characterises the DNA type

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[149] Robin Mejia and others, 'Implementing blind proficiency testing in forensic laboratories: Motivation, obstacles, and recommendations' (2020) 2 Forensic Science International Synergy 293.
[150] ibid.
[151] Randolph N Jonakait, 'Forensic Science: The Need for Regulation' (1991) 4(1) Harvard J L & Tech 109, 119; Brandon Garrett, 'Forensics, Statistics and Law: Ten Years After "A Path Forward"' (2020) 69 Duke Law Journal Online 22.
[152] ibid.
[153] Glen Whitman & Roger Koppl, 'Rational Bias in Forensic Science' (2010) 9 Law, Prob & Risk 69, 85.

of the suspect.[154] These checking mechanisms at the laboratory stage will help prevent a multiplying of errors as the evidence enters the judicial process.[155] In order to further enhance the knowledge of laboratory staff, the results of Periodic Scientific Performance Audits must be shared with them to ensure dynamic knowledge, ability, and awareness of qualified staff.[156]

Scholars who oppose empirical testing argue that it imposes unsustainable costs, and may be perceived as an unfair method to evaluate the work of laboratory professionals and could threaten their employment. However, such apprehensions can be kept at bay by sharing and exchanging data samples and results among crime labs, legally mandating blind proficiency testing and assuring employees that test results will only be used to create better laboratory protocols to judge their work in the future.[157] These tests are also an excellent way to overcome false positives in sensitive forensic techniques and build relationships and joint case management tracking systems with law enforcement agencies in the long run.[158] Furthermore, flexible work hours with greater autonomy involves formulating helpful laboratory practices and a high level of awareness among all stakeholders.

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[154] ibid.
[155] Jonakait (n 151); Brandon Garrett, 'Forensics, Statistics, and Law: Ten Years After "A Path Forward"' (2020) 69 Duke Law Journal Online 22.
[156] National Research Council, 'The Evaluation of Forensic DNA Evidence' (1996) The National Academic Press <https://doi.org/10.17226/5141> accessed 31 October 2020; SPA Report (n 57).
[157] Jonakait (n 151) 156.
[158] Sandra Guerra Thompson and Nicole Bremmer Casarez, 'Solving Daubert's Dilemma for the Forensic Sciences through Blind Testing' 57(3) Houston Law Review 617.

Thus, when foundational practices are rectified in laboratories, they will also help courts identify and engage with inaccurate or dubious expert testimony.[159]

D. JUDICIAL REGULATION

Criminal trials involve complex evidence and depend on accurate fact-finding exercises: a function that forensic function plays a crucial role in fulfilling.[160] Even when experienced professionals with near-flawless technical and analytical skills handle cases, if a method's foundational validity is based on an erroneous premise, the harms that accrue will remain the same.[161] Evidence on bite marks, footprints and firearms have been regularly disputed.[162] Despite this, the consistent codification of non-empirical findings of accuracy has led to their frequent use in courtrooms.[163] Thus, courts play an essential role in regulating the forensic science discipline.

It was in the case of *Selvi v. State of Karnataka*[164] ("*Selvi*") that the SC provided some guidance on the standards to be used while analysing the reliability of scientific evidence. The SC in *Selvi* was tasked with analysing the scientific and legal validity of polygraph examinations and Brain Electrical Activation Profile (BEAP) tests that are used a part of criminal investigations. The SC held that polygraph examinations and other similar

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[159] Holder Jr and others (n 86).
[160] Mohan Pan and Kaixin Zheng, 'A Study on the Model of Fact-Finding in Criminal Investigation' (2019) 5(3) Journal of Forensic Science and Medicine 156, 158.
[161] PCAST Report (n 33).
[162] Beecher-Monas (n 99); PCAST Report (n 33).
[163] PCAST Report (n 33).
[164] *Selvi v State of Karnataka* (2010) 7 SCC 263.

tests that rely on the testimonial responses of a defendant have been empirically proven to suffer from numerous limitations including errors associated with false positives and false negatives, drawing 'confirmatory' inferences based on the physiological responses of the defendant (such as nervousness, anxiety, confusion), and errors arising from false memories or traumatic recollections of an incident.[165] The SC observed that such tests often diluted an examiner's ability to recognise deliberate attempts on the part of the subject to manipulate test results and did not provide any conclusive guidance as to the nature of the subject's involvement in a crime.[166] The SC concluded that for scientific evidence to be treated as reliable, it should meet the 'beyond a reasonable doubt' standard necessitated in criminal cases.[167]

The SC's judgment in *Selvi* is also instructive on the issue of testing the validity of forensic evidence using constitutional standards. According to the SC, psychiatric examinations like narco-analysis, brain mapping and lie detector tests cause the subject to enter into a hypnotic trance, allowing investigating officers to gain access to the privacy of a human mind. Such tests are an intrusion into the subject's mental privacy, thereby violating the right to privacy and personal liberty under Article 21 of the Constitution.[168] As a result, such techniques dilute the voluntariness of the statements made by the subject and hence violate the requirement of free consent and the right against self-incrimination under Section 20(3) of the Constitution of

[165] ibid.
[166] ibid.
[167] ibid.
[168] ibid.

India. This finding was in stark contrast to SC's highly controversial judgment in *State of Bombay v. Kathi Kalu Oghad*, which held that the taking of bodily samples or impressions such as fingerprints, and handwriting samples by an investigating officer in custody or under court orders were a necessary part of the investigative process and hence not in violation of Section 20(3) of the Constitution.[169] Thus, in *Selvi*, the SC emphasised the need to test the validity of such forensic evidence on the basis of constitutional safeguards and a 'broader standard of reasonableness' to ensure that the defendant's free trial rights, right to privacy and personal liberty and the right against inhuman or cruel treatment are not violated.[170]

Despite the ruling in *Selvi*, reports reveal that investigating officials that rely on defendants as the main source of evidence continue to routinise the use of torture and other forms of coercion to extract bodily samples, conduct psychological tests and obtain involuntary confessions in custodial environments.[171] This raises concerns about the effective implementation of the ruling in *Selvi*. As Jinee Lokaneeta argues, the decision in *Selvi* largely focussed on the dilution of consent and inadmissibility of psychological tests, but did not recognise the role of forensic psychologists in continuing

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[169] ibid.

[170] ibid.

[171] Abhinav Sekhri, 'The right against self-incrimination in India: the compelling case of Kathi Kalu Oghad' (2019) SSRN 13 <https://dx.doi.org/10.2139/ssrn.3304431> accessed 31 October 2020; Jinee Lokaneeta, 'Why Police in India Use 'Third-Degree' Torture Methods for Interrogation' *The Wire* (23 July 2020) <https://thewire.in/books/police-torture-interrogation-jinee-lokaneeta-excerpt> accessed 30 October 2020; Scroll Staff, 'Thoothukudi custodial deaths: Father, son were tortured for 7 hours, made to clean blood, says CBI' *Scroll* (27 October 2020) <https://scroll.in/latest/976893/thoothukudi-custodial-deaths-father-son-were-tortured-for-7-hours-made-to-clean-blood-says-cbi> accessed 30 October 2020.

to allow the extraction of confessions in forensic laboratories.[172] She notes that the Indian government's decision to legitimise the use of such "*scientific investigations*" to replace physical torture is misplaced as forensic psychologists operating in hospitals and FSLs who vouched for the utility of such methods have "*unofficially replaced the police as interrogators*" and have "*created another confessional site for interrogation*".[173]

Recent judicial precedents on the use of scientific evidence in India disclose that courts have failed to condemn the use of unreliable forensic techniques and have even relied on techniques that have been proven to be junk science. For instance, a large proportion of narco-analysis tests occurred after the SC's verdict in *Selvi*, with the Delhi High Court in 2019 insisting on the availability of a narco-test facility in a Delhi FSL.[174] Similarly, while imposing the death penalty on the four accused during the trial of the Nirbhaya gang-rape case, the SC extensively relied on bitemark evidence that has resulted in wrongful convictions around the world and has been proven to be grossly misleading.[175] In this case, the SC selectively drew from one-sided academic literature and limited expert testimony to

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[172] Jinee Lokaneeta, 'Police Torture & the Truth Machines of India' *Article 14* (10 August 2020) <https://www.article-14.com/post/police-torture-the-truth-machines-of-india> accessed 30 October 2020.

[173] Jinee Lokaneeta, Truth Machines Policing, Violence, and Scientific Interrogations in India 135, 139, 184.

[174] ibid 159, 162.

[175] *In Re: Assessment of the Criminal Justice System in Response to Sexual Offences* Suo Moto Writ (Crl) No 04 of 2019; Adebola Olufunmi Olaborede and Lirieka Meintjes-van der Walt, 'The Dangers of Convictions Based on a Single Piece of Forensic Evidence' (2020) 23 Potchefstroom Electronic Law Journal 1, 34; Kelly Kostelnik, Dr Kenneth Cohrn and Dr Jason Byrd, 'Freeing the Innocent: When Guilty Convictions are Overturned due to Errors in Bite Mark Analysis' University of Florida College of Medicine <https://ufdc.ufl.edu/AA00060974/00001> accessed 31 October 2020.

conclude based on a dubious standard of proof that the marks were 'most likely' caused by the accused persons.[176] The use of the 'reasonable medical certainty' standard by the judiciary to evaluate bitemarks has been harshly criticised as there is no accepted threshold or measurable scientific criteria to determine its application in different cases.[177] Further, justifying forensic evidence merely because there was no visible tampering with the samples in question does not meet the standard of proof 'beyond a reasonable doubt'.[178]

Thus, in comparison to foreign jurisdictions, the reluctance of Indian courts to consistently make use of accepted standards to determine reliability of forensic evidence is indicative of the gaps in the law as well as a cumulative failure to embrace empirical and science-driven approaches to the law.

In contrast, the decision of the Supreme Court of the United States (SCOTUS) in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* ("*Daubert*"), is dubbed to have revolutionised the standards for evaluating scientific evidence.[179] The question before the SCOTUS in *Daubert* was to establish

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[176] *Mukesh* (n 7) 36.

[177] Micheal J Saks and others, 'Forensic Bitemark Identification: Weak foundations, Exaggerated Claims' (2016) 3(3) Journal of Law and the Biosciences 538, 558; Daniel Selby, 'Why Bite Mark Evidence Should Never Be Used in Criminal Trials' (2020) Innocence Project 26 April <https://www.innocenceproject.org/what-is-bite-mark-evidence-forensic-science/> accessed 31 October 2020; National Commission on Forensic Science, 'Testimony using the term "Reasonable Scientific Certainty"' (2016) National Institute of Standards and Technology <https://www.justice.gov/ncfs/file/795336/download> accessed 31 October 2020 (citing Prof Paul Giannelli).

[178] *Mukesh* (n 7) 224.

[179] *Daubert v Merrell Dow Pharmaceuticals, Inc* 509 US 579 (1993); David L Faigman, 'The Daubert Revolution and the Birth of Modernity: Managing Scientific Evidence in the Age

what criteria judges must follow while identifying the admissibility of scientific evidence. Before *Daubert*, courts relied on the ruling in *Frye v. United States* ("*Frye*"), in which the Circuit Court laid down the imprecise 'general acceptance test' to hold that all scientific evidence that was 'sufficiently established to have gained general acceptance in the particular field in which it belongs' be deemed admissible. In determining what constituted general acceptance, the *Frye* standard valued the testimony of forensic practitioners and not empirical validity.[180] Thus, when the petitioners subsequently challenged this vague standard in *Daubert*, the SCOTUS formulated four relevant criteria to determine admissibility. They were: 1) whether the scientific knowledge can be tested or falsified; 2) whether the scientific technique used has been published or subjected to peer review; 3) the potential error rate of the technique employed; 4) how far it agrees with the *Frye* standard of general acceptance.[181]

It is interesting to note that the SC in *Selvi* acknowledged the relevance of the *Daubert* standard and extensively relied on prior empirical studies carried out in the relevant forensic sub-discipline.[182] Unfortunately, Indian courts are far behind and are yet to formulate a standard to evaluate the reliability of scientific evidence. There are also very few instances in which Indian courts have relied on the *Daubert* standard while testing the

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of Science' (2013) 46 University of California at Davis Law Review 893, 902; *Dharam Deo Yadav v State of Uttar Pradesh* (2014) 5 SCC 509.

