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EDITORIAL: CONSTITUTING THE COSMOS: GLOBAL CONSTITUTIONALISM, PUBLIC TRUST, AND THE REGULATION OF OUTER SPACE IN INDIA

KRISHANGEE PARIKH¹ & KOVIDA BHARDWAJ²

As the Indian Space Research Organisation opens itself to private players, the privatisation of India's space sector must be constitutionally sound, democratically supervised, and designed to protect both public interest and individual rights. Using precedents such as the 2G Spectrum and Coalgate cases, this article contends that space resources like orbital slots, spectrum, and launch infrastructure must be allocated through transparent, non-arbitrary mechanisms. It also examines privacy and data governance challenges posed by remote sensing, geospatial technologies, and the Digital Personal Data Protection Act, highlighting risks of unchecked state and potentially, private surveillance, all through the lens of reasonability and the public trust doctrine. Internationally, it critiques the lacunae in the Outer Space Treaty and the selective applicability of instruments like the Artemis Accords, calling for stronger global accountability measures within the country.

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EDITORIAL: CONSTITUTING THE COSMOS: GLOBAL CONSTITUTIONALISM, PUBLIC TRUST, AND THE REGULATION OF OUTER SPACE IN INDIA

“If you want to keep it a secret, you must also hide it from yourself.”

- George Orwell, 1984

INTRODUCTION

India’s space sector stands at an inflection point. Once solely a domain of state-led innovation through the Indian Space Research Organisation (**“ISRO”**), the industry is now witnessing rapid de-regulation. With a projected leap from USD 8.4 billion in 2022 to an estimated USD 44 billion by 2033,³ India aims to capture 8% of the global space economy,⁴ which is expected to exceed USD 1.8 trillion by 2035.⁵

To achieve this, India has opened its space sector to private and foreign investment, enabling the entry of new space startups like Pixxel, Agnikul, Digantra and Bellatrix Aerospace⁶ and has eased barriers through deregulation, public-private partnerships,⁷ and foreign direct investment of up to 100%.⁸ Initiatives such as the establishment of Indian National Space Promotion and Authorization Centre (**“IN-SPaCe”**) and the Indian Space Policy, 2023 represent this shift toward market-driven expansion. The Indian Space Policy 2023 serves as an “*overarching, composite and dynamic*

³ FEDERATION OF IND. CHAMBERS OF COM., UNLOCKING INDIA’S SPACE ECONOMY - PATHWAYS TO GROWTH, INNOVATION AND GLOBAL LEADERSHIP (2025), https://www.ficci.in/study_details/24075.

⁴ Press Release, *Empowering India’s Space Economy: Rs. 1,000 Crore Venture Capital Fund Initiative for Innovation and Growth*, PRESS INFORMATION BUREAU (Oct. 25, 2025), <https://www.pib.gov.in/PressReleasePage.aspx?PRID=2068155>.

⁵ *Supra* note 3.

⁶ Press Release, *India’s Share in Global Space Economy to Rise 4 Times By 2030: Mos Department Of Spacecraft*, PRESS INFORMATION BUREAU (Jun. 20, 2024), <https://www.pib.gov.in/Pressreleasepage.aspx?PRID=2027137>.

⁷ Press Release, *Parliament Question: Cooperation with Private Sector in Space Development*, Press Information Bureau (Mar. 26, 2025), <https://www.pib.gov.in/Pressreleasepage.aspx?PRID=2115227>.

⁸ Press Release, *Cabinet approves amendment in the Foreign Direct Investment (FDI) policy on Space Sector*, PRESS INFORMATION BUREAU (Feb. 21, 2024), <https://www.pib.gov.in/PressReleasePage.aspx?PRID=2007876>.

framework” to regulate and implement private sector participation, and foster a thriving space ecosystem.⁹ Additionally, IN-SPACe was established pursuant to the Space sector reforms to promote, authorise, and supervise private players’ participation in India’s space activities. It acts as an interface between ISRO and non-governmental entities.¹⁰

However, this privatisation drive is not without constitutional and ethical implications. Space, as a frontier of both natural resources and sensitive data, demands governance that balances commercial interest with public accountability. The allocation of Indian National Space Promotion and Authorization Center-orbital slots, access to launch infrastructure, and control over satellite-generated data raise pressing questions about surveillance, data protection, national sovereignty, and just distribution. Without adequate legislative safeguards, privatisation risks reinforcing regulatory opacity and facilitating the monopolisation of common resources.

The authors argue that the privatisation of India’s space sector must be constitutionally sound, democratically supervised, and designed to protect both public interest and individual rights. Using Articles 14, 21, and 39(b) of the Constitution as normative touchstones, the paper examines the legal, regulatory, and ethical implications of increased private participation in space. It contends that while innovation and investment are essential, they must be guided by principles of fairness, transparency, and constitutional accountability.

This article is divided into four parts. Part I interrogates the constitutional and regulatory implications of space privatisation in India, Part II examines privacy and data governance challenges, Part III analyses global legal silences and India’s international obligations, and Part IV concludes with the way forward for constitutionally sound and democratically accountable space governance.

⁹ DEPT OF SPACE, GOV’T OF IND., INDIAN SPACE POLICY, Preamble, ¶1 (2023), https://www.isro.gov.in/media_isro/pdf/IndianSpacePolicy2023.pdf.

¹⁰ Department of Space, *Indian National Space Promotion and Authorisation Centre (IN-SPACe)*, INDIAN SPACE RESEARCH ORGANISATION, <https://www.isro.gov.in/IN-SPACe.html>.

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CONSTITUTIONAL PRINCIPLES AND REGULATORY CHALLENGES

Through this section, the authors shall test the privatisation of the Indian space sector on the anvil of Articles 14, 21, and 39(b) of the Constitution of India. The authors believe that the privatisation process must adhere to these constitutional provisions to ensure that it is democratically supervised and in the best interests of the public.

A. ARTICLE 14 AND THE EQUALITY IMPERATIVE IN ALLOCATION OF SPACE RESOURCES

Article 14 of the Constitution of India guarantees equality before law.¹¹ Embedding the principles of fairness and non-arbitrariness, Courts have struck down state actions that do not adhere to these principles.¹² Such state actions include fair distribution of the State's resources.¹³ In context of the Indian space industry, complying with Article 14 of the Constitution indicates equal distribution and access to resources¹⁴ which may be construed to include orbital slots, radio frequencies for satellites, and the ability to launch facilities to name a few.¹⁵ Such allocation shall be fair and

¹¹ INDIA CONST. art. 14.

¹² E.P. Royappa v. State of T.N., (1974) 4 SCC 3; Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

¹³ Centre for Public Interest Litigation v. Union of India., (2012) 3 SCC 104; Manohar Lal Sharma v. Principal Secretary, (2014) 9 SCC 516.

¹⁴ Herein, the authors interchangeably refer to natural resources and material resources. Space-industry related resources are an intersection of both since they are naturally occurring and finite in nature due to which they are judiciously allocated to States as per an international framework (ITU). Moreover, they may also involve man-made installations in space or on ground which are 'material' in nature due to their high economic value and public utility. Therefore, space-related resources cannot be strictly categorized.

¹⁵ DEPT OF SPACE, GOV'T OF IND., INDIAN SPACE POLICY, Point 4 (2023), https://www.isro.gov.in/media_isro/pdf/IndianSpacePolicy2023.pdf.

transparent, lest preferential treatment of certain private entities shall be violative of Article 14.

In 2008, the infamous *2G Spectrum case* raised concerns of arbitrary allocation of spectrum (a natural resource) by the then government in power; in favour of certain telecom companies.¹⁶ Such allocation was struck down by the Supreme Court as being violative of Article 14 and led to the cancellation of 122 licences granted to specific telecom companies.¹⁷ The State, as trustee of the public's resources, must allot them through methods "*guided by... justice, fairness, equality and larger public good.*"¹⁸ Such methods could be an auction or payment of license fee or any method that is considered transparent and fair for the distribution of that specific resource.¹⁹

Drawing an analogy to other space related resources, the Indian Space Policy, 2023 ("***Space Policy***") provides that the government aims to "*provide public goods and services through space technologies for national priorities*"²⁰ The terms 'public goods and services', 'space technologies' and 'national priorities' remain unexplained. It is unclear as to which resources classify as public goods and services, whether it is linked to article 19(6) of the Constitution, and what is covered under the ambit of space technology. Similarly, allocation of resources based on 'national priorities' is unclear as well. Moreover, Point 3(ii) states that IN-SPACE shall develop a 'stable and predictable regulatory framework' to provide a level-playing field to private players in the space sector. While this move is welcomed and appreciated, it is unclear on what the framework shall entail, or how existing private players in the space industry are complying to norms. The authors believe

¹⁶ Centre for Public Interest Litigation. v. Union of India, (2012) 3 SCC 10.

¹⁷ *Id.* ¶181(i).

¹⁸ Abhishek Malhotra, *Satellite Spectrum Allocation – Is Auction the Legal Mandate?*, SIA INDIA (Sep. 22, 2023), <https://www.sia-india.com/corner/satellite-spectrum-allocation-is-auction-the-legal-mandate/>.

¹⁹ Ayushi Kar, *Spectrum for satellite broadband services to be auctioned, not allocated*, THE HINDU BUSINESS LINE (Dec. 02, 2021), <https://www.thehindubusinessline.com/info-tech/spectrum-for-satellite-broadband-services-to-be-auctioned-not-allocated/article37804619.ece>.

²⁰ DEPT OF SPACE, GOVT OF IND., INDIAN SPACE POLICY, Point 3(i) (2023), https://www.isro.gov.in/media_isro/pdf/IndianSpacePolicy2023.pdf.

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that the policy serves merely as a visionary framework rather than delineating the exact steps the various governing bodies of DoS intend to take to execute the Space Policy. In light of a vague policy, it is likely that the distribution of resources shall be unchecked, and may not pass the “reasonableness” test of Article 19(6) of the Constitution, thereby leading to a potential violation of Article 14 and Article 19(6) of the Constitution respectively.

It is pertinent to note that while the Outer Space Treaty (“*Treaty*”) adopted by the United Nations General Assembly promotes the sharing of space resources,²¹ each country is assigned certain finite resources which lie exclusively under their national control (for instance, radio spectrum and orbital positions).²² The Supreme Court in *Secy., Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal*,²³ though pertaining to Article 19(1)(a) of the Constitution made an observation that “*airwaves or frequencies are a public property*”²⁴ that must be controlled and regulated in the public interest.²⁵ By extension of logic, space resources such as radio spectrum and orbital positions are a State’s ‘material’ assets which shall not be permitted to be monopolised or guaranteed based on whims of specific private players.

Moreover, the Supreme Court, in the *Coalgate scandal case*²⁶ dealt with the invalidation of numerous licenses of coal block allocation. Such allocation was held to be malafide and arbitrary as per Article 14 of the Constitution

²¹ Treaty On Principles Governing The Activities Of States In The Exploration And Use Of Outer Space, Including The Moon And Other Celestial Bodies, Art. I, (Jan. 27, 1967), 610 U.N.T.S. 205 (Entered into force on Oct. 10, 1967).

²² INT’L TELECOMM. UNION, GUIDANCE ON THE REGULATORY FRAMEWORK FOR NATIONAL SPECTRUM MANAGEMENT (2021), https://www.itu.int/dms_pub/itu-r/opb/rep/R-REP-SM.2093-4-2021-PDF-E.pdf.

²³ *Secy., Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal*, (1995) 2 SCC 161.

²⁴ *Id.* ¶122(i).

²⁵ *Id.* ¶¶ 55, 122(i).

²⁶ *Manohar Lal Sharma v. Principal Secretary & Ors* (2014) 9 SCC 516.

since the allotment was made on a ‘friendly’ basis.²⁷ Drawing an analogy, apart from space resources, the on-ground launch facilities (for instance, launch pads at Sriharikota) have been built using public funds.²⁸ Such state land shall also be subject to fair and transparent allocation, upholding Article 14 of the Constitution.

With reference to Satellite Communication Norms, Guidelines and Procedures (**“SATCOM norms”**) and Telecommunications Act of 2023, the committees and bodies exercise wide discretionary powers since there are no prescribed timelines for authorising satellite system launches, nor is there a clear policy framework guiding the use of such discretion.²⁹ This lack of procedural clarity raises serious concerns under Article 14 of the Constitution. This lack of clarity has weakened investor confidence and stalled the growth of space startups.³⁰

Adding to the hesitancy of fair allocation is the existing organisational structure of IN-SPACe that serves as an ‘autonomous’ body under the Department of Space (**“DoS”**).³¹ The DoS is headed by the Chairman of ISRO. This raises questions on the ‘autonomy’ of IN-SPACe and appears paradoxical to its vision of promoting and giving a free-hand to private sector players in an existing centrally-governed industry.

Moreover, the regulatory framework for space activities like SATCOM norms, Remote Sensing Data Policy, 2011 (**“RSDP”**) and technology

²⁷ Gautam Bhatia, *Coalgate and Judicial Review of Distribution of Natural Resources*, I. CON. L. PHIL., (Aug. 31, 2014), <https://indconlawphil.wordpress.com/2014/08/31/Coalgate-And-Judicial-Review-Of-Distribution-Of-Natural-Resources/>.