[180] Paul C Giannelli, 'Forensic Science: Daubert's Failure' (2017) 59 Case Western Reserve Law Review 869, 871.

[181] *Daubert* (n 179).

[182] *Selvi* (n 165).

scientific validity of forensic evidence.[183] As highlighted in previous sections, judicial engagement with scientific evidence revolves around the admissibility of expert evidence using vague standards. Very rarely have courts stressed on the need to adopt a practical and rational approach while accepting scientific evidence and rejecting such evidence only on justifiable grounds.[184]

Courts must tread a fine line while interpreting forensic methods: they must avoid overemphasising the validity of specific tests, particularly in cases involving sexual offences, and keep up with the changing research techniques employed by specialists.[185] In the long run, checking mechanisms must encourage courts to devise a higher and practically determinable standard of proof and to carry out their verification exercises when reports and forensic testimony come before them.[186] Even well-accepted judicial standards should not be treated as the final solution and must be scientifically critiqued. For example, the SCOTUS' much-lauded decision in *Daubert* has recently been criticised for having failed to demand that rigorous systematic research must first be carried out to understand the advantages and defects of different forensic methods and validate their

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[183] *Rajli @ Rajjo v Kapoor Singh and Ors* 2013 SCC OnLine P&H 25166; *Harjinder Kaur v State of Punjab* 2012 SCC OnLine P&H 13445.

[184] *Chellapan v State of Kerala* 2013 (2) KLJ 279.

[185] Dr Padma Bhate Deosthali and Sangeeta Rege, 'Hathras Rape Case: Right to Medico-Legal Care for Survivors Has a Long Way to Go' *The Leaflet* (5 October 2020) <https://www.theleaflet.in/hathras-rape-case-right-to-medico-legal-care-for-survivors-has-a-long-way-to-go/#> accessed 31 October 2020; Scroll Staff, 'Hathras case: This is What is Wrong with the 'No Sperm, No Rape' Line Being Pushed by UP Police' *Scroll* (5 October 2020) <https://scroll.in/article/ 974972/hathras-case-this-is-what-is-wrong-with-the-no-sperm-no-rape-line-being-pushed-by-up-police> accessed 31 October 2020.

[186] Thompson and Casarez (n 158).

accurate implementation in changing contexts.[187] Scholars argue that in the absence of foundational testing of these methods, the *Daubert's* test stands on shaky ground.[188] Such engagement with judicial precedent helps courts constantly reinvent evidentiary standards to keep up with changes in the field of forensic science. Perhaps the greatest reward to the forensic science community has come post-*Daubert* when researchers have begun finding new ways for courts to overcome challenges using error rate comparisons which are explicitly defined in each factual circumstance.[189]

Judges must go beyond perfunctory examinations of expert statements and judiciously engage with contrasting precedent before arriving at decisive conclusions on admissibility.[190] Questioning scientific experts on their reports and testimonies will keep out scientific conclusions that are drawn by incompetent or even fraudulent forensic professionals.[191] Further, the high standard of 'beyond a reasonable doubt' must be strictly followed while admitting scientific evidence. Disregarding accurate scientific testimony as well as overvaluing scientific proof as fully conclusive can seriously disadvantage either party. For example, in the United States, a party that admits blood sample evidence is at an advantage as courts have tended to liberally admit such samples without seeking expert

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[187] Giannelli (n 181) 873.
[188] ibid 875; Leah A Vickers, 'Daubert, Critique and Interpretation: What Empirical Studies Tell Us About the Application of Daubert' (2005) 40(1) University of San Francisco Law Review 109, 137.
[189] Munia Jabbar, 'Overcoming Daubert's Shortcomings in Criminal Trials: Making the Error Rate the Primary Factor in Daubert's Validity Inquiry' (2010) 85 (6) New York University Law Review 2034, 2050.
[190] Brandon L Garret and Chris Fabricant, 'The Myth of the Reliability Test' (2018) 86(4) Fordham Law Review 1559, 1576; Beecher-Monas (n 99).
[191] Pillai (n 104) 290; *Melendez-Diaz v Massachusetts* 129 S Ct 2527 (2009).

opinion or verifying the accuracy of forensic findings.[192] Therefore, the weight attached to scientific evidence by courts must be justified and detailed with cogent reasons provided by judges while testing the admissibility and reliability of such evidence.

Since all stakeholders do not directly handle forensic traces, it is essential to train officials at every step of the process to foster a culture of understanding from common knowledge, to avoid delays in delivering reports and court documents.[193] To illustrate, the Forensic Sciences Department under the government of Tamil Nadu has created a system that provides all laboratories with a copy of court judgments in every case.[194] This also means that lab reports are brought on the court's record. Such an exercise connects legal and scientific information while simultaneously saving the valuable time of both lawyers and forensic lab experts who do not have to go through any hardships to find these documents. By creating awareness among all stakeholders (judiciary, prosecution, police, social welfare, and laboratories) to pass on vital information made available to them regularly, testing costs can be minimised, standards improved, and scientific methods strictly followed.[195]

There must also be a greater degree of inclusion of forensic specialists within the legal system that can help balance out unbalanced

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[192] ibid 284.
[193] Science and Technology Select Committee, 'Forensic Science and the Criminal Justice System: A Blueprint For Change' (2019) House of Lords UK <https://publications.parliament.uk/pa/ld201719/ldselect/ldsctech/333/333.pdf>accessed 31 October 2020 (House of Lords Report).
[194] Mishra and Damodaran (n 47).
[195] House of Lords Report (n 194).

narratives. Some scholars suggest that courts should be allowed to turn down evidence from facilities that did not previously meet quality thresholds, carry out lab inspections at random by regulatory authorities and disclose the results of quality checks to the public.[196] These measures will incentivise laboratories to perform better, enhance transparency and accountability and improve the trust that various stakeholders place in these facilities.[197] The establishment of clear standard practices followed by forensic laboratories to test the validity of different scientific techniques can further assist judges in determining the reliability of different kinds of evidence.[198]

Training judges to read and understand scientific documents like forensic reports is also of utmost significance. While determining whether a given evidentiary sample is a match, judges must be trained to understand the trade-off between false positives and false negatives before arriving at the likelihood ratio. A likelihood ratio will help decision-makers approximate to what extent prior odds of a particular fact or evidentiary narrative have changed when the given forensic findings are taken into account.[199] With the help of this numerical or verbal calculation, judges can go beyond relying on textbook opinions and identify for themselves by testing the hypothesis of a match, whether the likelihood ratio satisfies the

[196] Erin Murphy (n 5) 660.
[197] ibid.
[198] Pillai (n 104) 285.
[199] Anders Nordgaard and Birgitta Rasmusson, 'The Likelihood Ratio as Value of Evidence – More than a Question of Numbers' (2012) 11(4) Law, Probability and Risk 303, 308.

standard of proof in the given case.[200] However, in order for judges to be able to compare likelihood ratios and measure their impact vis-à-vis forensic methods, they must be taught to interpret statistical information and understand how the threshold of proof may vary depending on the kind of forensic evidence. This would imply that forensic methods that are known to be less reliable, such as handwriting samples or shoe marks, would have to be held up to a higher likelihood ratio as opposed to DNA profiles created in a sexual offence. One way to implement this would be to train forensic professionals to brief judges by simplifying methods and effectively communicating to them what is at stake in cases involving complex forensic evidence.

Rather than tailor laboratory procedures to suit courtroom practices, future discourse within the discipline must aim to expand its scope into social policy, medicine, data analytics, intelligence, criminology, security, as well as sentencing and punishment procedures. As Professor Erin Murphy argues, the shift in forensic practices from first-generation forensic evidence (hair or pattern analysis, bite marks, firearms, and ballistic) towards 'second-generation forensic evidence' (location tracking, biometrics, digital forensics, and other database-driven techniques) should also take place in courtrooms.[201] In conclusion, only if judges, lawyers and investigating authorities are trained in the fundamentals of forensic science techniques and are taught to monitor how evidence is handled and

[200] David H Kaye, 'Hypothesis Testing in Law and Forensic Science: A Memorandum' (2017) 130 (5) Harvard Law Review Forum 127, 132; Edward K Cheng, 'The Burden of Proof and Presentation of Forensic Results' (2017) 130 Harvard Law Review 154, 156.
[201] Murphy (n 5) 636.

interpreted during criminal trials can they add value to the criminal justice process.

IV. CONCLUSION

The chain of forensic science is only as strong as its weakest link. Understandably, the Indian government wants to speed up the regulation of the forensic industry to meet rising demands. Nevertheless, without a thorough revaluation of existing systemic deficiencies using data backed by science, no amount of policy-making can address on-ground challenges faced by forensic science laboratories in India. The consistent failure on the part of governments to regulate the forensic science discipline has resulted in a considerable absence of updated, reliable empirical research on the functioning of forensic science laboratories. Critical gaps in legislation and oversight have created a fragmented framework of public and private forensic laboratories resulting in the duplication of costs, and the sprouting of superfluous, unsupervised, and ill-equipped laboratories that indulge in profiteering.

Today, there are large disparities in the internal functioning of forensic laboratories in terms of the quality of services offered, levels of funding, staff availability and accreditation systems. Existing laboratory practitioners bear excessive workloads, face several bureaucratic hurdles and have no standard procedures to guide their work. This has resulted in rampant mishandling of scientific evidence, error-prone data records, disgruntled and disincentivised staff, unreliable expert testimony and outdated research techniques.

A comprehensive analysis of these problems leads us to an inevitable conclusion: the existing forensic science landscape in India is far from perfect. Experience from other jurisdictions presents a guiding plan to Indian regulators on how not to perceive forensic regulation as an oversimplified exercise free from all imperfections. A future regulatory model must account for the unique developmental needs of individual laboratories derived from extensive scientific research. Using empirical findings, a public-private model that values laboratory independence while simultaneously recognising the need for external supervision is proposed. Ultimately, revamping Indian forensic laboratories using a dynamic participatory approach that involves key socio-legal stakeholders is an idea worth exploring. From the viewpoint of a disintegrating criminal justice system, it is undoubtedly a step in the right direction.

Bhavnish Kaur Chhabda and Vasanthi Hariharan, 'Cryptocurrency in India: Empowered in 2020?' (2021) 7(2) NLUJ L Rev 246

CRYPTOCURRENCY IN INDIA: EMPOWERED IN 2020?

Bhavnish Kaur Chhabda[*] *& Vasanthi Hariharan*[#]

ABSTRACT

Cryptocurrencies are distinguished from traditional currencies by way of their operation as a medium of exchange through the use of blockchain technology and their freedom from a central authority, regulatory or otherwise. While cryptocurrencies enamoured the world and the number of interested parties grew, governments of different nations became apprehensive of their potential dangers. India was no different, however since there was no explicit ban, cryptocurrency business slowly started becoming prominent locally. In April 2018, the Reserve Bank of India issued a circular which barred banks and other financial institutions from facilitating transactions involving cryptocurrencies. Subsequent to a challenge, the Supreme Court of India set aside the said circular which resulted in a temporary respite for cryptocurrencies. This paper adopts a comparative understanding of how other countries have responded to the growth of cryptocurrency business so as to determine their future in India. With this approach, it becomes apparent that only a permissive framework will benefit Indian regulators in addressing the risks associated with cryptocurrencies. If undertaken properly, such an approach has the potential to

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boost India's economic growth and make it an epicentre of industrial development. It is concluded that at the heart of cryptocurrency regulation lies the challenge of correctly classifying crypto-assets and identifying appropriate regulators. It is only a carefully calibrated legal framework that will protect the interests of stakeholders and enable blockchain-based growth in India.

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I. INTRODUCTION

From tweets on Twitter that dramatically affect the stock prices of a company[1] to negative effects on market strength due to sudden developments in the ongoing global pandemic,[2] the volatility of the financial market has become apparent to regular investors as well as laymen. The cryptocurrency market is one such example of a market that is known for fluctuations. Even though some view cryptocurrencies as a safe haven asset[3] or a hedge against the effects of global politics on the market, there are several risks associated with it. The speculative nature of cryptocurrencies brings volatility and instability in their value. The risk of cyber hacking is high and the anonymity in transactions results in various money laundering and terrorism financing activities through the cryptocurrency market. Therefore, countries around the world are considering the regulation of cryptocurrencies, or in a broader sense, of virtual currencies ("VCs"). Such regulation will help in ensuring that shocks caused by this market can be remedied through the existing infrastructure, and its investors can be protected. This has led to an important and widespread debate on nature, function, and ultimately, legality of

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[1] David Canellis, 'Tesla stock crashes after Elon Musk tweets: Tesla stock too high imo' *The Next Web* (1 May 2020) <https://thenextweb.com/hardfork/2020/05/01/tesla-stock-crashes-after-elon-musk-tweets-tesla-stock-too-high-imo/> accessed 19 October 2020.

[2] FE Bureau, 'Covid fears: Markets plummet tracking global peers' *Financial Express* (16 June 2020) <https://www.financialexpress.com/market/covid-fears-markets-plummet-tracking-global-peers/1992804/> accessed 19 October 2020.

[3] Zack Guzman, 'Coronavirus helps make the case for crypto: Tom Lee' *Yahoo! Finance* (5 February 2020) <https://finance.yahoo.com/news/bitcoin-could-top-18000-if-history-of-this-technical-buy-signal-repeats-itself-tom-lee-213148645.html> accessed 19 October 2020.

cryptocurrencies. The central focus of this paper is the prevailing debate regarding cryptocurrencies in India.

Cryptocurrency is an innovation in the financial technology space and, therefore, its unique nature is an important factor to be considered in its regulation. The key characteristics of cryptocurrency include its existence as a digital asset, the lack of any central regulatory authority, decentralization of the public account using distributed ledger technology ("DLT"), and the use of cryptography to secure the transaction records.[4] Despite not being a legal tender, it serves as a medium of both, exchange and investment. The advent of blockchain technology has enabled the development of a global cryptocurrency market which is influenced by market forces alone and is distinguished by freedom from any single government's control.[5]

With increasing developments in this area, countries have started recognising and clarifying the status of cryptocurrency in their jurisdiction. In India, the Reserve Bank of India (RBI) took note of the risk posed by VCs in its Financial Stability Reports of 2013, 2015, and 2016.[6] They

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[4] Giancarlo Giudici, Alistair Milne and Dmitri Vinogradov, 'Cryptocurrencies: market analysis and perspectives' (2020) 48(1) Journal of Industrial and Business Economics 1, 3.
[5] Lawrence Wintermeyer, 'The Role of Cryptocurrencies in Future Society' *Forbes* (16 October 2018) <www.forbes.com/sites/lawrencewintermeyer/2018/10/26/the-role-of-cryptocurrencies -in-future-society/#7e094711787d> accessed 19 October 2020.
[6] *Internet and Mobile Association of India v Reserve Bank of India* [2020] SCC OnLine SC 275 [2.2], [2.10], [2.11]; Reserve Bank of India, 'Financial stability Report June 2013' *Reserve Bank of India,* (2013) ch 3, para 3.60 <https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/FSPI260613FL.pdf> accessed 19 October 2020; Reserve Bank of India, 'Financial Stability Report December 2015' *Reserve Bank of* India(2015) ch 3, box 3.1 <https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/0FSR6F7E7BC6C14F42E99568A80D9FF7BBA6.PDF> accessed 19 October 2020; Reserve Bank of India, 'Financial Stability Report December 2016' *Reserve Bank of India*(2016), ch 3, para

highlighted the concerns over the volatility in value and anonymous nature of virtual currencies. These concerns translated into a Statement and Circular issued by the RBI in 2018, which prohibited all entities regulated by it from providing its services to any individual or entity dealing in VCs.[7] Before this Circular, the entities that dealt with VC exchanges operated in a regulatory vacuum. Upon challenge, the Supreme Court of India (SC) in the case of *Internet and Mobile Association of India v. Reserve Bank of India* ("*Cryptocurrency judgment*") struck down the said Statement and Circular for being unconstitutional.[8] The judgment was welcomed and celebrated by the industry and the professionals working in the cryptocurrency market.

Parallel to the RBI Circular, an Inter-Ministerial Committee ("Committee") was constituted by the Ministry of Finance in 2018 to look into the regulatory framework for cryptocurrencies. The Committee published its report in February 2019 along with the Draft Banning of Cryptocurrency and Regulation of Official Digital Currency Bill, 2019 ("Draft Bill") which, as the name suggests, introduced a complete ban on cryptocurrencies.[9] The future of VCs in India, however, is still uncertain.

3.22<https://rbidocs.rbi.org.in/rdocs/PublicationReport/Pdfs/0FSR_166BABD6ABE04B48AFB534749A1BF38882.PDF>accessed 19 October 2020.

[7] Jose J Kattoor, 'Statement on Developmental and Regulatory Policies' *Reserve Bank of India* (5 April 2018) <https://www.rbi.org.in/scripts/bs_pressreleasedisplay.aspx?prid=43574> accessed 19 October 2020; Saurav Sinha, 'Prohibition on dealing in Virtual Currencies (VCs)' *Reserve Bank of India* (6 April 2018) <https://www.rbi.org.in/Scripts/NotificationUser.aspx?Id=11243> accessed 19 October 2020.

[8] *Cryptocurrency judgment* (n 6).

[9] Department of Economic Affairs, 'Report of the Committee to propose specific actions to be taken in relation to Virtual Currencies' *Ministry of Finance* (29 February 2019) 34 <https://dea.gov.in/sites/default/files/Approved%20and%20Signed%20Report%20and%20Bill%20of%20IMC%20on%20VCs%2028%20Feb%202019.pdf> accessed 19 October 2020.

While some experts[10] argue that this judgment will change the approach of the government towards cryptocurrencies, others[11] believe that there is still scope for the legislature and the RBI to come up with a ban.

In this paper, the authors focus on the aftermath of the *Cryptocurrency judgment* and explore a feasible regulatory framework to deal with cryptocurrency trade in India. It analyses whether the Draft Bill is the best way forward for India, keeping in mind the growth trajectory of the Indian cryptocurrency industry that is set to gain a considerable global market share despite the negative effects on the economy due to the COVID-19 outbreak.[12] This paper intends to fill the gap in the existing literature by providing a comprehensive analysis of the proposed regulatory framework against the backdrop of approaches adopted by different countries. It identifies a need for regulation and explores the factors that legislators will need to keep in mind while formulating a law on VCs.

II. UNDERSTANDING CRYPTOCURRENCY

Predating the cryptocurrencies of the present, several attempts were made to create a digital currency that would be secured with cryptography

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[10] Suprita Anupam, 'Cryptocurrency vs RBI: The Supreme Court Judgement and The Aftermath' *Inc 42* (5 March 2020) <https://inc42.com/features/cryptocurrency-vs-rbi-the-sc-judgement-and-the-aftermath-in-india/> accessed 19 October 2020.

[11] Vishal Chawla, 'SC Verdict on Lifting Cryptocurrency Ban in India may be misinterpreted, and we may see the ban reinstated' *Analytics India Magazine* (7 April 2020) <https://analyticsindiamag.com/cryptocurrency-ban-india-verdict/> accessed 19 October 2020.

[12] Amit Raja Naik, 'Cryptocurrency This Week: Indian Crypto Exchanges Witness Surge in New Users, Bitcoin Sees $1000 Spike & More' *Inc 42* (2 June 2020) <https://inc42.com/buzz/indian-cryptocurrency-market-to-witness-increase-in-new-users-more/> accessed 19 October 2020.

and a ledger that would be easy to use and be decentralized.[13] The first serious attempt at developing cryptocurrency was Wei Dai's 'B-money', which was conceptually "*a scheme for a group of untraceable digital pseudonyms to pay each other with money and to enforce contracts amongst themselves without outside help*".[14] In 2008, this concept became a reality with the publication of Satoshi Nakamoto's paper titled "*Bitcoin – A Peer to Peer Electronic Cash System*".[15] Bitcoin has a limited supply to ensure steady appreciation of value and is secured cryptographic protocols which provide anonymity to its users. It was designed to function as a medium of exchange on the internet, without facing the problem of double-spending, which refers to a risk where a digital currency can be potentially spent twice and is susceptible to fraud.

From thereon, the growth of Bitcoin and other cryptocurrencies provoked countries to find ways to regulate the market. Thailand declared trading in bitcoin as illegal.[16] Germany's Ministry of Finance rejected it as an legal currency but paved the way for taxing transactions involving bitcoin by recognizing it as a "unit of account".[17] The People's Bank of China prohibited financial institutions from using bitcoins.[18] While some

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[13] Mark Atwood, *Bitcoin Explained: Become a Bitcoin Millionaire in 2018* (Create Space Independent Publishing Platform 2018).

[14] Wei Dai, 'B-money' (1998) <http://www.weidai.com/bmoney.txt> accessed 20 October 2020.

[15] Satoshi Nakamoto, 'Bitcoin: A Peer-to-Peer Electronic Cash System' (2008) <https://bitcoin.org/bitcoin.pdf> accessed 20 October 2020.

[16] AP, 'Virtual currency Bitcoin banned' *Bangkok Post* (30 July 2013) <https://www.bangkokpost.com/business/362222/bitcoin-declared-illegal-in-thailand> accessed 20 October 2020.

[17] GDN, 'Bitcoin approved by Germany as a 'unit of account' for transactions' *South China Post* (12 August 2013) <https://www.scmp.com/news/world/article/1298155/bitcoin-approved-germany-unit-account-transactions> accessed 20 October 2020.

[18] Laney Zhang, 'Regulation of Cryptocurrency: China' *Library of Congress*' (June 2018) <https://www.loc.gov/law/help/cryptocurrency/china.php> accessed 20 October 2020.

countries, such as Japan[19] and Norway,[20] are still open to the acceptance of bitcoin as a currency, central regulatory authorities around the world recognize the need to understand the technology and create an appropriate financial framework.

A. CONCEPT

A virtual currency has been defined as a digital representation of value that can be traded electronically, functioning as "*(1) a medium of exchange; and/or (2) a unit of account; and/or (3) a store of value, but not having a legal tender status*".[21] Cryptocurrency is a subset of virtual currency which is decentralised and protected by cryptography.[22] Bitcoin is an example of cryptocurrency.

To obtain a cryptocurrency, for example, bitcoin, the users must either "mine" them through their computer by solving complex mathematical algorithms or purchase them using the fiat currency. There are two ways in which cryptocurrency is used in the market - *first*, as a payment system or a means of exchange, and *second*, in the form of tokens issued through Initial Coin Offerings ("ICO").[23]

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[19] Luke Graham, 'As China cracks down, Japan is fast becoming the powerhouse of the bitcoin market' *CNBC* (29 September 2017) <https://www.cnbc.com /2017/09/29 /bitcoin-exchanges-officially-recognized-by-japan.html> accessed 20 October 2020.

[20] Jamie Redman, 'Norway's Largest Online Bank Integrates Bitcoin Accounts' *Bitcoin.com* (15 May 2017) <https://news.bitcoin.com/norways-online-bank-bitcoin-accounts/> accessed 20 October 2020.

[21] Financial Action Task Force, 'Virtual Currencies – Key Definitions and Potential AML/CFT Risks'*FATF* (June 2014), 8 <https://www.fatf-gafi.org/media/fatf/ documents/reports/Virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf> accessed 25 October 2020.

[22] ibid 5.

[23] Department of Economic Affairs (n 9) 22.

As a 'payment system', cryptocurrency lets users make secure payments and store money anonymously.[24] It is a peer-to-peer system which means that users can send or receive money from anyone without any external interference.[25] This allows users to process transactions through digital units of exchange. All records of the transactions are maintained in a public ledger which uses blockchain technology. The blockchain cannot be altered, and so the funds and goods can be transferred trustfully.[26] This ensures transparency and also decreases fraudulent activities.