²⁸ Press Release, *First Private Launchpad & Mission Control Center Established in ISRO Campus at SDSC, SHAR*, INDIAN SPACE RESEARCH ORGANISATION (Nov. 28, 2022), https://www.isro.gov.in/first_private_launch_mission_control.html; Press Release, *Cabinet approves the establishment of “Third Launch Pad”*, PRESS INFORMATION BUREAU (Jan. 16, 2025), <https://www.isro.gov.in/CabinetapprovesThirdLaunchPad.html>.

²⁹ Prashanti Upadhyaya, *Necessity for the enactment of space law in India*, LEGAL INDIA (Mar. 18, 2016), <http://www.legalindia.com/necessity-enactment-space-law-india/>.

³⁰ IBW Team, *Space Investor Community Stress on Need for Regulatory Certainty in India*, INDIAN BROADCASTING WORLD (Jul. 26, 2023), <https://www.indianbroadcastingworld.com/space-investor-community-stress/>.

³¹ Department of Space, *Indian National Space Promotion and Authorisation Centre (IN-SPACe)*, INDIAN SPACE RESEARCH ORGANISATION, <https://www.isro.gov.in/IN-SPACe.html>.

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transfer policies of ISRO provides an inkling that despite the presence of Antrix (the commercial arm of ISRO), ISRO and DoS, the government is the ‘operator as well as a regulator resulting in a virtual monopoly’.³² This creates an inherent conflict of interest, since the same authority that regulates private entities is also their competitor in commercial activities.

It is noted that the government has complete control over authorisation of space launch and allocation of spectrum/orbital spot. The exercise of such control is unexplained and remains discretionary.³³ The Indian Space Policy of 2023 states that IN-SPACE will ‘*hand- hold*’ space operations in India³⁴ and aim to balance the interests of Government entities and Non-governmental entities (which shall include private sector players) in ITU filings for orbital positions.³⁵ Contrarily, Point 4.13 of the Policy gives undefined power to NGEs to carry out commercial recovery of asteroids.³⁶ Claims of hand-holding, balancing interests and unbridled power to private players; all remain unsubstantiated and unclear on how they would be parallelly executed, causing further hesitancy to the ‘autonomy’ on IN-SPACE.

More importantly, policies affecting public resources and common good should ideally be vetted by the Parliament. However, India’s Space Policy 2023 was not placed or discussed in Parliament, thereby bypassing the democratic process. Hopefully, in light of the redrafting of the Space

³² *Supra* note 27.

³³ Prashanti Upadhyaya, *Necessity for the enactment of space law in India*, LEGAL INDIA (Mar. 18, 2016) <http://www.legalindia.com/necessity-enactment-space-law-india/>; Ananye Krishna, *Space Law and India*, THE RMLNLU L. REV. BLOG (Jun. 30, 2016), https://rmlnlulawreview.com/2016/06/30/space-law-and-india/#_ftn5.

³⁴ Indian Space Policy 2023, DEP’T OF SPACE, GOV’T OF IND., INDIAN SPACE POLICY, Point 5 (2023), https://www.isro.gov.in/media_isro/pdf/IndianSpacePolicy2023.pdf.

³⁵ DEP’T OF SPACE, GOV’T OF IND., INDIAN SPACE POLICY, Point 5(12) (2023), https://www.isro.gov.in/media_isro/pdf/IndianSpacePolicy2023.pdf.

³⁶ DEP’T OF SPACE, GOV’T OF IND., INDIAN SPACE POLICY, Point 4(13) (2023), https://www.isro.gov.in/media_isro/pdf/IndianSpacePolicy2023.pdf.

Activities Bill after eight years,³⁷ the above-mentioned inconsistencies and disparities can be resolved. IN-SPACE shall emerge as a regulatory body with statutory powers granted through an Act of Parliament once the newly drafted Bill is approved.³⁸

IN-SPACE facilitates technology transfers of propellants, electric/electrical components, chemical formulations etc. to the private sector.³⁹ As of December 2024, IN-SPACE has signed 75 technology transfer agreements⁴⁰ and 10 more as of 3rd July, 2025.⁴¹ Therefore, private sector companies can secure rights to such technologies that have been developed and improved upon by ISRO during their research or space missions. This shall benefit companies working on space-related projects and also lower the entry barrier for them.⁴²

³⁷ Ankit Tiwari, *A New Draft For The Space Activities Bill: Amidst A Sea-Change in India's Space Sector*, COUNCIL FOR STRATEGIC AND DEFENSE RESEARCH (Jun. 9, 2025), <https://Csdronline.Com/Blind-Spot/A-New-Draft-For-The-Space-Activities-Bill-Amidst-A-Sea-Change-In-Indias-Space-Sector/>.

³⁸ *Id.*

³⁹ DEPT OF SPACE, GOV'T OF IND., Technology Transfer (2025), https://www.isro.gov.in/media_isro/pdf/resourcespdf/technology_transfer_august_2022.pdf; Abhishek Dubery & Sagnik Sarkar, *The Indian Space Industry: Key Regulatory And Policy Developments From 2024*, TRILEGAL (Feb. 10, 2025) https://Trilegal.Com/Knowledge_Repository/Trilegal-Update-The-Indian-Space-Industry-Key-Regulatory-And-Policy-Developments-From-2024/.

⁴⁰ Press release, *Parliament Question: Foreign Direct Investment in the Space Sector*, PRESS INFORMATION BUREAU (Mar. 12, 2025) <https://www.pib.gov.in/Pressreleaseshare.aspx?PRID=2110835>; *ISRO, IN-SPACE & NSIL sign five tech transfer pact with non-governmental entities*, THE ECONOMIC TIMES (Sep. 20, 2024) <https://economictimes.indiatimes.com/news/science/isro-in-space-nsil-sign-five-tech-transfer-pact-with-non-governmental-entities/articleshow/113529628.cms?from=mdr>.

⁴¹ Shine Jacob, *In-Space Transfers 10 ISRO Technologies To Private Sector For Space Growth*, BUSINESS STANDARD (Jul. 03, 2025), https://www.Business-Standard.Com/Technology/Tech-News/Inspace-Transfers-10-Isro-Technologies-To-Private-Sector-125070300993_1.html.

⁴² Abhishek Dubery & Sagnik Sarkar, *The Indian Space Industry: Key Regulatory And Policy Developments From 2024*, TRILEGAL (Feb. 10, 2025) https://Trilegal.Com/Knowledge_Repository/Trilegal-Update-The-Indian-Space-Industry-Key-Regulatory-And-Policy-Developments-From-2024/.

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While private participation offers significant potential benefits, unless guided by a fair and transparent framework, private participation in space risks arbitrariness in allocation, thereby undermining Article 14 of the Constitution.

B. ARTICLE 39(B) AND THE PUBLIC TRUST DOCTRINE

Article 39(b) of the Constitution states “*the ownership and control of the material resources of the community are so distributed as best to subserve the common good.*”⁴³ Coupled with the public trust doctrine, which has been read into Article 21 and 48A, imposes a responsibility on the State to ensure that natural resources are not depleted or destructed; rather used wisely. The ambit of “resources” covered under Article 39(b) of the Constitution read with the public trust doctrine is widened by Courts to include natural resources such as spectrum⁴⁴ and natural gas.⁴⁵

Though Courts have not specifically linked the Public Trust Doctrine and space resources through any judicial precedent, space-based resources, though intangible (as seen in the case of 2G Spectrum case) can be viewed as “*material resources of the community*” as per Article 39(b) of the Constitution due to its economic value and utility. For instance, orbital slots in the geostationary arc (vital for communications and broadcasting) are limited “positions” allocated to countries through ITU coordination, spectrum for satellite services (C-band, Ku-band, etc.) resemble a scarce resource and shall be distributed judiciously. Such resources shall be used for the common good. Privatising the space sector without safeguards on judicial use of these resources might prioritise a few private interests, rather than equitably benefiting all.⁴⁶

⁴³ INDIA CONST. art. 39(b),

⁴⁴ Centre for Public Interest Litigation & Ors. v. Union of India & Ors., (2012) 3 SCC 10.

⁴⁵ Union of India v. Reliance Industries Ltd., (2023) SCC OnLine Del 2666.

⁴⁶ M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388.

Therefore, Article 39(b) and the Public Trust Doctrine provide a constitutional compass for space policy. The State must act as guardian of space resources, ensuring their distribution maximizes public welfare. While the authors do not oppose privatization, they believe that distribution must be keeping public good in mind apart from fairness and transparency that has been covered by the authors in the previous section.

Therefore, to address the common concerns under Articles 14 and Article 39(b), the solution lies in *first*, vesting statutory powers with IN-SPACE through the Space Activities Bill, to overcome the conflict of being both operator and regulator. *Second*, allocation of orbital slots, spectrum and launch facilities must be guided by transparent methods, as mandated in the 2G Spectrum and Coalgate cases, thereby minimising discretion. *Third*, the Space Policy requires Parliamentary scrutiny and clear definitions of terms such as “public goods,” “space technology,” and “national priorities” to ensure democratic legitimacy. *Finally*, the Public Trust Doctrine should be explicitly recognised in the allocation of space resources, mandating that any private participation demonstrably subserves the common good.

C. ARTICLE 21: IN-SPACE, ISRO, AND THE ILLUSION OF REGULATORY AUTONOMY

Article 21 of the Constitution guarantees right to life and personal liberty to persons.⁴⁷ Article 21 extends to protecting privacy of the individuals as laid down by the Supreme Court.⁴⁸ Drawing an analogy, the increasing participation of private players in satellite remote sensing, Earth observation and communication (for instance, Pixxel),⁴⁹ raises privacy concerns. Moreover, concerns of cyber-attacks have been prevalent in the space sector.⁵⁰ NASA reported over 6,000 cyberattacks between 2017 to

⁴⁷ INDIA CONST. art. 21.

⁴⁸ K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1.

⁴⁹ Julia Seibert, *Top Private Space Companies In India & Industry Landscape*, SPACE INSIDER (Sep. 25, 2025) <https://Spaceinsider.Tech/2023/07/12/Private-Space-Companies-In-India/>.

⁵⁰ Ka-Sat Network Cyber Attack Overview, VIASAT (Mar. 30, 2022), <https://www.Viasat.Com/Perspectives/Corporate/2022/Ka-Sat-Network-Cyber-Attack-Overview/>; Valerie Insinna & Zeba Siddiqui, *Boeing Says 'Cyber Incident' Hit Parts Business After Ransom Threat*, REUTERS (Nov. 2, 2023).

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2021.⁵¹ In 2023, 16th C0C0N cyber-conference, Mr. S. Somanath, the Chairman of ISRO, revealed that ISRO faced over 100 cyber-attacks daily.⁵²

In this context, remote sensing refers to the capturing of images by telescopes, satellites and rovers from a distance. Such images of the Earth or other planetary bodies provide valuable scientific insights. It helps study other planets, monitor Earth's climate/atmosphere/topography and any other natural movement. Apart from its usage for research and development purposes, it is also helpful in communication, navigation, weather forecasting and national security purposes. Such high-resolution imagery may contain "*sensitive information, and proprietary technologies, that, if compromised, can have far-reaching consequences*".⁵³

In the process of gathering data and capturing images, it may transcend into gathering personal data of individuals via their movement, activities etc. without their knowledge. Further on, it is the State's duty to protect the rights of all persons even against private players. In furtherance of the same, the Government of India formulated the Remote Sensing Data Policy in 2011 ("***RSDP***").⁵⁴

<https://www.Reuters.Com/Business/Aerospace-Defense/Boeing-Investigating-Cyber-Incident-Affecting-Parts-Business-2023-11-01/>.

⁵¹ The National Aeronautics Space Administration, Nasa's Cybersecurity Readiness, Report No. ig-21-019 (2021), <https://Oig.Nasa.Gov/Wp-Content/Uploads/2024/02/Ig-21-019.Pdf>.

⁵² The Hindu Bureau, *Chairman Calls For Strong Cybersecurity Knowledge Base*, THE HINDU (Oct. 7, 2023) <https://www.thehindu.com/News/Cities/Kochi/Isro-Chairman-Calls-For-Strong-Cybersecurity-Knowledge-Base/Article67393468.Ece>.

⁵³ Team of AMLegals, *Protecting Space: Privacy Challenges in Satellite Imaging and Surveillance*, AMLEGALS (May 15, 2025) <https://amlegals.com/protecting-space-privacy-challenges-in-satellite-imaging-and-surveillance/#>.

⁵⁴ DEP'T OF SPACE, GOV'T OF IND., REMOTE SENSING DATA POLICY, (2011).