As an 'asset', cryptocurrency can be issued as tokens through ICO. A company can raise funds through ICO, and this process is crypto-industry's equivalent to an Initial Public Offering in a stock market. This has emerged as an alternative to traditional forms of financing. People interested in making an investment can buy the token and invest in a company, where the token is a utility or asset issued by the company. They can be transferred or traded by the holders. Such tokens can serve two functions of (i) a utility and (ii) a security. A utility token gives the holder access to the company's products whereas, security tokens are similar to shares wherein its holders get dividend whenever the company earns a profit.[27]

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[24] Ilker Koksal, 'The Rise of Crypto as Payment Currency' *Forbes* (23 August 2019) <https://www.forbes.com/sites/ilkerkoksal/2019/08/23/the-rise-of-crypto-as-payment-currency/?sh=6428941026e9> accessed 30 January 2021.
[25] ibid.
[26] ibid.
[27] Luis Oliveira and others, 'To Token or not to Token: Tools for Understanding Blockchain Tokens' (International Conference of Information Systems, San Francisco, USA, 12 - 16 December 2018) 6.

B. NATURE AND RISKS

Since cryptocurrency is a decentralized medium of exchange, its value is immune from government control. The emergence of VCs is believed by some to be a threat to the banking sector since it eliminates the need for an intermediary and has risen to be a viable alternative to traditional payment methods.[28] This results in a lower cost of transaction and increased efficiency. The ease of using cryptocurrencies has been predicted to revolutionise the banking sector.[29] Financial institutions will have to incorporate blockchain technology into their operations to compete in the market.

However, there are some drawbacks. Despite the secure nature of blockchain transactions, cryptocurrency exchanges and its users remain vulnerable to cyber hacking. In 2014, a major security flaw was exposed when Mt. Gox, a Bitcoin exchange in Japan, went offline and announced that approximately 850,000 BTC went missing.[30] Unlike fiat money, cryptocurrencies are not backed by a central authority. An incident like Mt. Gox can devalue the VCs overnight.[31] Further, acceptance of VCs does not

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[28] Antonio Fatás and Beatrice Weder di Mauro, 'As Cryptocurrencies Rise, Who Needs Banks?' (2018) Harvard Business Review 7 May 2018 <https://hbr.org/2018/05/as-cryptocurrencies-rise-who-needs-banks> accessed 20 October 2020.

[29] Abhay Padda, 'How Will Blockchain Revolutionize the Global Financial System?' *WNS* (2018) <https://www.wns.com/insights/articles/articledetail/534/how-will-blockchain-revolutionize-the-global-financial-system> accessed 20 October 2020.

[30] Robert Mcmillan, 'The Inside Story of Mt. Gox, Bitcoin's $460 Million Disaster' *Wired* (3 March 2014) <https://www.wired.com/2014/03/bitcoin-exchange/> accessed 20 October 2020.

[31] A Greenberg, 'Bitcoin's price plummets as Mt. Gox goes dark, with massive hack rumored' *Forbes* (25 February 2014) <http://www.forbes.com/sites/andygreenberg/2014/02/25/bitcoins-price-plummetsas-mt-gox-goes-dark-with-massive-hack-rumored/> accessed 30 January 2021.

depend upon any government or country and therefore, in absence of any regulations or oversight, there is no consumer protection.[32] This means that consumers are not insured against incidents like the shutdown of a VC exchange company. There are also concerns around the lack of traceability of VCs which were highlighted when money laundering activities and drug transactions on Silk Road, a digital black market, were carried out using bitcoin.[33] Increasing risks to consumers and economy due to cryptocurrency transactions have led various governments to explore regulatory options and, in some cases, even ban their use.

III. GLOBAL REGULATORY APPROACHES

With advanced technological developments and increasing popularity of cryptocurrency, countries around the world have had to clarify its legal status. No country has accepted cryptocurrency as a legal tender.[34] Most of the countries, including India,[35] have released warnings to their citizens about how a virtual currency is different from the legal tenders issued by the government. Jurisdictions like the United States of America

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[32] Kim-Kwang Raymond Choo, 'Cryptocurrency and Virtual Currency: Corruption and Money Laundering/Terrorism Financing Risks?' in David Lee Kuo Chen (eds) *Handbook of Digital Currency: Bitcoin, Innovation, Financial Instruments and Big Data* (Academic Press 2015) 301.

[33] David Adler, 'Silk Road: The Dark Side of Cryptocurrency' Fordham Journal of Corporate and Financial Law, 21 February 2018) <https://news.law.fordham.edu/jcfl/2018/02/21/silk-road-the-dark-side-of-cryptocurrency/> accessed 20 October 2020.

[34] 'Regulation of Cryptocurrency Around the World' *Law Library of Congress* (June 2018) 2 <https://www.loc.gov/law/help/cryptocurrency/cryptocurrency-world-survey.pdf> accessed 25 October 2020.

[35] Ajit Prasad, 'RBI cautions users of Virtual Currencies against Risks' *Reserve Bank of India* (24 December 2013) <https://www.rbi.org.in/Scripts/BS_PressReleaseDisplay.aspx?prid=30247> accessed 25 October 2020.

(USA or US), Singapore and Germany have capitalized on the crypto market and have not restricted their use. However, some jurisdictions have decided to impose a ban instead. Nepal, Pakistan, and Vietnam have banned cryptocurrency directly while China has done so indirectly.[36] Venezuela has, in fact, developed its own cryptocurrency. In most countries, including India, Austria, Belgium, Greece and Lithuania there are no clear regulations and the crypto-industry functions in a legal vacuum.[37] This section analyses the different approaches taken by the major economies to regulate cryptocurrency.

A. PERMISSIVE

The most common trend that can be observed is the adoption of a permissive approach by developing a cryptocurrency-friendly regime. Various countries, while being permissive, have also recognized the risks that come along with it. They have either developed a new regulatory framework or accounted for these challenges within their existing laws. The former spectrum includes countries like France and Malta,[38] while the latter system includes jurisdictions like the USA, Australia, Canada and Japan. This section looks at the permissive regulatory frameworks in the USA and Japan.

i. USA

[36] Library of Congress Report (n 34) 2.
[37] 'Cryptocurrencies by country' *Thomson Reuters* (25 October 2017) <https://blogs.thomsonreuters.com/answerson/world-cryptocurrencies-country/> accessed 30 January 2021.
[38] Radhika Pandey, D Priyadarshini and Raghunath Seshadri, 'Approaches to regulation of cryptocurrencies' *Ideas for India* (31 October 2019) <https://bit.ly/2HA8M7T> accessed 25 October 2020.

The laws governing crypto exchanges in the USA differ state-wise and are enacted largely based on three major approaches.[39] *First*, in order to boost the local economy, few states have brought in favourable regulations which aim at increasing investment. For instance, the state of Wyoming is considered as the friendliest state for cryptocurrency and has exempted crypto transactions from property taxation.[40] Some states, such as Ohio,[41] have even allowed the payment of taxes through cryptocurrency. *Second*, states like California and New Mexico have issued warnings against the potential risks associated with cryptocurrency investment.[42] *Third*, restrictive use legislations have been passed, for instance, in the state of New York.[43] Therefore, it is difficult to identify a consistent approach in the USA with respect to cryptocurrency legislation. At the federal level, however, the USA regulators have taken a proactive approach in dealing with cryptocurrencies.

Securities and derivative market

[39] Joe Dewey, 'Blockchain and Cryptocurrency Regulation, USA' *Global Legal Insights* (2020) <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/usa> accessed 25 October 2020.

[40] Kevin C. Desouza, Chen Ye, and Kiran Kabtta Somvanshi, 'Blockchain and U.S. state governments: An initial assessment', *Brookings* (17 April 2020) <https://www.brookings.edu/blog/techtank/2018/04/17/blockchain-and-u-s-state-governments-an-initial-assessment/> accessed 25 October 2020.

[41] Kelly Philips Erb, 'Ohio Becomes the First State to Allow Taxpayers to Pay Tax Bills Using Cryptocurrency' *Forbes* (26 November 2018) <https://bit.ly/3e9yonD> accessed 25 October 2020.

[42] Desouza (n 40).

[43] Matthew Kohen and Justin Wales, 'State Regulations on Virtual Currency and Blockchain Technologies' (Updated July 2020) *Carlton Wales* (14 July 2020) <https://www.carltonfields.com/insights/publications/2020/state-regulations-on-virtual-currency-and-blockchain-technologies-(updated-july-2020)> accessed 25 October 2020.

USA's securities market regulator, Securities and Exchange Commission (SEC), has classified cryptocurrencies as securities[44] decided by the 'Howey Test'. Developed by the Supreme Court of the United States (SCOTUS) in 1946, the Howey Test lays down four criteria for an instrument to be classified as a security: It must be an (i) investment of money, (ii) with an expectation of profit, (iii) in a common enterprise, and (iv) with the profit to be generated by a third party.[45] The Howey Test is used in order to identify whether the tokens issued in an ICO are utility based or a security.[46] If classified as a security, then the regulatory framework of SEC, including the licensing and disclosure requirements, will become applicable. The Commodities Futures Trading Commission,[47] which regulates the USA derivative markets, has adopted a liberal approach. It considers cryptocurrencies, like Bitcoin, as commodities which can be traded in public. Both the regulators agree that when the Howey Test is not met, the crypto-asset will be classified as a commodity.[48]

Financial crimes

The Financial Crimes Enforcement Network, a US agency for tackling financial crimes, has accepted cryptocurrency exchanges as money

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[44] Chairman Jay Clayton, 'Statement on Cryptocurrencies and Initial Coin Offerings' *U.S. Securities and Exchange Commission* (17 December 2018) <https://www.sec.gov/news/public-statement/statement-clayton-2017-12-11> accessed 25 October 2020.

[45] *SEC v WJ Howey Co* [1946] 328 US [293], [298], [299].

[46] M Todd Henderson and Max Raskin, 'A Regulatory Classification of Digital Assets: Toward an Operational Howey Test for Cryptocurrencies, ICOs, and Other Digital Assets' (2019) 2019 Colum Bus L Rev 443, 454.

[47] 'Bitcoin' *Commodities Futures Trading Commission* <https://www.cftc.gov/Bitcoin/index.htm> accessed 25 October 2020.

[48] Pandey, Priyadarshini and Seshadri (n 38).

transmitters.[49] Therefore, these exchanges have to abide by the Bank Secrecy Act of 1970.[50] The money services businesses, including cryptocurrency businesses, have to implement the anti-money laundering program, and need to conduct a risk assessment about their exposure to money laundering. Cryptocurrencies are considered as property and not currency by the Internal Revenue Service, and therefore, are taxed accordingly.[51]

ii. Japan

Japan has created a very conducive environment for cryptocurrency and witnessed a market boost in 2018. After allowing cryptocurrency transactions in 2017, the market saw the retail investors shift from leveraged foreign-exchange trading to leveraged cryptocurrency trading.[52] Japan's Financial Services Agency ("FSA")[53] regulates trading and exchanges. In order to provide exchange services in the country, the entity has to register as a Virtual Currency Exchange Service Provider with the FSA.[54] Thus, the

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[49] 'Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies' *Financial Crimes Enforcement Network* (13 March 2018) <https://www.fincen.gov/resources/statutes-regulations/guidance/application-fincens-regulationspersons-administering> accessed 25 October 2020.

[50] 'What is FinCEN? How Does It Regulate Virtual Currencies?' *Sygna* (2020) <https://www.sygna.io/blog/what-is-fincen/> accessed 25 October 2020.

[51] Mordecai Lerer, 'The Taxation of Cryptocurrency' *The CPA Journal* (January 2019) <https://www.cpajournal.com/2019/01/24/the-taxation-of-cryptocurrency/> accessed 25 October 2020.

[52] C. Edward Kelso, 'Japan's GDP Grows Due to Bitcoin Wealth Effect' *Bitcoin.com* (12 January 2018) <https://news.bitcoin.com/japans-gdp-grows-due-to-bitcoin-wealth-effect/> accessed 30 January 2021.

[53] Financial Services Agency, 'About FSA' <https://www.fsa.go.jp/en/about/index.html/> accessed 25 October 2020.

[54] Taro Awataguchi and Takeshi Nagase, 'Blockchain & Cryptocurrency Regulation 2021, Japan' *Global Legal Insights* (2020) <https://www.globallegalinsights.com/practice-areas/blockchain-laws-and-regulations/japan> accessed 25 October 2020.

registration requirements subject the businesses to the money laundering and terrorism financing laws of the country. Japan had to make its laws stricter after the incident of Mt. Gox in 2014[55] and of 2018 where Japan's cryptocurrency exchange, Coincheck, lost around $530 million to hacking.[56] As a result, both the Payment Services Act ("PS Act") and the Financial Instruments and Exchange Act ("FIEA") were amended.

The PS Act, which regulates cryptocurrency exchange businesses, requires them to establish security systems to protect their information.[57] In addition, it makes it necessary for businesses to manage the user's money separately than their own. The FIEA amendment brought within its purview the ICO and Security Token Offerings ("STO").[58] It also regulates any unfair activities involving crypto-asset derivatives. From the tax perspective, cryptocurrencies are classified as 'miscellaneous income' by the National Tax Agency and the investors are taxed at the rates of 15% - 55%.[59]

Japan is also the first country in the world to establish a self-regulatory body for cryptocurrency exchanges. The Japanese Virtual

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[55] McMillan (n 30).
[56] Reuters Staff, 'Tokyo-based cryptocurrency exchange hacked, losing $530 million: NHK' *Reuters* (26 January 2018) <https://www.reuters.com/article/japan-cryptocurrency/tokyo-based-cryptocurrency-exchange-hacked-losing-530-million-nhk-idUSL4N1PL4K9> accessed 30 January 2021.
[57] Awataguchi and Nagase (n 54).
[58] ibid.
[59] ibid.

Currency Exchange Association[60] was put in place to improve compliance with the regulations and give advice to unlicensed exchanges.

B. RESTRICTIVE

An overly cautious approach has been taken by countries like Bolivia and Vietnam which have banned cryptocurrencies outrightly.[61] Indirect restrictions have been placed in countries like China and Bangladesh whereby the government, by barring financial institutions within their borders from facilitating transactions involving cryptocurrencies, have effectively crippled its usage in the country.

i. China

The approach of the People's Republic of China towards cryptocurrency regulation, while being cautious, has been structured to achieve technological benefits without compromising on stability. Like many other jurisdictions, China has recognized the potential of blockchain technology[62] and aims to integrate blockchain-based solutions in areas ranging from credit reporting and supply chain management to e-commerce and the finance industry. However, cryptocurrencies do not receive the same treatment.

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[60] William Suberg, 'Japan Finally Gets Self-Regulatory Body for Cryptocurrency Exchanges', *CoinTelegraph* (24 April 2018) <https://cointelegraph.com/news/japan-finally-gets-self-regulatory-body-for-cryptocurrency-exchanges> accessed 25 October 2020.

[61] Library of Congress Report (n 34) 2.

[62] Arjun Kharpal, 'Chinese giants Huawei and Tencent join national group on blockchain after Xi's backing for the tech' *CNBC* (15 April 2020) <https://www.cnbc.com/2020/04/15/huawei-tencent-on-china-blockchain-national-committee.html> accessed 25 October 2020.

In 2013, several Chinese regulatory bodies issued a joint 'Notice of Preventing the Risk of Bitcoin', confirming that there is only one official currency recognized in the country and other cryptocurrencies like Bitcoin shall not be treated as "currency", but instead as a "virtual commodity". China also released a notice ordering commercial banks and payment institutions to stop providing services to the Bitcoin industry[63].

Therefore, while the act of holding or transferring cryptocurrencies has not been directly banned, its growth has been restricted by enforcing a separation between cryptocurrencies and the financial market. In 2017, seven central government regulators issued a joint announcement which banned ICOs in China.[64] According to the announcement, ICO financing that raises "so-called 'virtual currencies' such as Bitcoin and Ethereum" through the irregular sale and circulation of tokens is essentially public financing without approval, and hence illegal.

China implements strict capital controls which are supervised by the State Administration of Foreign Exchange and designed to limit the amount of capital outflow via foreign exchange and remittances abroad, by both corporations and individuals.[65] By their nature, cryptocurrencies do

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[63] Gerry Mullany, 'Notice on Further Strengthening the Bitcoin Risk Prevention Work' *The New York Times* (5 December 2013) <https://www.nytimes.com/2013 /12/06/business/international/china-bars-banks-from-using-bitcoin.html> accessed 25 October 2020.

[64] Saheli Roy Choudhury, 'China bans companies from raising money through ICOs, asks local regulators to inspect 60 major platforms' *CNBC* (4 September 2017) <https://www.cnbc.com/2017/09/04/chinese-icos-china-bans-fundraising-through-initial-coin-offerings-report-says.html> accessed 25 October 2020.

[65] 'Major Functions' *State Administration of Foreign Exchange* <https://www.safe.gov.cn/en/MajorFunctions/index.html> accessed 25 October 2020.

not fall within state control, and therefore, risk destabilising the system of capital controls. As per existing regulations, any corporate entity utilising cryptocurrency to transfer significant sums of money abroad would be deemed to violate these controls.[66]

China's strategy of increasing the use and importance of its sovereign currency has dominated the regulation of cryptocurrency in the nation.[67] While it cracks down on decentralized cryptocurrencies like Bitcoin, Ripple, etc., the government has been working on an official digital currency known as the Digital Currency Electronic Payment ("DCEP"), available via a mobile wallet and pegged 1:1 with fiat currency.[68] Preserving the authority of the Central Bank unlike existing cryptocurrencies, the DCEP is aimed at reducing handling charges, promoting financial inclusion in difficult circumstances like the coronavirus pandemic and making cross border payments seamless.

IV. THE INDIAN APPROACH

The Inter-Ministerial Committee, in its 2019 report, identified several issues with the usage of non-official digital currencies and arrived at the conclusion that VCs need to be banned in India. The main issues identified were, viz. the need to protect consumers from fraud and risks

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[66] Rosie Peper, 'China is moving to eliminate all cryptocurrency trading with a ban on foreign exchanges' *Business Insider* (6 February 2018) <https://bit.ly/2TyY3gn> accessed 25 October 2020.

[67] Hirooyuki Nishimura, 'China takes battle for cryptocurrency hegemony to new stage' *Nikkei Asia* (14 June 2020) <https://asia.nikkei.com/Spotlight/Comment/China-takes-battle-for-cryptocurrency-hegemony-to-new-stage> accessed 25 October 2020.

[68] Partha Ray and Shantanu Paul, 'Notes on a digital currency plan, made in China' *The Hindu* (23 May 2020) <https://www.thehindu.com/opinion/op-ed/notes-on-a-digital-currency-plan-made-in-china/article31653605.ece> accessed 25 October 2020.

due to price manipulation, the need to protect the financial system and economy from instability caused by a decentralized system and massive energy consumption, and the need to prevent criminal activity.[69] Keeping these issues in mind, the Committee submitted the Draft Bill which is indicative of India's regulatory approach at present.[70]

A. DRAFT BILL

The Draft Bill provides a broad definition for cryptocurrency –

> "*any information or code or number or token not being part of any Official Digital Currency, generated through cryptographic means or otherwise, providing a digital representation of value which is exchanged with or without consideration, with the promise or representation of having inherent value in any business activity which may involve risk of loss or an expectation of profits or income, or functions as a store of value or a unit of account and includes its use in any financial transaction or investment, but not limited to, investment schemes.*"[71]

The definition not only covers recognized cryptocurrencies, but also any virtual currency that may not even use cryptography or employ a decentralized system or DLT. It may cover 'Supercoins' on Flipkart, 'Frequent Flyer rewards' on IndiGo or any digital representation of value that is capable of exchange. This is problematic as the major issues identified in the Committee's report with respect to the protection of consumers and the economy mainly pertain to cryptocurrencies and thus, a

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[69] Department of Economic Affairs (n 11) 17.
[70] ibid 59.
[71] Banning of Cryptocurrency & Regulation of Official Digital Currency Bill 2019, s 2(1)(a).

widespread ban on all types of virtual currencies is a disproportionate measure. As a result of employing a broad definition, the Draft Bill prohibits the mining, generation, holding, sale, dealing in, issue, transfer, disposal or use of all VCs other than the official digital currency in the territory of India.[72]

It further provides that the Central Government may, in consultation with the Central Board of the RBI, approve digital rupee to be legal tender. Central Bank Digital Currency ("CBDC"), if introduced, has both advantages and disadvantages in its impact on the monetary policy and financial stability. A CBDC can result in lower transaction costs and increase technology efficiency by removing the need for intermediaries like banks. It will create an attractive ecosystem that will encourage economic growth and digital innovation.[73] On the other hand, CBDC being a virtual currency is also subject to price volatility and speculations. This can result in competition for commercial banks and may lead to banks increasing their deposit rates.[74] The CBDC has geographical limitation wherein it is only accepted in the issuing country[75] and poses other infrastructural challenges.[76] Therefore, the Committee recommended the constitution of a "Group" by the Department of Economic Affairs with the participation of the representatives of the RBI, Ministry of Electronics and Information

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[72] ibid ss 6 and 7.

[73] A Koumbarakis and G. Dobrauz-Saldapenna,'Central bank digital currency: Benefits and drawbacks' (2019) SSRN Electronic Journal1, 8 <http://dx.doi.org/10.2139/ssrn.3429037> accessed 31 January 2021.

[74] O Olson, 'Central bank digital currencies' (2018) 1 Norges Bank Papers 15.

[75] A Wadsworth, 'The pros and cons of issuing a central bank digital currency' (2018) 81(7) Reserve Bank of New Zealand Bulletin 1, 9.

[76] ibid.

Technology and Department of Financial Services for the examination and development of an appropriate model for digital currency in India.[77] This "Group" has not been formed yet.

B. NEED FOR A PERMISSIVE FRAMEWORK

Reviewing the recommendations of the Committee and the approach adopted in the Draft Bill leads to the conclusion that there are some aspects that are still unresolved when it comes to regulation. Although a complete ban has been recommended, it would be prudent for the government to reconsider the economic and legal factors.

First, a report written by Coinpaprika and OKEx observed that the Indian cryptocurrency market is set to gain a considerable global market share starting from 2020.[78] The report attributes this growth projection to three factors, viz. cross border remittances, concerns over stability of the Indian rupee and current regulatory environment post the *Cryptocurrency judgment*. Several crypto exchanges have reported huge growth in trading volumes and new users during the pandemic and nationwide lockdown.[79] There is an overall growth in this market with new cryptocurrency

[77] Department of Economic Affairs (n 11) 45.
[78] 'Mapping out India's Blockchain Ecosystem – Coinpaprika & OKEX report' *OKEX* (26 May 2020) <https://www.okex.com/academy/en/mapping-out-indias-blockchain-ecosystem-coinpaprika-okex-report> accessed 25 October 2020.
[79] Kevin Helms, 'India to Significantly Increase Crypto Market Share This Year: Report' *Bitcoin* (1 June 2020) <https://news.bitcoin.com/india-significantly-increase-crypto-market-share/> accessed 25 October 2020.

exchanges being launched,[80] global exchanges expanding into the country, and increasing investment in Indian cryptocurrency start-ups.

Second, a complete ban does not ensure consumer protection. It would instead push the agencies dealing with such transactions under the radar and equate genuine transactions to illegal payments in unregulated markets. It is a reaction akin to blaming the tool for the crimes committed by a human using the tool. Since the potential effect of new technology is scalable for benefit as well as harm, only strong governance, regulation, and education can help reduce the dangers.[81]

Third, even China, which has completely banned cryptocurrencies, has acknowledged its existence as a virtual asset and even allowed for the inheritance of virtual assets such as bitcoin in its new Civil Code.[82] Therefore, even if it is declared unfeasible to allow the trade and use of cryptocurrency as a medium of exchange without being legal tender, there is still scope for the use of cryptocurrency as assets or commodities.

Fourth, by regulating cryptocurrencies and clearly identifying the categories of use, the transactions that could previously slip out of the purview of a regulatory authority will be monitored and as a result, the RBI will be in a better position to protect the investors and consumers.

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[80] Kevin Helms, 'New Cryptocurrency Exchanges Launch in India as Businesses Seek Answers From RBI' *Bitcoin* (8 May 2020) <https://news.bitcoin.com/new-cryptocurrency-exchanges-india/> accessed 25 October 2020.
[81] Don Tapscott and Alex Tapscott, *Blockchain Revolution* (Portfolio Penguin 2018) 276.
[82] Kevin Helms, 'China Passes Law Protecting Cryptocurrency Inheritance' *Bitcoin* (28 May 2020) <https://news.bitcoin.com/china-law-cryptocurrency-inheritance/> accessed 25 October 2020.