The RSDP classifies remote sensing data by resolution and sensitivity, and imposes tiered restrictions on higher-resolution data.⁵⁵ All imagery of ground resolution up to 1 meter is freely distributable on a non-discriminatory basis, as “requested” by users.⁵⁶ However, imagery sharper than 1 m (i.e. < 1 m ground sampling distance) is labelled as “sensitive”. Such data must be screened and cleared by an inter-agency High Resolution Image Clearance Committee (“*HRC*”) before distribution.⁵⁷ In practice, even for 1 m images, the data is pre-screened to mask sensitive areas (like military installations) prior to release.⁵⁸ Government users (and those recommended by the government) can get high-resolution data relatively easily, but private, foreign or online services require case-by-case HRC clearance for < 1 m imagery.⁵⁹ Earlier, even 1m data was heavily restricted by the Government (only imagery coarser than 5.8m was freely accessible for NGE), which was eventually liberalised due to technological advancement.⁶⁰

Unlike RSDP’s clearance model, Indian players now require no prior approvals, relying instead on self-certification.⁶¹ The Clarifications to Geospatial Guidelines, 2022 further restricted foreign access by prohibiting

⁵⁵ DEP’T OF SPACE, GOV’T OF IND., REMOTE SENSING DATA POLICY, Point 4 (2011), https://www.nrsc.gov.in/EOP_irsdata_Policy/page_3?language_content_entity=en#:~:text=,by%20one%20Government%20agency%2C%20for.

⁵⁶ DEP’T OF SPACE, GOV’T OF IND., REMOTE SENSING DATA POLICY, Point 4(a) (2011), https://www.nrsc.gov.in/EOP_irsdata_Policy/page_3?language_content_entity=en#:~:text=,by%20one%20Government%20agency%2C%20for.

⁵⁷ DEP’T OF SPACE, GOV’T OF IND., REMOTE SENSING DATA POLICY, Point 4(b)(4) (2011), https://www.nrsc.gov.in/EOP_irsdata_Policy/page_3?language_content_entity=en#:~:text=,by%20one%20Government%20agency%2C%20for.

⁵⁸ Suvrat Kher, *Indian Remote Sensing Data Policy Has Been Updated*, SUVRATK BLOGSPOT (Jul. 7 2011), <http://suvratk.blogspot.com/2011/07/indian-remote-sensing-data-policy-has.html>.

⁵⁹ DEP’T OF SPACE, GOV’T OF IND., REMOTE SENSING DATA POLICY, Point 4(b)(3) (2011), https://www.nrsc.gov.in/EOP_irsdata_Policy/page_3?language_content_entity=en#:~:text=,by%20one%20Government%20agency%2C%20for.

⁶⁰ Kher, *supra* note 58.

⁶¹ DEP’T OF SPACE, GOV’T OF IND., GUIDELINES FOR ACQUIRING AND PRODUCING GEOSPATIAL DATA AND GEOSPATIAL DATA SERVICES INCLUDING MAPS, Point 8 Explanation (viii) (2021), <https://www.surveyofindia.gov.in/UserFiles/files/document-49301-New%20Guidelines%20on%20Geospatial%20Data.pdf>

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finer-than-threshold data from reaching overseas servers, mandating domestic storage and API-based licensing.⁶² While these reforms liberalised

geospatial activity for Indian firms, they shifted the emphasis from case-by-case state vetting to post-facto compliance, raising concerns on privacy and surveillance safeguards.

On the other hand, the Indian Space Policy, 2023 aims to make efforts to encourage the broadest possible dissemination of remote-sensing data and applications based on the same.⁶³ IN-SPACE authorisation is required for dissemination of satellite based remote sensing data of high resolution (Ground sampling distance ≤ 30 cm), owing to national security considerations. Data above GSD > 30 cm needs intimation to IN-SPACE.⁶⁴ Unlike RSDP the thresholds of data categorisation as high resolution under the Indian Space Policy of 2023 shall be reviewed from time to time.⁶⁵ Additionally, the policy permits open data access from remote sensing satellites of ISRO.⁶⁶ Remote sensing data of GSD of less than 5 meter, shall be made available free of any charges to Government entities but at fair and transparent pricing to NGEs.⁶⁷

In the following sub-section, the authors shall analyse the challenges in enforcement of the above-mentioned frameworks and the applicability of the Digital Personal Data Protection Act of 2023 (***“DPDP Act”***).

⁶² DEPT OF SPACE, GOV'T OF IND., CLARIFICATIONS/COMPLIANCE POINTS IN PURSUANCE TO GEOSPATIAL GUIDELINES, 2022, Point 2(1)(f) (2022), <https://www.surveyofindia.gov.in/UserFiles/files/document-49301-New%20Guidelines%20on%20Geospatial%20Data.pdf>

⁶³ DEPT OF SPACE, GOV'T OF IND., INDIAN SPACE POLICY, Point 4(6) (2023), https://www.isro.gov.in/media_isro/pdf/IndianSpacePolicy2023.pdf.

⁶⁴ DEPT OF SPACE, GOV'T OF IND., INDIAN SPACE POLICY, Point 5(20) (2023), https://www.isro.gov.in/media_isro/pdf/IndianSpacePolicy2023.pdf

⁶⁵ *Id.*

⁶⁶ DEPT OF SPACE, GOV'T OF IND., INDIAN SPACE POLICY, Point 6(3) (2023), https://www.isro.gov.in/media_isro/pdf/IndianSpacePolicy2023.pdf

⁶⁷ *Id.*

D. EYES IN THE SKY: THE RIGHT TO PRIVACY IN ORBIT

It can be gathered that a private company would also fall under RSDP along with Indian Space Policy and the DPDPA. However, enforcement may be challenging, *first*, when a company streams imagery online in real-time; the old model of pre-screening each image may not hold. *Second*, foreign satellite firms (for example, Planet Labs, Maxar) provide high-resolution imagery of India globally. Though not covered under the Indian jurisdiction, they can continue to sell data pertaining to India and a buyer (falling under the Indian jurisdiction) can purchase it. This highlights a gap in India's data protection policy, and privatization without addressing these concerns could widen that gap.

Therefore, privatisation of the space sector may eventually lead to decentralisation of data control (the autonomy earlier held by ISRO) and in absence of a strict framework, risks to data protection are on the rise.

Moreover, the DPDPA establishes a framework for gathering and processing of personal data, imposing obligations on data fiduciaries, data minimisation, and security safeguards etc. While not specific to the space sector, the Act's principles extend to any personal data, digital or otherwise.⁶⁸ However, applying DPDPA to satellite data is a novel territory. A potential hurdle is that raw imagery is often not personal data (for instance, a picture of a field is not personal data unless tied to an owner or a person present).

A significant criticism of the DPDPA is the broad exemptions it grants to the government. Section 18 of the Act allows the central government to exempt any of its agencies from most provisions of the law for reasons such as national security, public order.⁶⁹ Practically, this means that Indian intelligence or law enforcement could lawfully compel private satellite firms to share data, or itself use personal data collected by them, without adhering to general privacy norms. The Act also permits the government

⁶⁸ The Digital Personal Data Protection Act, 2023, § 3, The Gazette of India, pt. II sec. 1 (August 11, 2023).

⁶⁹ The Digital Personal Data Protection Act, 2023, § 18, The Gazette of India, pt. II sec.1 (August 11, 2023).

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to access personal data with companies and even issue directions to block content or information. In the context of the space industry, one can envisage scenarios such as the government asking a private imaging company to routinely provide real-time surveillance footage of the Earth over certain areas for security operations. This could include mass surveillance without warrant. While such use might be justified for counterterrorism or border security, the concern is the lack of independent oversight or limitation. This dilemma between national security and privacy is at the heart of the debate around Article 21 of the Constitution.

The Court in *Puttaswamy* acknowledged that national security can be a legitimate aim but underscored the need for proportionality and supervision.⁷⁰ Currently, RSDP itself is driven by security concerns (preventing high-resolution images of sensitive sites), with privacy as an implicit outcome. As privatisation progresses, a recalibration is needed wherein privacy is addressed more explicitly alongside security. For instance, not just shielding army bases, but also perhaps prohibiting high-resolution imaging of private spaces without consent or government clearance.

These concerns could be addressed by *first*, restricting imaging of sensitive installations or very high-resolution personal data without clearance (i.e. strict licensing framework). *Second*, there should be an oversight authority to monitor satellite data use and *third*, the law should clearly delineate liability if a space operator's data practices infringe privacy. *Last*, informed citizens can then exercise whatever choices or rights they have (e.g., a right to object to persistent surveillance if that becomes recognized by law).

Having analysed India's data protection framework, in the next subsection, the authors shall critique the inadequacy of India's outdated surveillance framework and threat to illegal surveillance in light of the Pegasus incident, despite strong assurance against it.

⁷⁰ K.S. Puttaswamy (Privacy-9J.) v. Union of India, (2017) 10 SCC 1, ¶T4.

ARTICLE 21 AND THE PEGASUS INCIDENT

The American pursuit of space surveillance became clear in 2013 when a classified information leak by the US National Security Agency employee Edward Snowden revealed government agencies' coordination with private actors in mass surveillance operations. Often described as the 'securitization' of society, this occurs without the knowledge or consent of citizens.⁷¹ A petrifying manifestation of such securitization could be seen with the Pentagon purchasing the rights to all satellite imagery of Afghanistan from a private space company owning high- resolution satellites.⁷²

This is certainly not the first attempt of a government being a coveted client of a private data company; which is observable from the forgotten case of *Manohar Lal Sharma v. Union of India*,⁷³ where the respondent (the government of India), via the Minister of IT, Ashwini Vaishnaw stated in the Parliament, that any form of illegal surveillance is *impossible* in India, due to the existence of 'robust laws and institutions'. Palpably, the only visible safeguard in the form of any institutional establishment is referred to be a review committee headed by the Union Cabinet Secretary,⁷⁴ who functions under the government of India and does not constitute an independent oversight mechanism. Such an arrangement fails-the test of reasonableness and fairness required by a procedure established by law to satisfy its legality under article 21 of the constitution as laid down in *Maneka Gandhi v. Union of India*.⁷⁵ Moreover, it also contradicts the test of adhering to principles of natural justice as propounded in *Uma Nath Pandey v. State of UP and Ors.*⁷⁶ Any legal safeguards to militate against illegal surveillance, for that matter, do not exist in India.

⁷¹ Zygmunt Bauman, Didier Bigo, Paulo Esteves, Elspeth Guild, Vivienne Jabri, David Lyon, R. B. J. Walker, *After Snowden: Rethinking the Impact of Surveillance*, 8(2) IPS, 121 (2014).

⁷² Steven Livingston. & W. Lucas Robinson,, *Mapping Fears: The Use of Commercial High-Resolution Satellite Imagery in International Affairs*, 1(2) ASTROPOLITICS, 3, 3-25 (2003).

⁷³ *Manohar Lal Sharma v. Union of India*, (2021) SCC OnLine SC 1066.

⁷⁴ *Manohar Lal Sharma v. Union of India*, (2021) SCC OnLine SC 1066.

⁷⁵ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248.

⁷⁶ *Uma Nath Pandey v. State of U.P.*, (2009) 12 SCC 40.

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This is followed by a rather confusing statement which seems to admit the existence of such unwarranted surveillance, where Vaishnav propounds that the government is entitled to interception of electronic communication for the purposes of national security or public safety by way of the infamous section 5 of the Indian Telegraph Act. From its textual interpretation, this provision limits its applicability only in cases of a public emergency⁷⁷ and has thankfully been subject to restrictive judicial interpretation.⁷⁸ Alongside this, the draconian section 69 of the Information Technology Act is often used to justify breaches of citizens' privacy.⁷⁹

Two pertinent questions arise from this case. *First*, whether the government indeed made use of Pegasus for surveillance activities, and *second*, whether such surveillance was limited to intercepting activities that endanger sovereignty or illegally encroach the digital privacy of citizens such as journalists and vigilantes without their consent.⁸⁰ The former, even if legal, poses a threat to sovereignty itself. For instance, security and defence agencies spend nearly a billion dollars annually to procure earth observation data and imagery from foreign sources, and India severely lacks in self-sufficiency in situational space awareness to accurately track space objects in order to classify them as friendly, hostile or debris. This is keeping in mind the fact that India needs high-resolution radar and electro-optical sensors in space in order to defend its huge landmass and oceans from two formidable adversaries.⁸¹

⁷⁷ Indian Telegraph Act, 1885, § 5, No. 13, Acts of Imperial Legislative Council of India, 1885 (India).

⁷⁸ PUCL v. Union of India, (1997) 1 SCC 301.

⁷⁹ Apar Gupta v. PIO, Ministry of Home Affairs, (2022) SCC OnLine CIC 4746.

⁸⁰ Krishnadas Rajagopal, *Supreme Court asks what's wrong if country using Pegasus against 'anti-nationals', agrees to examine if private citizens were hacked*, THE HINDU, (Apr. 29, 2025) <https://www.thehindu.com/news/national/pegasus-row-supreme-court-says-wont-disclose-report-that-touches-countrys-security-sovereignty/article69504285.ece>.

⁸¹ Anil Chopra, *Impact of Defence Space Capabilities on National Security*, INDIAN AEROSPACE & DEFENCE BULLETIN (Apr. 24, 2024), <https://www.iadb.in/2024/04/14/impact-of-defence-space-capabilities-on-national-security/>.