Fifth, a working permissive model has been implemented in Japan and the USA, as explained earlier. Accordingly, these countries have been able to harness the technology in a better fashion while addressing security threats like hacking and fraud.

A comprehensive legislation for the regulation of cryptocurrencies in cohesion with an enacted data protection law would bring a largely unregulated self-sustaining economy within the fold of the RBI and would ensure security.

V. ENVISIONING THE INDIAN MODEL

While looking at the regulatory approaches adopted by countries around the world, various trends emerge. Essentially, the Indian government will have to tackle two main aspects while framing a national strategy: *first*, the classification of cryptocurrency, and *second*, the potential regulatory challenges.

A. CLASSIFICATION OF CRYPTOCURRENCY ACTIVITIES

The regulatory framework for cryptocurrencies depends on the nature of the activity and its classification. It is important that cryptocurrency is classified because it helps the regulators to fit it in the existing framework or create a new one. Regulators around the world are largely attempting to classify cryptocurrency as a "currency, commodity, or security".[83] Cryptocurrencies are complex, and people use them in different

[83] J Riley Key, Lee Gilley and Erin Jane Illman, 'Cryptocurrencies: Currency, Commodity, Security or Something Else?' *Financial Services Perspectives* (5 February 2019) <https://www.financialservicesperspectives.com/2019/02/crytpocurrencies-currency-commodity-security-or-something-else/> accessed 25 October 2020.

ways. Depending on the nature of its activity, it can even be classified as all three. The original cryptocurrencies were conceived as an alternative to money but over the past decade, they have assumed different shapes and utility values.[84]

i. Currency

Cryptocurrency can easily be classified as a currency because it acts as a medium of exchange, it is a unit of account, and it is capable of storing value.[85] However, in practicality, it does not behave like currency. Due to the fluctuations in its value, traders choose the time of sale of goods and services based on when the specific cryptocurrency peaks. Such vast fluctuations do not happen for normal currencies and thus, the price instability makes it unsafe as a medium of exchange.

ii. Commodity

VCs are increasingly being classified as a commodity and are sometimes referred to as digital gold.[86] Commodities can be traded in exchanges and their value is determined by the supply and demand. They are regarded as interchangeable units which have the same core properties and are objects with utility.[87] Some cryptocurrencies seem to fit these

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[84] *Cryptocurrency judgment* (n 6) para 6.54.

[85] CMC Germany, 'Cryptocurrency as a means of payment' *Lexology* (18 January 2018) <https://www.lexology.com/library/detail.aspx?g=83d9e851-5263-411d-ab00-b5bee8707fbd> accessed 25 October 2020.

[86] Jeffrey Gogo, 'Bitcoin to Be Digital Gold in 2020, Says Bloomberg Report' *Bitcoin.com* (23 April 2020) <https://www.luno.com/learn/en/article/bitcoin-as-digital-gold> accessed 25 October 2020.

[87] Team Luno, 'Cryptocurrency, Is It A Security, Currency or Asset?' *Medium* (8 November 2018) <https://medium.com/luno/cryptocurrency-is-it-a-security-currency-or-asset-1785acb1e60f> accessed 25 October 2020.

characteristics as they can be bartered, and the value is determined by market expectations. It, therefore, has an exchange value. There is a certain overlap between these two categories. If regular currency, like the Indian Rupee, is used to buy something then it acts as a mode of payment. However, when traders sell it in the exchange market depending upon the rate fluctuations, it acts as a commodity. The same is the case with cryptocurrencies.

iii. Securities

Cryptocurrencies can be classified as securities because just like stocks, the owner makes money if it rises in value and loses out if it drops.[88] The distinction lies in the fact that cryptocurrencies are decentralised. However, in the case where ICOs are used to raise funds by issuing digital tokens, they are released by a company and can therefore be regulated as stocks.

Different regulators around the world have adopted different definitions for cryptocurrency leading to opposite views from the courts across jurisdictions.[89] They have classified cryptocurrency into different categories ranging from property to commodity to non-traditional currency to payment instruments to money to funds. They have adopted this classification depending upon the context and the statute involved in the case.

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[88] ibid.

[89] *Cryptocurrency judgment* (n 6) para 6.71.

In the Indian context, the SC has ruled that cryptocurrencies can be regulated by the RBI. It held that virtual currencies can be classified as "currency".[90] Section 2(h) of the Foreign Exchange Management Act, 1999 defines currency as "*all currency notes, postal notes.... bills of exchange and promissory notes, credit cards or other such similar instruments as may be notified by the Reserve Bank.*"[91] The SC observed that bills of exchange, cheques are also not currencies but still operate as a valid mode of discharge of debt. Therefore, even virtual currencies can be classified as currency falling under the category of "other similar instruments" since it acts as money under certain circumstances.[92]

The SC has, however, acknowledged that the nature of virtual currencies is ever-changing. While it seems that the cryptocurrency exchanges will be regulated by the RBI, it will be open to other regulators to bringing crypto transactions under their purview depending upon the nature of the activity. The Securities and Exchange Board of India (SEBI) might recommend the amendment of the definition of "security" to bring within its scope the cryptocurrency tokens issued through the ICOs.[93] In such a case, the regulation and compliances are likely to be similar as initial public offerings.

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[90] ibid para 6.86 and 6.111.
[91] The Foreign Exchange Management Act 1999, s 2(h).
[92] *Cryptocurrency judgment* (n 6) para 6.86.
[93] Securities Contracts (Regulation) Act 1956, s 2(h).

B. POTENTIAL REGULATORY CHALLENGES

The Committee's report clearly highlights the risks associated with cryptocurrencies.[94] There is potential for money laundering and terrorism funding due to the anonymous or pseudonymous nature of owning/trading in cryptocurrencies. There are other security issues as well due to the irreversible nature of transactions and the irretrievable nature of a lost private key or wallet. Additionally, ignoring the impact of cryptocurrencies on the income of individuals and companies or inefficiently addressing the same by haphazardly applying general taxation laws could lead to adverse effects like double taxation. Considering these issues, the stark challenges before the government are taxation, prevention of crimes and technological barriers.

i. Taxation

The tax regime on cryptocurrencies has been in an ambiguous space since the *Cryptocurrency judgment*. There is a lack of clarity on the status of cryptocurrency exchanges for the purposes of availing banking services and the status of cryptocurrency itself in the nation. As highlighted earlier, the classification of cryptocurrency will impact how it is regulated. The nature of the transaction (income or expenditure) will determine whether it will be taxed under the Income Tax Act 1961 ("ITA") or the Central Goods and Services Tax Act 2017 ("CGST Act") respectively. Countries around the world have put the cryptocurrencies in the bracket of either goods/property or currency for tax purposes. Under the ITA, as a

[94] Department of Economic Affairs (n 11) 27.

good/property, it will fall within the head of 'Profit and Gains from Business and Profession'[95] (in case of goods) or 'Income from Capital Gains'[96] (in case of property), depending upon the purpose of the transaction. As a currency, it will not be subject to tax. This is because 'money' or 'currency' does not fall within the definition of 'income' under the ITA nor as 'goods' or 'services' under the CGST Act.

ii. Prevention of Crime

Due to the anonymity offered to those who hold and trade in cryptocurrency and decentralization, there is scope for terrorism funding and money laundering. Legitimate transactions follow regulatory requirements for identity verification and sourcing of funds, and exchanges that facilitate transactions are required to comply with anti-money laundering laws. However, cryptocurrency allows criminals to hide the origin of funds. To counter this, countries like Canada and Japan have brought their users and intermediaries within the purview of their anti-money laundering and prevention of terror laws.[97] The Draft Bill addresses this problem by bringing any act of mining, generating, issuing, holding, using, selling, transfer and/or disposal of cryptocurrency as defined in the legislation, within the ambit of the Prevention of Money Laundering Act 2002 ("PMLA") as a "scheduled offence". This approach treats the simple act of holding cryptocurrency as a major economic offence akin to money laundering, and any value so derived through such acts, as the "proceeds of

[95] The Income Tax Act 1961, s 28.
[96] ibid s 45.
[97] Department of Economic Affairs (n 11) 33.

crime" under section 2(u) of PMLA. Instead, India can adopt a permissive approach by imposing obligations under Section 12 of PMLA as per which an obligation is imposed on banking companies, financial institutions, and intermediaries to maintain records regarding such transactions.[98] At the international level, the Financial Action Task Force ("FATF") has urged countries to "*identify, assess, and understand the money laundering and terrorist financing risks emerging from virtual asset activities*" and adopt a risk-based approach.[99]

iii. Technological Barriers

As highlighted by the Committee's report, there are technological challenges to the acceptance of cryptocurrencies as well.[100] For example, blockchain transactions are much slower than existing digital financial services to ensure security and prevention of tampering. The transaction processing capacity for an average sized block is 3.3 to 7 transactions per second (TPS).[101] Financial services provider, Visa Inc. conducts 1700 TPS over a total claim of 150 million transactions per day.[102] Therefore, this is a

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[98] Anukriti Priya, 'Why the government should regulate and not ban cryptocurrency' *Inventiva* (2 July 2020) <https://www.inventiva.co.in/trends/anukriti/why-the-government-should-regulate-and-not-ban-cryptocurrency/> accessed 25 October 2020.
[99] Financial Action Task Force (n 21).
[100] Department of Economic Affairs (n 9) 27.
[101] Kyle Croman and others, 'On Scaling Decentralized Blockchains' in: Jeremy Clark and others (eds) *Financial Cryptography and Data Security: FC 2016* (Lecture Notes in Computer Science, vol 9604 Springer, 2016) 3 <https://doi.org/10.1007/978-3-662-53357-4_8> accessed 25 October 2020.
[102] L Kenny, 'The Blockchain Scalability Problem & the Race for Visa-Like Transaction Speed' *Towards Data Science* (30 January 2019) <https://towardsdatascience.com/the-blockchain-scalability-problem-the-race-for-visa-like-transaction-speed-5cce48f9d44> accessed 25 October 2020.

very pertinent issue regarding scalability of cryptocurrencies, should they be accepted as legal tender.

However, this issue is slowly being addressed with innovative solutions only due to use and regulation. The Lightning Network which operates as a payment protocol over blockchain transactions, allows users to create payment channels between any two parties to ensure that transactions between them are instant and cost effective.[103] This serves as a solution to speed up transactions and ensure the same level of security. A complete ban on cryptocurrencies would not promote such solutions to a developing technology and would be contradictory to the country's vision to promote innovators and pioneers in digital manufacturing and development.

VI. CONCLUSION: THE WAY FORWARD

A complete ban on cryptocurrency use is neither feasible nor efficient, keeping in mind the ambitions of the nation. The significance of crypto-assets in relation to the growth of blockchain technology has been observed by National Association of Software and Service Companies, which proposed a regulatory sandbox to address the risks,[104] and by the report of the Steering Committee on Fintech related issues, which has commented on the inevitable role of cryptocurrencies and ICOs in

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[103] Joseph Poon and Thaddeus Dryja, 'The Bitcoin Lightning Network: Scalable Off-Chain Instant Payments' (2016) <https://lightning.network/lightning-network-paper.pdf> accessed 25 October 2020.

[104] Chawm Ganguly, 'Banning Cryptocurrencies is not the solution, a regulatory framework must be developed: NASSCOM' *Core Sector Communique* (30 July 2019)<https://www.corecommunique.com/banning-crypto-currencies-is-not-the-solution-a-regulatory-framework-must-be-developed-nasscom/> accessed 25 October 2020.

transforming the global fintech landscape.[105] NITI Aayog, the policy think tank of the Government of India, published a discussion paper which recognized and analysed the areas that can be greatly benefitted by the use of blockchain technology.[106] Part 2 of the discussion paper is set to explore specific recommendations that would enable the growth of the blockchain ecosystem in the country. That said, at present, the legal framework around blockchain and cryptocurrency is still uncertain and needs to be resolved at the earliest, to ensure appropriate actions are taken.