Therefore, even if the government claims to have made use of foreign surveillance for national security purposes, that in itself doesn't seem to be the most promising way to ensure security, with there being a persistent threat of Indian militarily sensitive data being utilized by foreign countries. This rather does make a case for better privatisation of the Indian space sector. But the latter question makes the application of the same doubtful, which still remains doubtful due to the vagueness of privacy safeguards on dissemination of geospatial data discussed later in the article; particularly in light of newer trends of the prescribed use of artificial intelligence technologies.⁸²

The government of India has used the doctrine of compelling public interest to justify state surveillance on numerous occasions, citing national security and threat to sovereignty as the reasons for its actions.⁸³ However, this doctrine being more widely used in American jurisprudence, notably in the case of *Grutter v. Bollinger* demonstrates that such defenses taken by governments require the restriction to be tailored in the narrowest possible manner, also known as the 'narrow tailoring test'.⁸⁴ Anachronistic statutes such as the Telegraph Act as well as legislations such as the IT Act, by way of their ambiguous drafting, make it less feasible for the narrow tailoring test to be applied consistently.⁸⁵

In this context, in the following section, the authors aim to explore the possible privacy concerns with data that is publicly available through the use of satellites and other instrumentalities through outer space itself. Such data, referred as geospatial data, combines spatial data with attributes, in

⁸² World Economic Forum and McKinsey & Company, *Space: The \$1.8 Trillion Opportunity for Global Economy*, WEF (2024), https://www3.weforum.org/docs/WEF_Space_2024.pdf.

⁸³ Ritesh Sinha v. State of U.P., (2019) 8 SCC 1.

⁸⁴ *Grutter v. Bollinger*, 539 U.S. 306 (2003).

⁸⁵ Esha Aggarwal, *Analysis of India's Censorship Measures in Light of American Constitutionalism*, 8(2) COMP. CONST. L. & ADMIN. L. J. VII, 70 (2024).

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order to observe real time phenomena from the Earth's surface,⁸⁶ with a popular example being tools such as Google Earth.

SURVEILLANCE, PRIVACY, AND THE NEW GEOSPATIAL ECONOMY

Building on the concerns around India's geospatial policies, this section highlights their broader implications for surveillance and privacy. *First*, it shows how liberalised access to spatial data heightens risks of manipulation and breaches by both domestic and foreign actors. *Second*, it contrasts

India's lack of safeguards with U.S. policy responses, laying the groundwork for examining India's international obligations in outer space law.

A. GEOSPATIAL TECHNOLOGIES AND THE FICTION OF DEMOCRATIC ACCESS

Geospatial technology has been defined to include but not limit itself to any means of ground survey or satellite-based remote-sensing techniques. The National Geospatial Policy, 2022 has been a major step towards 'democratisation' of data access.⁸⁷ While the term hitherto used is most often referred to in the context of citizens' access to data and rights, the implication of the same in light of the policy is rather commercial. What it implies is that private companies in India will presumably have equal, *democratic* access to citizens' data, which will most likely occur without their knowledge.

The government initially introduced guidelines/policies for shaping the entire geospatial ecosystem. Therefore, the National Geospatial Policy,

⁸⁶ *Remote Sensing*, NASA Earthdata (Aug. 29, 2025), <https://www.earthdata.nasa.gov/learn/earth-observation-data-basics/remote-sensing>.

⁸⁷ MINISTRY OF SCIENCE AND TECHNOLOGY, GOV'T OF IND., NATIONAL GEOSPATIAL POLICY (2022), <https://dst.gov.in/sites/default/files/National%20Geospatial%20Policy.pdf>.

2022 read with Guidelines for acquiring and producing Geospatial Data and Geospatial Data Services including Maps (***“Geospatial Guidelines, 2021”***)⁸⁸ and Clarifications/Compliance points in pursuance to Geospatial Guidelines, 2022 (***“Clarifications to Geospatial Guidelines, 2022”***) are also referred for regulation of satellite imagery distribution.

The Geospatial Guidelines, 2021 provide for a liberalised system of providing data access, replacing the earlier licensing regime with a new self-certification regime. This also makes a clear distinction between data accessible to the government, Indian private entities, and foreign entities, respectively. It appears that the incentivisation of these entities to access data follows in a descending order, where the government exclusively owns access to ostensibly all forms of data, including sensitive areas, while Indian private entities are subject to transparent pricing, and subsequently lesser access for foreign entities, which appears to be a step in the right direction.⁸⁹

The Clarifications to Geospatial Guidelines, 2022 only reaffirm any potential loopholes while reiterating quite explicitly, the fact that foreign entities cannot capture data above thresholds prescribed for Indian companies, emphasising on national security concerns which makes it interesting to correlate the same with attributability of data mismanagement to the Indian government considering the fact that the guidelines themselves advocate for free access to data obtained by public funds in India, making it a public resource.⁹⁰ A pertinent question still arises; the government still has access to data containing minute, negative attributes such as traffic, directions, etc. What makes this a safer choice than entrusting it with private entities in the context of individual privacy?

⁸⁸ DEP^T OF SPACE, GOV^T OF IND., GUIDELINES FOR ACQUIRING AND PRODUCING GEOSPATIAL DATA AND GEOSPATIAL DATA SERVICES INCLUDING MAPS, Point 8 Explanation (iv)(a)(1) (2021), <https://www.surveyofindia.gov.in/UserFiles/files/document-49301-New%20Guidelines%20on%20Geospatial%20Data.pdf>

⁸⁹ *Id.*

⁹⁰ DEP^T OF SPACE, GOV^T OF IND., CLARIFICATIONS/ COMPLIANCE POINTS IN PURSUANCE TO GEOSPATIAL GUIDELINES (2021), <https://dst.gov.in/sites/default/files/DST OM dated 28th November 2022.pdf>.

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This can be foreseen with the development of high-resolution satellite imagery over the years, which has now made movements of up to 50 centimetres of Ground Sampling Distance (“*GSD*”) accessible⁹¹ that can reveal detailed visuals of buildings, homes, and potentially, individuals’ movements. This, without a doubt, is extremely useful for disaster management planning and better navigation services.⁹² A concern, however, is with respect to the guidelines for production and access to such data, which clearly require no prior approvals for Indian individuals, companies or government entities to acquire, process, share or publish geospatial data and maps. All this can be done without a security clearance or licensing, except for sensitive attributes like military installations which were to be notified by the government⁹³ and has notably not happened till date. The problem arises with the lack of a comprehensive data protection ecosystem; India currently stands at a crucial juncture with about 7,000 public inputs on the Draft Data Protection Rules⁹⁴ enacted in accordance with the Data Protection Act,⁹⁵ pending publication of the final rules which are delayed beyond weeks from the initial deadline.⁹⁶

⁹¹ NATIONAL DISASTER MANAGEMENT AUTHORITY, GOV’T OF IND., NATIONAL TECHNICAL DOCUMENT FOR ESTABLISHING CARTOGRAPHIC BASE IN INDIA (2016), <https://ndma.gov.in/sites/default/files/PDF/Technical%20Documents/national-technical-document-for-establishing-cartographic-base-in-india.pdf>.

⁹² Suha, *Liberalisation of Geospatial Data: A Gateway to Innovation for Indigenous Business*, 2 JCLJ., 115, 115-127 (2022).

⁹³ DEPARTMENT OF SCIENCE AND TECHNOLOGY, GOV’T OF IND., GUIDELINES FOR ACQUIRING AND PRODUCING GEOSPATIAL DATA AND GEO-SPATIAL DATA SERVICES INCLUDING MAPS (2021), <https://dst.gov.in/sites/default/files/Final%20Approved%20Guidelines%20on%20Geospatial%20Data.pdf>.

⁹⁴ Digital Personal Data Protection Rules, 2025, Gazette of India, pt. II sec. 3 sub sec. (i) (Jan. 3, 2025).

⁹⁵ Digital Personal Data Protection Act, 2023, The Gazette of India, pt. II sec. 1 (August 11, 2023).

⁹⁶ The Hindu Bureau, *Draft data protection rules have received almost 7,000 comments: IT Ministry*, THE HINDU (July 25, 2025), <https://www.thehindu.com/news/national/draft-data-protection-rules-have-received-almost-7000-comments-it-ministry/article69854950.ece>.

THE NEED FOR PRIVACY IN THE CYBERSPACE

As a corollary to the fact that private companies will now have greater access to special activities at a physical level with the use of remote sensing satellites which work on the information provided by the Survey of India as per the Geospatial policy guidelines, the line between access to special information and the cyberspace blurs. The integration of digital technologies into our physical lives is what creates a virtual dimension called the ‘cyberspace’.⁹⁷ For instance, the Internet of Things (“*IoT*”) computes data monitoring and analysis to the extent of a user being able to view the activity at their front door even while they are away, along with the ability to let them in as per their convenience.

These very technologies that ease data access in daily lives increase the risk of data manipulation and privacy breaches. This covers an individual’s concerns with their data going up for grabs to private companies and even the government, for that matter. Another aspect of the same, however, is the access of such data to foreign players in India’s space industry. The National Geospatial Policy, 2022 liberalises access not just for Indian startups, but also for foreign entities. Data relating to Indian geography and demography can be used for targeted surveillance or manipulation of consumer or voter behaviour,⁹⁸ because even though such access is restricted through API licensing, such manipulation is often institutionalised, capable of being easily surpassed.

This, without a doubt, extends to terrorism with the public dissemination of geospatial information. In the wake of 9/11, the US government began instituting information protection policies aimed at increasing homeland security to prevent unprecedented misuse of publicly available geospatial information.⁹⁹ Recently too, the United States, facing a similar challenge to

⁹⁷ Yinhao Jiang, Mir Ali Rezazadeh Bae, Leonie Ruth Simpson, Praveen Gauravaram, Josef Pieprzyk, Tanveer Zia, Zhen Zhao, and Zung Le, *Pervasive User Data Collection from Cyberspace: Privacy Concerns and Countermeasures*, 8 CRYPTOGRAPHY, 1, 1-24 (2024).

⁹⁸ MINISTRY OF SCIENCE AND TECHNOLOGY, GOV’T OF IND., NATIONAL GEOSPATIAL POLICY Point 5(20) Point 3(2) (2022), <https://dst.gov.in/sites/default/files/National%20Geospatial%20Policy.pdf>.

⁹⁹ Mark Corson, Geospatial Intelligence in Cyberspace, Department of Geography, PennState College of Earth and Mineral Sciences (Dec. 2023) <https://www.e-education.psu.edu/geog882/node/2204>.

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its policies of public dissemination of such information has acknowledged the fact that it needs to reconsider the types of geospatial information that can be made publicly accessible, as well as *whether* and *how* to restrict new sensitive information as it becomes available.¹⁰⁰

Such discourse, let alone palpable policies, are yet to be seen in India, which brings us to the following section concerning India's international obligations with respect to the data it acquires and exploits through outer space instruments.

GLOBAL CONSTITUTIONAL SILENCES AND INTERNATIONAL ACCOUNTABILITY

While domestic legislations in India on space regulation are relatively nascent, any discussion on the same would be incomplete without treading on the path that goes back to 1967 with the Outer Space Treaty as well as the Artemis Accords in particular, which act as a global constitutional framework to achieve attributability to nation-states for breach of international law in outer space.

¹⁰⁰ JOHN C. BAKER ET AL., MAPPING THE RISKS: ASSESSING THE HOMELAND SECURITY IMPLICATIONS OF PUBLICLY AVAILABLE GEOSPATIAL INFORMATION (The RAND Corporation, 2004).

A. THE OUTER SPACE TREATY: RESPONSIBILITY WITHOUT ACCOUNTABILITY

Outer space law essentially comprises of five core multilateral treaties¹⁰¹ and five sets of principles¹⁰² negotiated in the United Nations Committee on the Peaceful Uses of Outer Space and adopted by the UN General Assembly. As such, outer space activities are conducted in the shadow of the constitutive norms of *pacta sunt servanda*, sovereign equality, territorial integrity and non- interference.¹⁰³ The Treaty on Principles Governing the

¹⁰¹Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, (entered into force Oct. 1967), 6 I.L.M. 386 (1967), <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/outerspacetreaty.html>; Agreement on the Rescue and Return of Astronauts and Objects Launched into Outer Space, (entered into force Dec. 1968), Res. 2345 (XXII), <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/rescueagreement.html>; Convention on International Liability for Damage Caused by Space Objects, (entered into force Sept. 1972), Res. 2777 (XXVI), <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/liability-convention.html>; Convention on Registration of Objects Launched into Outer Space, (entered into force Sept. 1976), Res. 3235 (XXIX), <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/registration-convention.html>; Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, (entered into force Jul. 1984), Res. 34/68, <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/moon-agreement.html>.

¹⁰² Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space, (adopted Dec. 1963), Res. 1962 (XVIII), <https://digitallibrary.un.org/record/203965?v=pdf>; , The Principles Governing the Use by States of Artificial Earth Satellites for International Direct Television Broadcasting, (adopted Dec. 1982), Res. 37/92, https://www.unoosa.org/pdf/gares/ARES_37_92E.pdf; The Principles Relating to Remote Sensing of the Earth from Outer Space, (adopted Dec. 1986), Res. 41/65, https://www.unoosa.org/pdf/gares/ARES_41_65E.pdf; The Principles Relevant to the Use of Nuclear Power Sources in Outer Space, (adopted Dec. 1992), Res. 47/68, https://www.unoosa.org/pdf/gares/ARES_47_68E.pdf; The Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries, (adopted Dec. 1996), Res. 51/122, https://www.unoosa.org/pdf/gares/ARES_51_122E.pdf.