Different regulators should work together and classify cryptocurrency activities in order to bring them under regulatory purview. A security under the Securities Contracts (Regulation) Act 1956, includes "*shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate*."[107] There is an ambiguity as to whether crypto tokens and other crypto assets fit within this definition. These tokens may come under the control of SEBI if they are issued as ICOs or in collective investment schemes. Even with such uncertainty around cryptocurrency-related instruments, the Income Tax Department, in some cases, has issued notice and initiated proceedings against businesses dealing with cryptocurrencies. The chairman of the

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[105] Subhash Chandra Garg and others, 'Report of the Steering Committee on Fintech Related Issues' *Department of Economic Affairs, Ministry of Finance, Government of India* (2019) <https://dea.gov.in/sites/default/files/Report%20of%20the%20Steering%20Committee%20on%20Fintech_1.pdf> accessed 25 October 2020.

[106] Arnab Kumar and others, 'Blockchain: The India Strategy - Towards Enabling Ease of Business, Ease of Living and Ease of Governance' *NITI Aayog* (January 2020) <https://niti.gov.in/sites/default/files/2020-01/Blockchain_The_India_Strategy_Part_I.pdf> accessed 25 October 2020.

[107] SCRA (n 93) s 2(h).

Central Board for Direct Taxes has stated that Bitcoin-related income will be taxed.[108] If the existing laws are applied without considering the challenges highlighted earlier, those who deal with crypto-assets may be taxed twice under the CGST Act, as there is a tax liability on the purchase of the asset and subsequently, at the time of exchange for other goods and services subject to GST.[109]

The Inter-Ministerial Committee recommended the ban due to the regulatory concerns surrounding VCs. These risks have been addressed by the international community at the G20 leaders' summit at Osaka, Japan in 2019, where world leaders of the group and India affirmed their commitment to the FATF standards.[110] One major recommendation has been "*to manage and mitigate the risks emerging from virtual assets*" by ensuring virtual asset service providers like cryptocurrency exchanges are regulated through licensing and registration requirements, alongside effective monitoring systems for preventing money laundering and combatting financing of terrorism.[111] All G20 nations, while recognising the risks associated with VCs have chosen not to put an outright ban on crypto-

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[108] 'Bitcoin earnings to be taxed, investors to face action for hiding income, says CBDT chairman' *Business Today* (11 February 2018) <https://www.businesstoday.in/current/policy/bitcoin-investment-trade-earning-under-tax-income-virtaul-currency-tax-on-bitcoin/story/269981.html> accessed 25 October 2020.

[109] Nishith Desai and others, 'Building a successful blockchain ecosystem in India: Regulatory approaches to cryptoassets' *Nishith Desai & Associates,* (December 2018) <https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Building-a-Successful-Blockchain-Ecosystem-for-India.pdf> accessed 25 October 2020.

[110] 'G20 Osaka Leaders' Declaration' *European Council* (29 June 2019) <https://www.consilium.europa.eu/media/40124/final_g20_osaka_leaders_declaration.pdf> accessed 25 October 2020.

[111] Financial Action Task Force (n 21).

trading.[112] Countries like the USA and Japan have chosen to deal with these by extending their existing laws to cryptocurrency related activities. Even China, which has taken a strict approach, issued severe restrictions on the use of VCs but none of these amount to an outright prohibition like the one recommended in the Draft Bill. Considering the economic and legal factors, a permissive approach seems like the most prudent model for India. It will not only facilitate economic growth but will ensure that illegal activities associated with the use of cryptocurrencies are brought under regulatory purview.

In light of the *Cryptocurrency judgment* and amidst reports of the RBI considering a review,[113] it is open to the government to either ban or regulate cryptocurrencies in India. Reports[114] point to the fact that the government is in discussion with the RBI to bring out a regulatory framework.[115] The comparative study and analysis carried out in the previous sections indicate that it would be pragmatic for the Indian government to regulate cryptocurrencies in a permissive manner, in order

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112 Jaideep Reddy, 'The Case for regulating crypto-assets: a constitutional perspective' (2019) 15(2) IJLT 417.

113 Saloni Shukla and Sachin Dave, 'RBI to seek review of Supreme Court order on cryptocurrency' *ET Prime* (6 March 2020) <https://economictimes.indiatimes.com/news/economy/policy/rbi-to-seek-review-of-supreme-court-order-oncryptocurrency/articleshow/74503345.cms> accessed 25 October 2020.

114 Paddy Baker, 'India's Rumored Crypto Ban May Be Overblown, Say Industry Pros' *Coindesk* (15 June 2020) <https://www.coindesk.com/india-lawmakers-figuring-crypto-regulation> accessed 25 October 2020.

115 Kevin Helms, 'Indian Government Engages RBI to Discuss Cryptocurrency Regulation' *Bitcoin.com* (21 March 2020) <https://news.bitcoin.com/indian-cryptocurrency-regulation/#:~:text=The%20Indian%20government%20has%20been,providing%20recommendations%20for%20the%20country> accessed 25 October 2020.

to realize the potential benefits of DLT in the financial sector while mitigating the acknowledged risks.

Sahil Kanuga & Shraddha Bhosale, 'Mediation of Commercial Disputes in India' (2021) 7(2) NLUJ L Rev 282

MEDIATION OF COMMERCIAL DISPUTES IN INDIA

Sahil Kanuga[*] *& Shraddha Bhosale*[#]

ABSTRACT

Resolving commercial disputes in India can often be harder than one may imagine. While it is not difficult to file a civil proceeding in India, it is a well-known fact that courts in India are clogged with a burgeoning number of cases. It is not unusual to see cases linger unresolved for even decades at a time. Though the reasons for such delays is a subject beyond the purport of this paper, such delays do not work for commercial disputes where time is often equivalent to money. This led to an increased adoption of alternative dispute resolution methods, particularly arbitration. Arbitration provided an attractive alternative to the courts, where once adopted was binding on the parties and the award of the arbitral tribunal was equivalent to a decree of the court. However, over time, arbitration has become expensive, complex, and time-consuming. While it is still considered a better option than traditional court litigation, a void was felt for effective dispute resolution for commercial disputes, where the point in issue was often short and simple.

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While mediation is certainly not a new method to resolve disputes, of late, it often finds its way into legal chatter for such matters. This could probably be attributed to two reasons, first, the United Nations Convention on International Settlement Agreements resulting from Mediation to which India is a signatory, and second, the lockdown imposed to control the spread of COVID-19.

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I. INTRODUCTION TO THE SINGAPORE CONVENTION

The United Nations Convention on International Settlement Agreements resulting from Mediation ("Singapore Convention")[1] provides the framework for enforceability of international settlement agreements, resulting from mediation, to conclude commercial disputes. The Singapore Convention aims to facilitate international trade, and has been signed by 53 countries to date, including India.[2] It entered into force on 12 September 2020. This level of cross border recognition and enforcement of mediated settlements accorded through the Singapore Convention had made mediation an attractive option for commercial disputes, albeit it remains a non-binding method of dispute resolution and consequently, depends on the volition of the parties involved. Several recent deliberations have revolved around the issue of whether and when will India have its own mediation-specific legislation in pursuance of the Singapore Convention.[3] The provisions of such legislation will definitely play a crucial role in deciding the attractiveness of mediation as an effective option to resolve commercial disputes.

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[1] 'United Nations Convention on International Settlement Agreements Resulting from Mediation' United Nations (29 April 2019) <https://treaties.un.org/doc/Treaties/2019/05/20190501%2004-11%20PM/Ch-XXII-4.pdf> accessed 24 February 2021.

[2] ibid.

[3] Ajmer Singh, 'Supreme Court Forms Committee to Draft Mediation Law, Will Send to Government' (2020) The Economic Times (19 January 2020) <https://economictimes.indiatimes.com/news/politics-and-nation/supreme-court-forms-committee-to-draft-mediation-law-will-send-to-government/articleshow/73394043.cms?from=mdr> accessed 24 February 2021.

II. IMPACT OF COVID-19

Performance of various contracts was adversely affected because of several factors such as the nationwide lockdown to curb the spread of COVID-19, followed by several state-imposed lockdowns in the country. Even globally, the repercussions of similar lockdowns hit the ability of parties to adhere to the terms of their agreements. Delays and breaches of contract were the order of the day resulting in innumerable disputes and claims. While this may have come within the ambit of a *force majeure* clause in some contracts, the defaults were too large and widespread to consider traditional litigation; the sheer number of disputes would have meant a complete breakdown of the global dispute resolution system. A more practical approach was necessary considering that a pandemic was beyond either party's control. Several parties considered mediation as a better suited dispute resolution mechanism in such cases.

Considering the growing popularity of mediation, it is worthwhile to explore the current status of commercial mediation in India. Through this paper, the authors intend to draw the readers' attention to existing legal provisions pertaining to mediation in the Code of Civil Procedure 1908 ("CPC") and the Arbitration and Conciliation Act 1996 ("ACA"). Further, the authors present a holistic picture including mediation related provisions in multiple distinct legislations, such as the Commercial Courts Act 2015 and the Micro, Small, and Medium Enterprises Development Act 2006 ("MSMED Act").

In this paper, mediation and conciliation are to be understood as being synonymous,[4] especially in the context of their reference in a statute unless stated otherwise. In practice, however, a differentiation between the two can certainly be made based on the nature of the role played by the neutral party in the proceedings, as is the case in most jurisdictions in the world. With the entry of a new legislation for mediation in the near future, one would expect the gap between mediation and conciliation to widen and both will find their own space within the four corners of the law.

III. MEDIATION UNDER THE CODE OF CIVIL PROCEDURE 1908 AND THE ARBITRATION AND CONCILIATION ACT 1996

The insertion of Section 89 in the CPC and enactment of the ACA marked the beginning of commercial mediation in India. The wording of Section 89 seemed to distinguish between mediation and conciliation as entirely separate mechanisms, until in the case of *Afcons Infrastructure Ltd v. Cherian Varkey Construction Co Pvt Ltd*,[5] the Supreme Court of India (SC) settled, *inter alia*, several procedural aspects of a reference under the aforesaid Section 89.

Section 89 read with Rule 1A of Order 10 of the CPC empowers a court to refer a dispute before it of suitable category to arbitration, conciliation, mediation, Lok Adalat settlement or judicial settlement. The SC clarified that of these five modes of alternate dispute resolution, arbitration and conciliation are to be governed by the ACA; mediation and

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[4] *Afcons Infrastructure Ltd and Ors v Cherian Varkey Construction Co Pvt Ltd and Ors* [2010] 7 SCALE 293.
[5] ibid.

Lok Adalat settlement are to be governed by the Legal Services Authority Act, 1987 and judicial settlement is governed by such procedure as may be prescribed in that regard.[6]

Reference to conciliation under Section 89 can be made by a court only if all parties to the dispute consent to it and agree to undergo assisted negotiation with the help of a neutral third party, either by an agreement or by the process of invitation. Acceptance has to be provided in accordance with Section 62 of the ACA, which is followed by the appointment of conciliator(s) under Section 64 of the ACA. If the parties reach a settlement, the concerned court, which made the reference, can scrutinizes such settlement and make a decree in terms of such settlement thereby making it enforceable.

While there is no direct legislation dealing specifically with mediation yet, private commercial mediation in India is usually considered as being governed by Part III of the ACA, which deals with conciliation of disputes arising out of a legal relationship, whether contractual or not, and to all proceedings relating thereto. To initiate mediation under the ACA, a party is required to send a written invitation to that effect to the other party and on acceptance by the other party, the mediation can begin.[7] If the other party declines or does not respond, the mediation will be a non-starter.[8] The parties can agree to appoint a maximum of three mediators to act jointly.[9] Such an appointment can be mutual or through the assistance of a

[6] ibid.
[7] Arbitration and Conciliation Act 1996, s 62.
[8] ibid.
[9] ibid s 63.

suitable institution.[10] The mediator(s) will not be bound by the CPC or the Indian Evidence Act 1872.

The ACA provides the procedure to be followed for a settlement agreement when it appears to the conciliator that there exist elements of a settlement that may be acceptable to the parties. The *first* stage of the procedures entails formulation of the terms of a possible settlement by the conciliator. Then the conciliator is required to submit such terms to the parties for their observation, and further, the conciliator may reformulate the terms of a possible settlement in the light of such observations. *Second*, if the parties reach an agreement on a settlement of the dispute, they may draw up and sign a written settlement agreement. If requested by the parties, the conciliator may draw up, or assist the parties in drawing up the settlement agreement. Upon signing the settlement agreement, it shall be final and binding on the parties and persons claiming under them. *Finally*, the conciliator shall authenticate the settlement agreement and furnish a copy thereof to each of the parties.[11]

The ACA accords same status and effect to the settlement agreement as if it were an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under Section 30 of the ACA.[12] The pre-condition is that all the essentials of the settlement agreement are met under Section 73.[13]

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[10] ibid s 64.
[11] ibid s 73.
[12] ibid s 74.
[13] *Mysore Cements Ltd v Svedala Barmac Ltd* [2003] 10 SCC 375.

Further, the ACA safeguards confidentiality and requires the conciliator and the parties to keep all matters relating to the conciliation proceedings as well as the settlement agreement confidential, except where its disclosure is necessary for purposes of implementation and enforcement.[14] In addition to confidentiality, Section 81 of the ACA makes the following inadmissible as evidence in any subsequent arbitral or judicial proceedings:

- views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;

- admissions made by the other party in the course of the conciliation proceedings;

- proposals made by the conciliator; and

- the fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.[15]

Effectively, litigants before an Indian court for adjudication of a civil suit can initiate mediation at any time before framing of issues of such suit. Even after making a reference under Section 89 of the ACA, the matter does not go out of the Court's purview. If the parties settle during such mediation, the Court before which the suit was originally pending can decree the suit in terms of such settlement on scrutiny thereof. If parties do not settle, the Court can proceed with framing of issues in the suit. Moreover, even if the Court has begun with its trial and the recourse under Section 89 is no longer available, nothing prevents the parties from

[14] Arbitration and Conciliation Act 1996, s 75.
[15] ibid s 81.

engaging in mediation privately, and if they settle, they still have the ability to either withdraw the suit or have it decreed in terms of their settlement.

In case where a dispute has arisen but parties have not yet filed a suit, parties can agree to mediate either under the rules of an institution offering mediation services or in an *ad hoc* manner under the provisions of the ACA as stated above. The parties can mutually appoint a mediator of their choice and if they settle their dispute, having followed the applicable provisions of the ACA, it will result in settlement agreement having enforceability akin to an arbitral award/decree.

IV. MEDIATION UNDER THE COMMERCIAL COURTS ACT 2015

The Commercial Courts Act 2015 ("CCA") was enacted to constitute commercial courts for adjudicating commercial disputes.[16] Section 2(1)(c)[17] defines a 'commercial dispute' as:

> "*A dispute arising out of- i) ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents; ii) export or import of merchandise or services; iii) issues relating to admiralty and maritime law; iv) transactions relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same; v) carriage of goods; vi) construction and infrastructure contracts, including tenders; vii) agreements relating to immovable property used exclusively in trade or commerce; viii) franchising agreements; ix)*

[16] Commercial Courts Act 2015, preamble.
[17] ibid s 2(1)(c).

distribution and licensing agreements; x) management and consultancy agreements; xi) joint venture agreements; xii) shareholders agreements; xiii) subscription and investment agreements pertaining to the services industry including outsourcing services and financial services; xiv) mercantile agency and mercantile usage; xv) partnership agreements; xvi) technology development agreements; xvii) intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semiconductor integrated circuits; xviii) agreements for sale of goods or provision of services; xix) exploitation of oil and gas reserves or other natural resources including electromagnetic spectrum; xx) insurance and re-insurance; xxi) contracts of agency relating to any of the above; and xxii) such other commercial disputes as may be notified by the Central Government.

Explanation. - A commercial dispute shall not cease to be a commercial dispute merely because - (a) it also involves action for recovery of immovable property or for realisation of monies out of immovable property given as security or involves any other relief pertaining to immovable property; (b) one of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions."

Evidently, the definition of '*commercial dispute*' is quite broad and all-encompassing. Subsequently, a 2018 Amendment to the CCA was promulgated for, *inter alia*, the insertion of Section 12A titled '*Pre-institution mediation and settlement*'.[18] The said provision mandates that a

[18] ibid s 12A.

plaintiff/applicant seeking to institute a suit for adjudication of a commercial dispute under the CCA shall first be required to initiate pre-institution mediation for the same dispute unless the plaintiff/applicant intends to seek urgent interim relief under the said Act. The Central Government has also notified the Commercial Courts (Pre-institution Mediation and Settlement) Rules 2018 that will govern such mediation proceedings under the CCA.

On making of an application to the concerned Authority (as notified by the Central Government) for initiation of pre-institution mediation, the said Authority will issue a notice to the opposite party to appear and give consent to participate in the mediation.[19] In the absence of response or refusal to participate from such opposite party to the said notice, the Authority shall treat the mediation to be a non-starter and prepare a report to that effect.[20] Should the opposite party agree to participate in such mediation, then such Authority shall complete the process of mediation within three months from the date of application by the applicant to initiate mediation.[21] However, with the parties' consent, the said period may be extended by two more months.[22]

Any settlement between the parties shall be reduced to writing and shall be signed by the parties to the dispute and the mediator.[23] The settlement arrived at under Section 12A of the CCA shall have the same

[19] ibid s 3(1).
[20] ibid s 3(4).
[21] ibid s 3(8).
[22] ibid.
[23] ibid s 7(vii).

status and effect as if it is an arbitral award on agreed terms under Section 30(4) of the ACA.[24] The provision further states that the period during which the parties remained occupied with the pre-institution mediation shall not be computed for the purpose of limitation under the Limitation Act 1963.[25]

The parties, their authorized representatives or counsel, and the mediator are bound to maintain the confidentiality of the proceedings. Stenographic, audio or video recording of the mediation sessions is not permitted.

In effect, pre-institution mediation under the CCA continues to remain a voluntary process. Only initiation of the process of mediation is mandatory before institution of a suit, and the choice is left with the opposite party to decide whether to participate in such proceedings. The provision is a well-intended nudge and offers a quick, cost-effective dispute resolution mechanism to disputants. A potential pitfall of this provision is lack of the parties' ability to choose their mediator. It is well known that a mediation is only as good as the mediator. It is also possible that the opposite party may use pre-institution mediation as a tool to somewhat protract initiation of a suit by the applicant. However, largely, on balance, the advantages outweigh the disadvantages.

[24] ibid s 12A(5).
[25] ibid s 12A(3).

V. A PEEK INTO THE STATISTICS

It is fair to expect that the statistics would show this mechanism to be a tremendous success. As statistics on a national scale appear to be lacking, we have taken the data available for the states of Maharashtra and Karnataka as examples. Considering the numbers in Maharashtra, it appears that in the period between July 2018 and March 2019, 1,168 applications were received to initiate pre-institution mediation.[26] Out of these 1,168 applications, the opposite party refused to participate or never responded in 104 cases ("non-starter" cases); and 28 cases underwent the process of mediation of which only 2 cases were settled.[27]

Subsequently, data available for the first quarter of 2020 in Maharashtra shows that 1,259 applications were received to initiate pre-institution mediation.[28] Out of these, 970 cases were "non-starter"; and 44 cases underwent the process of mediation of which only 4 cases were settled.[29] Lastly, data available for the second quarter of 2020 in Maharashtra shows that only 158 applications were received to initiate pre-institution mediation of which only 1 case underwent the process of mediation and does not appear to have been settled. [30] In all of the above data, there seems to be no information available of the outcome of the

[26] Maharashtra State Legal Services Authority, 'Statistical Data' (2020) MSLSA <https://legalservices.maharashtra.gov.in/1122/Statistical-Data> accessed 24 February 2021.
[27] ibid.
[28] ibid.
[29] ibid.
[30] ibid.

balance cases in respect of which applications to initiate mediation were filed.

However, this sudden decrease in applications can be attributed to the severe outbreak of COVID-19 in the state during this period. In another example, the data available for Karnataka for the period from January 2020 to March 2020 shows that 382 applications were received during this period. Data shows that 209 cases were 'non-starters', 16 cases were referred to mediation, and only 1 case was settled. [31]

The rather grim statistical data available is perhaps indicative of the fact that voluntary mediation has not taken off as desired, and measures need to be introduced to create awareness to assist parties in making informed decisions about choosing or rejecting mediation as a dispute resolution mechanism.

VI. MEDIATION UNDER THE MICRO, SMALL AND MEDIUM ENTERPRISES DEVELOPMENT ACT 2006

The MSMED Act was enacted with a view to facilitate the promotion, development, and competitiveness of enterprises classified as micro, small, and medium under the said Act.[32]

As part of the measures framed for recovery of delayed payments to micro and small enterprises, the provisions under Chapter V of the MSMED Act allows for a reference to be made by either party to the 'Micro

[31] Karnataka State Legal Services Authority, 'Statistical Data' (2021) KSLSA <https://kslsa.kar.nic.in/NLA.asp#> accessed 24 February 2021.
[32] Micro, Small, and Medium Enterprises Development Act 2006, preamble.

and Small Enterprises Facilitation Council' ("MSEFC") for resolution of a dispute between a buyer and a seller. On receipt of such a reference, the MSEFC either itself conducts conciliation or it can seek the assistance of any institution or centre providing alternate dispute resolution services by making a reference to such an institution or centre for conducting conciliation.[33] Sections 65 to 81 of the ACA apply to such a dispute as if the conciliation were initiated under Part III of that Act.[34]

This provision seems to open a window to access the benefits of settlement of disputes under Part III of the ACA. A potential drawback though is that in case settlement is not reached in a mediation conducted by the MSEFC, the MSEFC itself is empowered to adjudicate the same dispute by way of arbitration. This means that a 'Med-Arb' model is being followed by MSEFC which may be frowned upon by parties for reasons such as inability of the neutral to remain impartial as an arbitrator after having mediated the dispute.

That said, the intent to provide Micro and Small Enterprises with a speedy and cost-effective mechanism is met in this instance. The online portal of 'Delayed Payment Monitoring System' called 'MSME SAMADHAAN' indicates that the MSEFC successfully conciliates and settles roughly 35% of the cases admitted before it.

[33] ibid s 18(2).
[34] ibid.

VII. THE WAY FORWARD

In addition to the above statues, mediation has also been introduced in other areas such as resolution of real estate disputes under the Real Estate (Regulation and Development) Act 2016, consumer disputes under the Consumer Protection Act 2019, as well as the Companies Act 2013. Initiation of mediation under these statutes remains mostly voluntary which is undoubtedly a core value of the process of mediation. However, this does not rule out the fact that parties opt not to mediate simply because they do not understand what mediation entails. So, the decision to not mediate may not always be an informed decision.

At the same time, if mediation is made mandatory, there is always a risk that parties may participate in it only as a step to finish in a tiered process which defeats the purpose of mediation. To bridge this gap between mandatory and voluntary mediation, India could consider following Italy's 'Required Initial Mediation Session' model introduced in limited civil and commercial cases in Italy.[35] As a backdrop, the Italian judiciary is just as backlogged as the Indian judiciary and hence, this may be an appropriate solution. Under the said model, the applicant/plaintiff is required to first file a mediation request before instituting a suit. Following such request, the parties are required to mandatorily attend an initial mediation session with the mediator where the process is explained to the parties and lawyers. Subsequently, if parties, after understanding the process

[35] Leonardo D'Urso, 'Italy's 'Required Initial Mediation Session': Bridging the Gap between Mandatory and Voluntary Mediation' (2018) 36(4) Alternatives to the High Cost of Litigation 49.

and weighing its pros and cons, choose to mediate, such mediation is concluded within ninety days from initiation. But if, after such a mandatory introduction session, one or more parties choose not to move forward, then the requirement of the initial mediation session will stand fulfilled and the applicant/plaintiff can institute the suit. If one of the parties remains absent during such 'Required Initial Mediation Session' then the concerned judge will sanction that party in ensuing judicial proceedings. The model can be considered and replicated in the Indian context with necessary amends. Its implementation will also require uniformity in training of mediators and the process to be followed during such mandatory introduction session.

In conclusion, although India's existing legal framework for commercial mediation is fairly robust, some tweaks appear necessary. In addition to making some sessions of mediation mandatory for disputing parties prior to the institution of a suit before the courts, the creation of widespread awareness about the benefits of mediation as well as reputed mediation institutions should form part of the next few steps. This will likely be enhanced by introduction of mediation-specific legislation as is anticipated to happen, especially in case of commercial disputes. We must not lose sight of the fact that mediation is now slowly becoming mainstream and we are yet in its early days. The road ahead remains positive and hopeful for the success of mediation.