¹⁰³ Adam Bower, *Global Constitutionalism and Outer Space Governance*, Handbook of Global Constitutionalism, 529 ANTHONY F. LANG & ANTJE WIENER EDS., EDWARD ELGAR PUBL'G., 2-19 (2023).

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Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (**“Outer Space Treaty”**) remains to be the only ostensible source for *governing* states’ activities in outer space.

It asserts that “*States shall be responsible for national space activities whether carried out by governmental or non- governmental entities*”,¹⁰⁴ which should ostensibly restrain the activities of private space corporations by incentivising states to ensure rather robust legislative safeguards to avoid attribution of possibly illegal activities under the treaty.

Instead, this points to a larger global constitutional silence; the Outer Space Treaty does not mention states’ responsibility with respect to data monitoring or illegal surveillance in space. A rather weak provision it has with some semblance of security to militate against illegal surveillance is Article XI, which requires states to intimate the Secretary-General of the United Nations and to the public and international scientific community, to the greatest extent feasible and practical, of the nature, conduct, locations and results of activities.¹⁰⁵ Needless to say, the ambiguity ingrained in ‘feasible’ and ‘practical’ offers virtually no binding obligations on states to worry about the consequences of data surveillance.

Additionally, the lack of specificity in the Outer Space Treaty with respect to private property rights over extra- terrestrial resources which includes the physical expanse of outer space grants selective access for conducting space activities only to a narrow class of wealthy investors from already prosperous space economies such as the United States.¹⁰⁶ What places India

¹⁰⁴ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, (entered into force Oct. 1967), art. VI, 6 I.L.M. 386 (1967), <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/outerspacetreaty.html>.

¹⁰⁵ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, (entered into force Oct. 1967), art. XI, 6 I.L.M. 386 (1967), <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/outerspacetreaty.html>

¹⁰⁶ Take for instance, the rise of private space agencies such as Elon Musk’s SpaceX, whose terms for service for its Starlink broadband internet service state: “For services provided on Mars, or in transit to Mars via Starship or other spacecraft, the parties

at a clear disadvantage from utilising this provision is first, lack of resources with private companies in India, and second, lack of clear regulatory framework to enable efficient privatization of the space sector. Even though corporations such as Larsen and Toubro, Godrej and Tata have been long term vendors for ISRO, these collaborations have had to be backed by the safety net of buybacks to ensure business survivability.¹⁰⁷ Contrastingly, America's National Aeronautics and Space Administration (NASA) being financially stronger budgets a separate amount for private partnerships, supported by players like Boeing and SpaceX, greatly leveraging America's rocket, satellite launch and space manufacturing capabilities. Essentially, the space economy in America is decentralized, where the government limits itself to being the chief developer. This has been backed since 2006 with the Commercial Resupply Services (CRS) program to regulate the terms and functioning of such partnerships.

B. THE ARTEMIS ACCORDS AND STRATEGIC SOFT LAW

The Artemis Accords lay down principles and guidelines that apply to the safe exploration of the moon and also extends to the possibility of humans exploring Mars.¹⁰⁸

Section 8 of the Artemis Accords is about the release of scientific data, which makes it compulsory for state organizations to openly share scientific data while being completely inapplicable to the private sector.¹⁰⁹ It must be kept in mind that the very purpose of these accords is to foster interoperability with the involvement of private players in outer space

recognize Mars as a free planet and that no Earth- based government has authority or sovereignty over Martian activities.” (Adam Bower, *Global Constitutionalism and Outer Space Governance*, Aug. 2022).

¹⁰⁷ LESLEY JANE SMITH ET AL. (EDS.), ROUTLEDGE HANDBOOK OF COMMERCIAL SPACE LAW (Routledge, 1st ed. 2023).

¹⁰⁸ Artemis Accords: Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes, Oct. 13, 2020, <https://www.nasa.gov/wp-content/uploads/2023/07/Artemis-Accords-signed-13Oct2020.pdf>.

¹⁰⁹ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, (entered into force Oct. 1967), art. VIII, 6 I.L.M. 386 (1967), <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/outerspacetreaty.html>.

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activities.¹¹⁰ As unregulated private involvement in outer space is becoming rather institutionalized, it is pertinent to refer to when during the Russo Ukraine war the Ukrainian military planned an attack on a Russian naval fleet based in Crimea, as the operation involved sending six drone submarines packed with explosives. This was being done by a Starlink satellite which gave Elon Musk the final call on acceding to Ukraine's call for what could have potentially been a nuclear explosion.¹¹¹

This is exactly what the authors aim to flag; international obligations must be enforced with the help of institutionalised mechanisms specific to each country, as we potentially arrive in an era where private players may have control over people's daily activities, and of course, lives.

CONCLUSION

As Orwell cautioned, the gravest secrets are the ones hidden even from those meant to guard them. For India's space future, that means refusing opacity, ensuring that neither the State nor private actors operate beyond the reach of their own oversight. Only then can the commons remain truly common.

A pertinent question that arises when evaluating the *usage* of this data, is regarding the *source* of such data in the first place. The National Data Sharing and Accessibility Policy ("**NDSAP**") provides for all 'data collected by the government using public funds' to be available for public exploitation. The preamble to the policy mentions the intent behind the same to be the fact that a 'large quantum of data generated using public funds by various organizations in the country remain inaccessible to the civil society' which appears to be a step in the right direction. The problem as discussed above arises simply due to the lack of privacy safeguards and

¹¹⁰ Artemis Accords: Principles for Cooperation in the Civil Exploration and Use of the Moon, Mars, Comets, and Asteroids for Peaceful Purposes, § 5 (Oct. 13, 2020), <https://www.nasa.gov/artemis-accords/>.

¹¹¹ CBS News, *Elon Musk Says He Denied Ukraine Satellite Request to Avoid Complicity in 'Major Act of War' vs. Russia*, CBS (Sept. 8, 2023) <https://www.cbsnews.com/news/elon-musk-ukraine-russia-war-starlink-satellite-denied-major-act-of-war/>.

clear framework for holding actors accountable as discussed above in detail.¹¹²

There is no doubt that efficient mapping is imperative for modern governance. India's complex topography as well as digital divide create roadblocks for efficient surveying causing gaps in statistical data further creating gaps in focused policy-making.¹¹³ However, efficient mapping by itself does not resolve these issues. It is only after robust safeguards to an individual's privacy protected by carefully crafted guidelines and effectively enforceable covenants that too by independent actors, that the 'welfare' aspect of these efforts can be touched upon.

What makes Indian private space companies promising in this respect is not just the cost efficiency, but also the availability of launch infrastructure and fully-formed launch vehicles. This sets the country's industry, including Indian private space companies, apart from places like Europe, which has little of either, or the UK, whose northern inclination reduces what it can launch and where. The way forward appears optimistic. Typically, early startups were rarely able to draw angel and venture capital funds in India, but as risk-taking tendencies emerge, one can frequently see examples like Digantara, which is building active orbital surveillance platforms throughout the country.¹¹⁴

Together, these mean India must keep its private space actors in check to ensure compliance with global commons principles. For instance, India cannot simply allow a private firm to occupy an orbital slot that harms another country's equitable access; that would violate both OST and the constitutional value of common good. The Moon Agreement of 1979¹¹⁵

¹¹² National Data Sharing and Accessibility Plan, 2012, Gazette of India, pt. I sec. I (Mar. 23, 2012).

¹¹³ The Global Fundamental Geospatial Themes, United Nations Committee on Experts on Global Geospatial Information Management, 2019 https://ggim.un.org/meetings/GGIM-committee/9thSession/documents/Fundamental_Data_Publication.pdf.

¹¹⁴ SMITH, *supra* note 107.

¹¹⁵ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, (entered into force Oct. 1967), Res. 34/68, art. XI, 6 I.L.M. 386 (1967), <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/outerspacetreaty.html>.

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goes further, calling lunar resources the “*common heritage of mankind*” and hinting at a future international regime to govern exploitation. While not widely adopted, it aligns with Article 39(b) ideals.

In summary, both domestic and international norms caution India to tread carefully: privatisation should not become privatization of the commons. Space must remain a realm that broadly benefits humanity, not just a few companies. Any legal framework for space mining, satellite licensing, or spectrum allocation should reflect sustainable and equitable use, with proceeds and benefits ploughed back into society via government revenues, improved services, or technology transfers to the public domain.

IN THIS ISSUE

The fields of constitutional law, and administrative law and their comparative aspects demand academic rigour from both the authors and the editors. Together, we are in a position to deliver something meaningful to the academic discourse. As the Editor-in-Chief of the Comparative Constitutional Law and Administrative Law Journal (“**CALJ**”) under the Centre for Comparative Constitutional Law and Administrative Law (“**CCAL**”), it gives me immense pleasure to introduce Issue II of Volume IX of our journal to the readers.

In ‘*Deparadoxing Constitutional Democracy*’, Prof. (Dr.) Laurence Claus revisits Socrates’ observations that democracy can undermine itself when popular authority becomes concentrated in the hands of a singular leader. The article argues that while the British parliamentary and American presidential systems achieved durability through long formative periods marked by elitist constraints, the involvement of mass suffrage from the start has rendered the system vulnerable. The author suggests that charismatic leaders are uniquely able to convert temporary popularity into disciplined party control, enabling them to dominate legislatures and, at times, alter constitutional frameworks to entrench their power. Drawing on comparative experience, the article contends that this paradox is not insoluble. It examines case studies from early British and American constitutional development to demonstrate how institutional dispersal of

authority prevented total executive capture. It then turns to the Swiss system, where proportional representation and a plural executive provide structural safeguards against the rise of singular leaders. The article concludes that contemporary constitutional democracies can remain both fully inclusive and institutionally resilient by perfecting models of power sharing that resist the temptations of charismatic authority.

In *‘The Conundrum of Manifest Arbitrariness and Legislature’s Intent: An Inquiry’*, the authors examine the evolution of Article 14 of the Indian Constitution from the reasonable classification test to the doctrine of arbitrariness. They trace its origins in Justice Bhagwati’s opinion in *E.P. Royappa*, where arbitrariness was positioned as antithetical to equality, and analyse Justice Nariman’s decision in *Shayara Bano*, which extended the concept of “manifest arbitrariness” to strike down plenary legislation. The article critiques this judicial innovation on both conceptual and institutional grounds. By equating arbitrariness with inequality, the authors argue, courts risk conflating administrative law standards with constitutional adjudication. This creates uncertainty about whether arbitrariness constitutes a standalone test or a variant of reasonable classification. More significantly, the doctrine allows courts to enquire into legislative intent, a move that unsettles the presumption of constitutionality and blurs the line between legislative policy and judicial review. Through a detailed engagement with precedents ranging from *Royappa* and *Ajay Hasia* to *McDowell*, *Naveej Johar*, and the Electoral Bonds judgment, the article highlights inconsistencies in the Supreme Court’s reasoning. The authors contend that the use of manifest arbitrariness risks fostering excessive judicial intervention and undermining the principle of separation of powers. It concludes that while Article 14 must remain a robust safeguard against discriminatory state action, the doctrine of manifest arbitrariness is constitutionally unsustainable, normatively undefined, and vulnerable to judicial overreach. The authors caution that the continued use of this doctrine could lead to “juristocracy,” and argue instead for a restrained and textually grounded approach to legislative review under Article 14.

In *‘Democracy on Trial: A Case of Temporary Disqualification of People’s Representatives under Section 8B of the Representation of the People Act,’* the author examines the escalating criminalisation of Indian politics, spotlighted by a 2024 Association for Democratic Reforms

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report revealing that 46% of Lok Sabha members face criminal charges, with 31% accused of serious offences like murder and rape. The study evaluates the proposed Section 8B of the Representation of the People Act, 1951, which advocates disqualifying candidates upon framing of charges for serious crimes, as recommended by the 244th Law Commission Report (2014). Analysing judicial precedents such as *Public Interest Foundation v. Union of India*, the paper critiques the inadequacy of current disqualification laws reliant on convictions, hindered by judicial delays and low conviction rates. It addresses parliamentary concerns about Section 8B, such as premature disqualification and potential misuse, arguing that safeguards like a one-year charge cut-off and expedited trials ensure fairness. Comparing jurisdictions like Egypt, the Philippines, and Germany, the article further highlights stricter global disqualification norms. Finally, it advocates for Section 8B's enactment, voter sensitization, party penalties, and special courts to expedite trials, urging coordinated action among stakeholders to protect India's electoral integrity and democratic principles.

In “*Tribal Communities and the Indian Constitution: Socio-economic Rights of Tribes in India and the Challenges of Climate Change*,” the author explores the vulnerability of India's tribal populations to climate change. The article argues that the constitutional framework, particularly the Fifth and Sixth Schedules and the Panchayat (Extension to Scheduled Areas) Act (PESA), has failed to adequately protect the socio-economic rights of tribes and ensure their effective participation in decision-making. By tracing the historical trajectory of tribal representation, from colonial-era policies to the debates in the Constituent Assembly, the paper highlights how a paternalistic, top-down approach has disempowered these communities. The author analyzes the legal provisions, demonstrating how the current system, often influenced by political and economic interests, facilitates the exploitation of natural resources at the expense of tribal rights and livelihoods. Ultimately, the article underscores the urgent need for constitutional remedies to empower tribal communities and safeguard their deep-rooted connection to nature in the face of the global climate crisis.

In “*Decriminalising Indian Politics: Synchronising Democratic Probity and Fairness in India’s Electoral Set-Up*,” Archisa Ratn and Atharva Dwivedi contend that India’s legal framework for preventing political criminality is flawed and inadequately applied. The authors critically examine Sections 8 and 11 of the Representation of the People Act, 1951 (RoPA), which disqualify convicted individuals from holding public office. By tracing the legislative history, the paper argues that the provision’s broad language and rigid application, specifically the two-year sentence threshold, fail to distinguish between serious crimes and minor, politically motivated offenses. Using the disqualification of Rahul Gandhi as a prime example, the article asserts that these provisions are susceptible to misuse, creating an arbitrary and unconstitutional legal landscape. The authors conclude by proposing legislative reforms that balance the need for ethical politics with fairness, advocating for a more nuanced approach that considers the nature of the crime rather than simply the length of the sentence.

In “*To Consociate or Not to Consociate: Understanding the Paradox of Elite Dominance and Constitutionalism*,” Daisy Verghese and Parvathy K. Arun present a critical analysis of consociationalism, a political theory for managing deeply divided societies. The authors challenge Arend Lijphart’s classification of India as a successful consociational state, arguing that the theory’s power-sharing mechanisms, intended to mitigate ethnic conflict, have instead contributed paradoxically, to elite dominance and the oppression of minorities. By examining India’s political evolution, the paper demonstrates how the informal adoption of consociational principles, such as proportionality in government appointments and cultural autonomy, has institutionalized ethnic divisions. This framework, they argue, exacerbated tensions and ultimately contributed to significant violence, including the Partition. The article concludes that India’s experience serves as a cautionary tale, revealing that consociational policies can deepen divisions rather than alleviate them, and highlights the need for alternative policy structures that promote genuine social harmony without institutionalizing ethnic identities.

CCAL ACTIVITIES

Over the last seven months, CCAL has undertaken several activities aimed at fostering interest and development in the fields of constitutional law and

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administrative law. The endeavour of the Centre to encourage discourse on the subject matter of constitutional and administrative law is furthered by preparations for hosting our annual National Seminar on Constitutionalism in Contemporary Times, guest lecture events, Writ[e] & Talk podcast and the regular publication of articles on topics of contemporary relevance on our blog “*Pith and Substance: The CCAL Blog*”.

The Centre for Comparative Constitutional and Administrative Law hosts its podcast, “*Writ[e] and Talk*.” This podcast features in-depth interviews with the authors of various articles. It allows listeners to take them beyond the written word, by delving further into the concepts, arguments, and analyses underlying published works. The same is hosted by Ms. Sayantani Bagchi, and our student members. Listeners can subscribe to our podcast on YouTube, Google Podcasts, and Spotify. This came as a further development to talks that were organised by the centre which saw several luminaries over the span of 4 years such as Dr. Seema Kazi, Dr. Rowena Robinson, Dr. Prashant Narang to name a few.

Our podcast is available on Spotify, Google Podcasts and YouTube. Transcripts of the episodes and links to relevant reading material can be found on our blog, Pith & Substance: The CCAL Blog.

CCAL in collaboration with the University’s Queer Alliance, PRIDE NLUJ, hosted a virtual guest lecture on September 8, 2025, by Prof. Rehan Abeyratne, Professor and Associate Dean (Higher Degree Research) at Western Sydney University School of Law, to mark the 7th anniversary of *Navej Singh Johar v. Union of India* (2018). Drawing from his recent book *Courts and LGBTQ+ Rights in an Age of Judicial Retrenchment*, Prof. Abeyratne offered a nuanced analysis of the paradox between the judicial advancement of LGBTQ+ rights and the simultaneous decline of liberal constitutionalism worldwide, weaving in perspectives from the United States, India, and Hong Kong to show how courts, even under retrenchment, have remained pivotal to the recognition of LGBTQ+ rights. Such events reflect the commitment of CCAL to contribute towards contemporary discourse in constitutional law and queer rights.

The centre aims to encourage dialogue and make academia accessible, by simplifying ideas and constitutional theory, for students and people from a non-legal background to understand the same.

For Constitution Day, the Centre hosted an Intra-University Essay Writing Competition for students of the university, inviting them to critically engage with the ethos of the Constitution, highlighting the legacy of Indian jurists whose contributions to the evolution and interpretations of the Constitution have been invaluable. This year, our 3rd edition, invited students to write on Justice H.R. Khanna.

ACKNOWLEDGEMENT

The editorial board of CALJ (“**Board**”) worked on the issue over the last seven months with utmost dedication and determination. The process was a learning experience for us and provided us with the opportunity to bond with the entire team.

The publication of this issue would not have been possible without the guidance of our Patron, Hon’ble Vice-Chancellor of the National Law University, Jodhpur, Prof. (Dr.) Harpreet Kaur. At this juncture, we would also take the opportunity to thank our Chief Editor – Ms. Sayantani Bagchi, for her constant support, mentorship and engagement with every initiative we undertake. The Registrar of National Law University, Jodhpur has also ensured smooth functioning at every stage, and we are thankful for it.

We would also like to thank every member of the Board for working on the issue and ensuring that the standards of our journal improve constantly. Members of the Board — Sonsie Khatri, Krishangee Parikh, Kovida Bhardwaj, Dhruv Singhal, Mohak Dua, Tasneem Fatma, Sourabh Manhar, Vaishnavi Suresh, Manugonda Soumya, Aadisha Dhaliwal, Adithya Talreja, Amita Kaka, Devvrata, Anand Shankar, Gurmehar Singh Bedi, Manishka Baweja, Mayank Sinha, Paavani Kalra, Prabhav Chaturvedi, Tamanna, Udit Jain, Suhana Gandhi, Ananthajitha, Divita Joshi, Karlo Cruz, Kushal Pal, Princy Sawant, Rohitash Yadav and Rini Varghese — have been assets to our team.

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with sufficient resources. The Board also recognises the vital part performed in processing each application and ensuring the efficiency of the process by the University's Students Section.

On behalf of the Board, we must also thank our authors for taking the time to contribute to this issue. The topics covered in this issue are of contemporary relevance to Indian Constitutional Law as well as theoretical underpinnings of the Constitution.

We are grateful to the writers for their persistence and cooperation throughout the editing process, which made the timely and smooth release of this issue possible. The Board hopes that readers will find this issue to be a useful resource and that it will encourage informed discussion on the topics of administrative law and constitutional law. Should our readers have any queries, suggestions or feedback for us, write to us at: **editorcalq[at]gmail[dot]com.**

Himanshi Yadav & Sinchan Chatterjee

Editors-in-Chief

DEPARADOXING CONSTITUTIONAL DEMOCRACY

LAURENCE CLAUS¹

Democracy can become more fragile as it becomes more complete. Socrates noticed this paradox three millennia ago. British parliamentary and American presidential systems of government established stable electoral patterns during the long formative periods when those systems were not as democratic as they are today. Elitist ways of selecting legislators stopped even the most popular prime ministers and presidents from fully controlling Parliament and Congress. When these systems have been emulated elsewhere with mass voting from the outset, they have often failed. Fuller democracy can enable a charismatic leader to transform a mass following into a disciplined party that can exploit transient popularity to control legislatures and turn democracy against itself. But this paradox is resolvable. Comparative constitutional experience shows that we can be fully democratic today and reliably stay fully democratic tomorrow by redesigning the way we vote for legislators and the way we structure executives.

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DEPARADOXING CONSTITUTIONAL DEMOCRACY

INTRODUCTION

And is it not always the practice of the commons to select a special champion of their cause, whom they maintain and exalt to greatness?

Yes, it is their practice.

Then, obviously, whenever a despot grows up, his origin may be traced wholly to this championship, which is the stem from which he shoots.

– Socrates²

Democracy can become more fragile as it becomes more complete. *Constitutional* democracy seeks to keep democracy intact not only for today's elections but for future times too. Keeping up the democracy game depends on maintaining patterns of real repeat play in which today's winners never end the tournament and take power permanently. Both the United Kingdom's parliamentary system and the United States' presidential system established patterns of real repeat play during the long formative periods when those systems were less democratic than they are now. Their oligarchic, elitist features helped deepen the grooves of custom that secured voters' rights for the future. In particular, elitist methods of choosing legislators helped prevent prime ministers and presidents from controlling their legislatures. Those legislatures could not be completely captured through anyone's transient popularity.

When democracy really dawned, when the electorate widened to include the mass of ordinary citizens, a new route to power opened up, a route that much more readily and comprehensively concentrated power in one pair of hands. One true leader could attract a mass following and turn that following into a disciplined party that could capture control of legislatures and even amend constitutions. Temporarily concentrating so much power in one charismatic person puts a democratic system at risk of changing in ways that permanently concentrate power in one person and end democracy. When the British parliamentary and American presidential models have been emulated elsewhere with mass voting from the outset, we have often seen

² PLATO, *THE REPUBLIC* 299 (bk. 8, 565) (John Llewellyn Davies & David James Vaughan, trans., 3rd ed., 1866).

them take this route to tyranny. These models often fail when transplanted,³ just as Socrates predicted.⁴

How do we make democracy complete without setting it up to sabotage itself? How do we let everyone vote without exposing democracy to predation by demagogues who draw power from mass voting? How do we maintain the real repeat playing that is the lifeblood of *tomorrow's* democracy?

Courts can try. Constitutional strategies to self-maintain democracy include empowering courts and other supervisory institutions, such as electoral commissions, to enforce barriers to deep systemic change. The Indian Supreme Court's basic structure doctrine exemplifies such a strategy in action.⁵ But such barriers are themselves vulnerable to critique as anti-democratic.⁶ And such courts and other institutions can be captured by those they seek to constrain,⁷ and often are.⁸

³ See, e.g., Juan J. Linz, *Presidential or Parliamentary Democracy: Does It Make A Difference?*, in 1 JUAN J. LINZ & ARTURO VALENZUELA (EDS.), *THE FAILURE OF PRESIDENTIAL DEMOCRACY* 3-87 (1994); MATTHEW SOBERG SHUGART & JOHN M. CAREY, *PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS* 40 (1992); Scott Mainwaring & Matthew S. Shugart, *Juan Linz, Presidentialism, and Democracy: A Critical Appraisal*, 29 *COMPARATIVE POLITICS* 449, 453 (1997). “The 2023 *V-Dem* report noted that the global level of democracy in 2022 had returned to its 1986 value. Over seventy-two percent of the world's population, 5.7 billion people, live in autocracy. ... Moreover, the tempo of de-democratization is increasing. Just within the last year, the number of autocratising countries has increased by nine. The hope for the fourth wave of democratization, ignited by the Arab Spring in 2011, has been crushed, and a part of the third wave of democratization has been undone.” Katarína Šipulová & David Kosar, *Decay or Erosion? The Role of Informal Institutions in Challenges Faced by Democratic Judiciaries*, 24(8) *GERMAN L.J.* 1577, 1577–78 (2024).

⁴ PLATO, *supra* note 2.

⁵ See *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225; *Minerva Mills v. Union of India*, (1980) 3 SCC 625.

⁶ See, e.g., Upendra Baxi, *The Constitutional Quicksands of Kesavananda Bharati and the Twenty-Fifth Amendment*, (1974) 1 SCC (Jour.) 45; Raju Ramachandran, *The Supreme Court and the Basic Structure Doctrine*, in B. N. KIRPAL ET AL. (EDS.), *SUPREME BUT NOT INFALLIBLE: ESSAYS IN HONOUR OF THE SUPREME COURT OF INDIA* 110 (2004).

⁷ “Put a bit more strongly than is appropriate, IPDs are most likely to be successful just in the situations where they are least needed.” MARK TUSHNET, *THE FOURTH BRANCH: INSTITUTIONS FOR PROTECTING CONSTITUTIONAL DEMOCRACY* 66 (2021). See also Rosalind Dixon & David Landau, *Abusive Judicial Review: Courts Against Democracy*, 53 *U.C. DAVIS L. REV.* 1313 (2020).

⁸ “Dutifully performing its role in a highly-choreographed display of political theatre, Russia's highest court on Monday approved constitutional changes that opened the way for President Vladimir V. Putin

DEPARADOXING CONSTITUTIONAL DEMOCRACY

We can both more fully *be* and more reliably *stay* democratic by stopping the executive from becoming a predator and a capturer. This article identifies promising and complementary ways to do that: proportional representation voting models that reduce the prospects of one person controlling a legislature and plural executive models, such as Switzerland's, that help prevent one person from controlling the executive.

THE MAKINGS OF MODERN DEMOCRACY

The “paradox of democracy” is a phrase used by many authors to highlight puzzles, contradictions, and curiosities in and about democracy.⁹ There is a basic tension in the idea of *self*-government, because governing a large group will involve some humans doing acts that lead and many humans doing acts that follow. *Leadership by all the followers* is not actually possible. But letting the followers keep deciding whom they will follow *is*. What if the followers vote for someone who ends voting? That was how Karl Popper read Socrates’

to crash through term limits and stay in power through 2036. With a dense 52-page ruling clogged with legalese, the Constitutional Court removed one of the last, albeit very flimsy potential obstacles to Mr. Putin effectively becoming president for life. ... Ekaterina Schulmann, a political commentator and former member of Mr. Putin's human rights council, mocked the Constitutional Court's ruling on Monday as evidence of how cravenly pliant Russia's nominally independent judicial system had become. 'It is rare that the spirit of slavery and intellectual cowardice express themselves with such fullness in a written text,' she said in a commentary posted on Facebook.” Andrew Higgins, Russia's Highest Court Opens Way for Putin to Rule Until 2036, N.Y. TIMES, Mar 16, 2020.

⁹ See, e.g., Richard Wollheim, *A Paradox in the Theory of Democracy*, in PETER LASLETT & W.G. RUNCIMAN (EDS.), *PHILOSOPHY, POLITICS AND SOCIETY* 71 (1st ed., 1962) (a true democrat can favor implementing a particular policy and favor implementing the policy that has democratic support, but the two may be antithetical to each other); Larry Jay Diamond, *Three Paradoxes of Democracy*, 1 J. DEMOCRACY 48 (1990) (democracy requires conflict but also consensus; government must be representative but able to govern the represented; there must be consent but also effectiveness); ZACH GERSHBERG & SEAN ILLING, *THE PARADOX OF DEMOCRACY: FREE SPEECH, OPEN MEDIA, AND PERILOUS PERSUASION* (2022) (free speech intrinsic to democracy can threaten democracy and cannibalize itself). See also, e.g., Stephen Holmes, *Precommitment and the paradox of democracy*, in JON ELSTER & RUNE SLAGSTAD (EDS.), *CONSTITUTIONALISM AND DEMOCRACY* 195 (1988); Robert A. Dahl, *A Democratic Paradox?*, 115 POL. SCI. Q. 35 (2000); Kevin Olson, *Paradoxes of Constitutional Democracy*, 51 AM. J. POL. SCI. 330 (2007); PAUL M. SNIDERMAN ET AL. (EDS.), *PARADOXES OF LIBERAL DEMOCRACY: ISLAM, WESTERN EUROPE, AND THE DANISH CARTOON CRISIS* (2014); BRUCE KAPFERER & DIMITRIOS THEODOSSOPOULOS (EDS.), *DEMOCRACY'S PARADOX: POPULISM AND ITS CONTEMPORARY CRISIS* (2019).

paradox of democracy.¹⁰ What leads to that paradox is the one we now notice: the more democratic we are, the more likely we are to let someone end the democracy we have. The broader the franchise, the more precarious it is.

This paradox is resolvable. It exists only because we humans often let ourselves be led by charismatic individuals. Many people can become in thrall to a person. No one has ever been in thrall to a committee. If we create models of democratic governance that do not set up singular leaders as focal points for following, we can fix democracy's fragility, its precariousness. Almost two centuries of Swiss constitutional experience evidence this.¹¹ But if this diagnosis and prescription are correct, why has democracy survived for centuries in the United Kingdom and the United States, despite those nations having substantively singular chief executives? Two case studies from those prototype systems' infancy help explain why democracy's durability in the United Kingdom and the United States does not diminish the case for calling charismatic individual leadership the key threat to democracy now.

A. WALPOLE AND BRITISH PARLIAMENTARY DEMOCRACY

Robert Walpole came to the fore at a turbulent time.¹² The Glorious Revolution that ousted King James II had embarked England on a new constitutional era, reflected in the Bill of Rights of 1689, the Act of Settlement of 1701, and the union with Scotland in 1707. The seventeenth century's power struggles between the Stuart monarchs and Parliament had been a series of winner-take-all elimination games. The losers of each round lost more than office, sometimes even their lives. To restart the contest required revolution and risked more violence. Would the eighteenth century be any different?

Walpole's early experience was inauspicious. After his Whig faction lost electoral support, the new Tory government accused him of corruption, impeached him in Parliament, and imprisoned him in the Tower of London.

¹⁰ KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 581-82 (2013).

¹¹ See Part III, *infra*.

¹² For the historical context of these events, see particularly Sir John Plumb's two volume biography of Walpole: J. H. PLUMB, *SIR ROBERT WALPOLE: THE MAKING OF A STATESMAN* (1956) and J. H. PLUMB, *SIR ROBERT WALPOLE: THE KING'S MINISTER* (1961).

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But the political wind soon changed again. Queen Anne died before the Tories could prepare the nation to accept her exiled Catholic brother, James. When a more distant Protestant relative took the throne, Walpole's Whigs swept back into power.

In Parliament, Walpole led in attainting the Tory Viscount Bolingbroke for treason. The cycle of winner-take-all elimination seemed to be ongoing. Walpole also managed to situate himself to lead the nation so singularly and for so long that we now consider him the first British prime minister. He had qualities of personality and intelligence that set him up to lead, nurturing the kind of relationship to others that Max Weber called *charismatic authority*.¹³ His wide support in Parliament made the new monarch dependent on him to get things done. The executive power delegated to him by the monarch included power to decide who would be appointed to other government offices, both high and low, and who would receive other forms of government patronage. That, in turn, strengthened his hold over other members of Parliament.

Yet something was changing about the ways those with power in England were able to wield it. Even as the emerging system's dynamics concentrated power in Walpole's hands, they also limited him in ways that the preceding century's winners had not been limited. Nothing illustrated this so starkly as the actual fate of his nemesis, Bolingbroke.

Through charm and bribery, Bolingbroke manoeuvred into the good graces of the monarch, who insisted that Walpole persuade Parliament to let Bolingbroke return from exile in France and own land in England.¹⁴ On return, Bolingbroke did not stay quiet. He led in criticising Walpole's administration, both in person and in print.¹⁵ His home became a centre of opposition. Among his distinguished visitors was a friend from France: Charles-Louis de Secondat, Baron de Montesquieu.¹⁶

¹³ Max Weber, *Theory of Social and Economic Organization*, in S. N. EISENSTADT, ED., ON CHARISMA AND INSTITUTION BUILDING: SELECTED PAPERS 46–62 (1968) (A. K. Henderson & Talcott Parsons trans., 1947).

¹⁴ PLUMB, THE KING'S MINISTER, *supra* note 12, at 125–126.

¹⁵ See ISAAC KRAMNICK, BOLINGBROKE AND HIS CIRCLE: THE POLITICS OF NOSTALGIA IN THE AGE OF WALPOLE 15–24 (1992).

¹⁶ ROBERT SHACKLETON, MONTESQUIEU: A CRITICAL BIOGRAPHY 297–301 (1961); Robert Shackleton, *Montesquieu, Bolingbroke, and the Separation of Powers*, 3 FRENCH STUDIES 25–38 (1949).

Montesquieu could see that Bolingbroke was getting away with publicly opposing the government. Walpole could not just say “*will no one rid me of this turbulent priest?*”¹⁷ and have Bolingbroke silenced. Bolingbroke had what Montesquieu called “*political liberty*,” which Montesquieu defined as “*a tranquillity of mind arising from the opinion each person has of his safety*.” Montesquieu opined that “[i]n order to have this liberty, it is requisite the government be so constituted as one man need not be afraid of another.”¹⁸ England’s eighteenth-century constitution did just that, Montesquieu argued, by separating three kinds of power and giving them to different people: the monarch, the members of Parliament, and the adjudicators in courts.¹⁹

Montesquieu could surely see that the monarch was helping to protect Bolingbroke.²⁰ Montesquieu contended that having one person as chief executive was consistent with a constitution of liberty and desirable “*because this branch of government, having need of despatch, is better administered by one than by many*.”²¹ The danger to liberty would come, Montesquieu argued, from executive and legislative power being fused in the same people. “[I]f there were no monarch, and the executive power should be committed to a certain number of persons selected from the legislative body, there would be an end then of liberty; by reason the two powers would be united, as the same persons would sometimes possess, and would be always able to possess, a share in both.”²² The danger to Bolingbroke’s freedom would come, Montesquieu predicted, from the likes of Walpole ultimately controlling both the legislature and the executive. In Montesquieu’s eyes, danger to liberty lay in the emerging practice of responsible government that was concentrating power in Walpole – the monarch was delegating executive power to the person who had the most power in the legislature.

¹⁷ See W.L. WARREN, HENRY II 112, 508 (1977).

¹⁸ 1 CHARLES-LOUIS DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS, 151 (Thomas Nugent trans., orig. publ. 1748, 1900).

¹⁹ *Id.* at 151-62; SHACKLETON, *supra* note 16, at 285, 297-301. “The British constitution was to Montesquieu, what Homer has been to the didactic writers on epic poetry. As the latter have considered the work of the immortal Bard, as the perfect model from which the principles and rules of the epic art were to be drawn, and by which all similar works were to be judged; so this great political critic appears to have viewed the constitution of England, as the standard, or to use his own expression, as the mirror of political liberty; and to have delivered in the form of elementary truths, the several characteristic principles of that particular system.” JAMES MADISON, THE FEDERALIST No. 47 (1788).

²⁰ MONTESQUIEU, *supra* note 18, at 156.

²¹ *Id.*

²² *Id.*

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When we consider how often parliamentary systems have turned into tyrannies, we can see that Montesquieu was not wrong to call the concentrated powers of prime ministership dangerous. To exemplify that, we need look no further than the governments of the three Axis powers that started World War II. Montesquieu's mistake was to see the danger in combining *kinds* of power, when it really lay in concentrating too much power in one person.

Combining kinds of power is inevitable. There was not really a separation of powers in England, but a sharing of powers. For example, the monarch had power to say no to new laws, and the Parliament had power to remove the monarch's officials. Montesquieu argued that these checks and balances existed to protect the institutional separation,²³ but as James Madison acknowledged at the American Founding,²⁴ checks and balances did more than defend institutional turf. The monarch's power to veto laws made the monarch a third chamber of Parliament, with leverage to negotiate for the laws the monarch wanted. And centuries of experience in constitutional democracies around the world have demonstrated that implementing existing law involves making more, both through executive regulations and through judicial decisions. Throughout the common law world and beyond, all three branches of government exercise both legislative and executive powers.²⁵

The true source of English liberty was the power sharing that stopped any individual in government, including Walpole, from having the last word on the reach of their own powers.²⁶ Walpole had more influence than anyone else on what the executive did and on what the legislature did. He had both executive and legislative power. But neither was ultimately his alone. The

²³ See, e.g., *id.* at 159: “The executive power . . . ought to have a share in the legislature by the power of rejecting; otherwise it would soon be stripped of its prerogative.” *Id.* at 150: “[C]onstant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. . . . To prevent this abuse, it is necessary from the very nature of things that power should be a check to power.”.

²⁴ “On the slightest view of the British constitution we must perceive that the legislative, executive and judiciary departments are by no means totally separate and distinct from each other. The executive magistrate forms an integral part of the legislative authority.” JAMES MADISON, *THE FEDERALIST* No. 47 (1788).

²⁵ See Laurence Claus, *Montesquieu's Mistakes and the True Meaning of Separation*, 25 OXFORD J. LEGAL STUDIES 419 (2005).

²⁶ *Id.* at 425-26.

monarch's presence above him was one limitation on Walpole's power, but it was not the only one. The legacy of Parliament's successes in the power struggles of the seventeenth century was that a sufficiently united Parliament would ultimately get its way against the monarch. What limited Walpole most was that he could not sufficiently control Parliament.

Walpole had two ways to affect what Parliament did – persuasion and patronage. He was charismatic and shrewd enough to use both tools to great effect.²⁷ This attracted the criticism that Walpole was arrogating too much power by making the legislature dependent on the executive. David Hume countered that Walpole was really just maintaining an equilibrium between the branches that enabled effective governance. The right question, Hume argued, was not whether Walpole was making Parliament dependent on the executive, but “*what was the proper degree of this dependence, beyond which it became dangerous to liberty.*”²⁸ Some degree of dependence, Hume argued, just counter-balanced the executive's dependence on parliamentary support. Dangling carrots of preferment could take Walpole only so far, and less far as he aged and looked less likely to offer much more in the future. What he lacked were sticks.

Many members of Parliament, including erstwhile allies, had little reason to fear reprisal for not bending to Walpole's will, because he could not control the processes through which they held their seats. In one chamber, seats were hereditary. In the other chamber, members were chosen through longstanding, jealously cherished local and regional processes involving small numbers of privileged people.²⁹ Walpole could not completely capture candidate selection processes for the House of Commons because other powerful people had well-settled say in those processes. Many in these old enfranchised families had risked their lives in standing up to the Stuart monarchs. They were neither in awe nor afraid of Walpole. That actual dispersion of electoral power was what maintained the election cycle and preserved the freedom of speech and really stopped Walpole from becoming

²⁷ See, e.g., PLUMB, THE MAKING OF A STATESMAN, *supra* note 12, at 52-61, 72-73, 78; PLUMB, THE KING'S MINISTER, *supra* note 12, at 307.

²⁸ David Hume, *Of the independency of Parliament*, in KNUD HAAKONSEN (ED.), HUME: POLITICAL ESSAYS 26 (1994). The virtue of mutual dependence had been a central claim of Walpole's defence against Bolingbroke's critique. See KRAMNICK, *supra* note 15, at 123-24.

²⁹ PLUMB, THE MAKING OF A STATESMAN, *supra* note 12, at 41-42.

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a dictator, not the formal separation of institutions that Montesquieu noticed.

Bolingbroke never regained public office. But he never lost his ability to speak out and influence others. Outsiders such as Montesquieu marvelled that England's new constitutional settlement enabled stable and successful governance to coexist with vocal, uninhibited opposition. Had some newfound *spirit* of liberty or democracy removed the risk of tyranny? When they saw opportunity, Walpole and Bolingbroke each tried to destroy the other. Their long coexistence resulted from circumstances not of their choosing and not intrinsic to constitutional democracy.

B. JEFFERSON AND AMERICAN PRESIDENTIAL DEMOCRACY

Thomas Jefferson's candidacy for the presidency had long coattails. Members of his Democratic-Republican party won most of the seats in the House of Representatives, and as his presidency progressed, the party gained a majority in the Senate too. Only the judiciary remained undominated. The defeated Federalists had seen to that, creating new courts and a flurry of new appointments on their way out of office. When Congress convened, the Jeffersonians set about undoing the Federalists' handiwork. They repealed the recent judicial re-organisation, abolishing seats already occupied by Federalist appointees.³⁰ In the Senate, Gouverneur Morris complained that this made a mockery of the Constitution's promise, mirroring the English Act of Settlement, that federal judges would hold their offices "*during good Behaviour*."³¹ Could it really be that "*you shall not take the man from the office, but you may take the office from the man; you shall not drown him, but you may sink his boat under him*"[?]³² A cowed Supreme Court nonetheless recognised the repeal.³³

What of the Supreme Court Justices themselves? The Constitution clearly required the Court's existence, but could the Jeffersonians remove political opponents from its bench? When his party had acquired the Senate

³⁰ Act to Repeal Certain Acts respecting the Organization of the Courts, 2 STAT. 132, March 8, 1802.

³¹ U.S. CONST. art. III §1.

³² 11 ANNALS OF CONGRESS 39 (United States Senate, January 8, 1802).

³³ *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803). See Letter John Marshall to Samuel Chase, Jan. 23, 1804, reproduced in 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL*, between 176 and 177 (1919).

supermajority needed to remove officeholders for “high Crimes and Misdemeanors,”³⁴ Jefferson decided to try. With his encouragement, the House of Representatives impeached Samuel Chase,³⁵ the Court’s most vociferous and intemperate critic of the Jeffersonians. At trial in the Senate, Chase’s counsel argued “*that the offence, whatever it is, which is the ground of impeachment, must be such a one as would support an indictment.*”³⁶ Yet the arch-Federalist Alexander Hamilton had argued in the Constitution’s ratification debates that the impeachment power gave Congress “*a complete security*” against “*judiciary encroachments on the legislative authority.*”³⁷ That seemed to suggest that Congress could remove judges for the way they were doing their jobs, even if the objectionable behaviour fell short of indictable crime.

Chase’s impeachment failed. Some of the Jeffersonian senators acquitted him on all charges.³⁸ Though we cannot be certain of their individual

³⁴ U.S. CONST. arts. I § 3 cl. 6; II §4.

³⁵ The Articles of Impeachment reported to the House on March 26, 1804, concluded that the House of Representatives “*do demand that the said Samuel Chase may be put to answer the said crimes and misdemeanors*” (13 ANNALS OF CONGRESS 1240) and alleged that Chase had lacked impartiality when presiding at trials and when supervising grand jury investigations in several cases against political opponents of the Adams administration, and that in 1803 he had delivered “*an intemperate and inflammatory political harangue*” to a grand jury in Maryland against the state government. (*Id.* at 1237-1240).

³⁶ 4 JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 453 (1836), which Elliot annotated with Joseph Story’s commentary: “*It seems to be the settled doctrine of the high court of impeachment, (the Senate,) that though the common law cannot be a foundation of a jurisdiction not given by the Constitution or laws, that jurisdiction, when given, attaches, and is to be exercised according to the rules of the common law; and that what are, and what are not, high crimes and misdemeanors, is to be ascertained by a recurrence to the great basis of American jurisprudence.*” (*Id.*)

³⁷ “[T]he supposed danger of judiciary encroachments on the legislative authority, which has been upon many occasions reiterated, is in reality a phantom. Particular misconstructions and contraventions of the will of the legislature may now and then happen; but they can never be so extensive as to amount to an inconvenience, or in any sensible degree to affect the order of the political system. This may be inferred with certainty from the general nature of the judicial power; from the objects to which it relates; from the manner in which it is exercised; from its comparative weakness, and from its total incapacity to support its usurpations by force. And the inference is greatly fortified by the consideration of the important constitutional check, which the power of instituting impeachments, in one part of the legislative body, and of determining upon them in the other, would give to that body upon the members of the judicial department. This is alone a complete security.” ALEXANDER HAMILTON, THE FEDERALIST No. 81 (1788).

³⁸ See 3 SENATE JOURNAL 524-7 (March 1, 1805). On the Chase impeachment and its legacy, see WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 19, 22-23, 53-57, 98-

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motivations, their decision met the concern expressed by James Wilson at the Philadelphia Convention that “[t]he Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Govt.”³⁹ How could judicial independence stay real if impeachment hung over the heads of the federal judges like an ideological sword of Damocles?⁴⁰ How could constitutional limitations on the government stay real if a powerful president could purge the courts of those who might rule against him? A frustrated Jefferson later wrote to one of his Senate supporters that “*impeachment is a farce which will not be tried again.*”⁴¹

Jefferson could not get rid of Chase because many senators in his own party were not deeply beholden to him. They had their own power bases in their home states, whose legislatures had chosen them for six-year terms.⁴² They were invulnerable to presidential vendettas. Like Walpole, Jefferson led a political faction that was overwhelmingly dominant. Yet like Walpole, Jefferson still could not completely control the legislature. Party discipline was just not that strong. Localised and elitist selection processes sidelined party leaders sufficiently to protect the integrity of the constitutional system.

Jefferson and Walpole could not get past inhibitions that fuller democracy has since loosened. What if they had led mass movements that turned into truly disciplined parties? What if the candidates from those parties had owed their seats to, and depended for their prospects utterly on, their leader? What if a passing burst of popularity had catapulted such a party into overwhelming dominance? What if a leader with such dominance had wanted to keep it forever? When we look closely, we can see that traditions of repeat playing leadership contests evolved in Britain and America through circumstances that were mostly not included in the packaging for export and are no longer present even in those nations now.

113 (1st ed, 1992). See also Keith E. Whittington, *Reconstructing the Federal Judiciary: The Chase Impeachment and the Constitution*, 9 STUDIES IN AMERICAN POLITICAL DEVELOPMENT 55-116 (1995).

³⁹ 2 MAX FARRAND (ED.), RECORDS OF THE FEDERAL CONVENTION 429 (1911) (Madison's notes, Aug. 27, 1787).

⁴⁰ 5 MARCUS TULLIUS CICERO, TUSCULAN DISPUTATIONS 286-88 (Andrew P. Peabody trans., 1886).

⁴¹ Letter Thomas Jefferson to William Branch Giles, April 20, 1807, in 5 H.A. WASHINGTON, ED., THE WRITINGS OF THOMAS JEFFERSON 65, 68 (1854).

⁴² U.S. CONST. art. 1 §3 cl. 1. (See now the Seventeenth Amendment.)

THE CHALLENGE OF CHARISMATIC LEADERSHIP

Speaking in the Constituent Assembly about India's draft constitution, Dr. B. R. Ambedkar observed:

*A democratic executive must satisfy two conditions – (1) It must be a stable executive and (2) it must be a responsible executive. ... The American and the Swiss systems give more stability but less responsibility. The British system on the other hand gives you more responsibility but less stability. ... In England, where the Parliamentary system prevails, the assessment of responsibility of the Executive is both daily and periodic. The daily assessment is done by members of Parliament, through questions, Resolutions, No-confidence motions, Adjournment motions and Debates on Addresses. Periodic assessment is done by the Electorate at the time of the election which may take place every five years or earlier. The Daily assessment of responsibility which is not available under the American system it is felt far more effective than the periodic assessment and far more necessary in a country like India. The Draft Constitution in recommending the Parliamentary system of Executive has preferred more responsibility to more stability.*⁴³

Ambedkar's thoughtful analysis missed the way that party discipline under one true leader can flip the script on responsible government. Instead of the executive being accountable to the legislature, the legislature can become captive to the executive. Like American-style presidential systems, British-style parliamentary systems enable singular leaders to threaten democracy itself, perhaps even more readily.⁴⁴ *"Parliamentary systems with disciplined parties and a majority party offer the fewest checks on executive power, and hence promote a winner-takes-all approach more than presidential systems."*⁴⁵

In defending the American founders' choice to build their system on Montesquieu's vision of separated powers,⁴⁶ Madison argued that their own

⁴³ 7 CA DEB Nov. 4, 1948, 7.48 200. See also GRANVILLE AUSTIN, THE INDIAN CONSTITUTION 127 (1999) ("members believed that with the separation of powers of the Swiss or American systems, the Executive would not be sufficiently subject to legislative control").

⁴⁴ "We have identified twelve presidential regimes and twenty-one parliamentary regimes that have broken down in the twentieth century." SHUGART & CAREY, *supra* note 3, at 40.

⁴⁵ Mainwaring & Shugart, *supra* note 3, at 453.

⁴⁶ "The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. If he be not the author of this invaluable precept in the science of politics, he has the merit at least of displaying

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self-interested ambitions would cause officeholders in all three branches to stand up to each other and prevent power from concentrating in one place.

But the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.⁴⁷

Madison's analysis, like Ambedkar's, missed the impact of party discipline under one true leader. If the party is the true source of its members' privileges and power, then party members' self-interested ambitions may be served by subordinating formal separations and supervisory responsibilities to the agenda of the party and ultimately, of its leader. The formal institutions of government may appear separated and subject to each other's checks and balances, but the real configuration of power relationships may be that which pertains within the ruling party. That may be a pyramid, with one person at the top, and when it is, the transient popularity that sweeps the party into power may give that person both temptation and opportunity to change the system and make their temporary power permanent.

A wealth of recent legal and political science scholarship documents the steps by which charismatic leaders of disciplined parties have succeeded in undermining constitutional democracy around the world.⁴⁸ In the leading examples of contemporary democratic decline that feature in this literature, one person ultimately pulled the strings that puppeteered party members and others in a process of degrading democracy.⁴⁹ Another rich political

and recommending it most effectually to the attention of mankind." JAMES MADISON, THE FEDERALIST No. 47 (1788).

⁴⁷ JAMES MADISON, THE FEDERALIST No. 51 (1788).

⁴⁸ See, e.g., STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* (2018); TOM GINSBURG & AZIZ Z. HUQ, *HOW TO SAVE A CONSTITUTIONAL DEMOCRACY* (2018); Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018); ROSALIND DIXON & DAVID LANDAU, *ABUSIVE CONSTITUTIONAL BORROWING: LEGAL GLOBALIZATION AND THE SUBVERSION OF LIBERAL DEMOCRACY* (2021).

⁴⁹ See, e.g., Miklós Bánkúti, Gábor Halmái, & Kim Lane Scheppele, *Hungary's Illiberal Turn: Disabling the Constitution*, 23 J. DEMOCRACY 138 (2012); Turkuler Isiksel, *Between Text and Context: Turkey's Tradition of Authoritarian Constitutionalism*, 11 INT'L J. CONST. L. 702 (2013);

science literature shows that pyramid power structures with one person at the top are the natural shape of tyranny.⁵⁰ Why, then, when a people have the gift of full democracy, are they so often drawn to singular leadership, like moths to a flame?

We once needed it.⁵¹ In the struggle to survive and thrive, groups that are well-coordinated outcompete groups that are not.⁵² Charismatic authority,⁵³ the exhilarating psychological dynamic of inspiring leadership and devoted following, helped grow ancient human communities from small groups to

Javier Corrales, *The Authoritarian Resurgence: Autocratic Legalism in Venezuela*, 26 J. DEMOCRACY 37(2015).

⁵⁰ See, e.g., BARBARA GEDDES, JOSEPH WRIGHT, AND ERICA FRANTZ, HOW DICTATORSHIPS WORK: POWER, PERSONALIZATION, AND COLLAPSE 226 (2018) (“dictatorships led by somewhat collegial groups of officers (*juntas*) end sooner than other kinds of dictatorship”); MILAN W. SVOLIK, THE POLITICS OF AUTHORITARIAN RULE 55 (2012) (“the reasons for the emergence of personal autocracy are structural. ... [A]uthoritarian elites operate under distinctly hazardous conditions. They cannot rely on an independent authority to enforce mutual agreements, and violence is the ever-present, ultimate arbiter of their conflicts. These dismal circumstances ensure that any dictator’s aspiration to become the next Stalin is matched by the opportunity to do so. ... Rather than an accident of history, the emergence of personal autocracy is a systematic phenomenon.”).

⁵¹ See, e.g., Joseph Henrich, Maciej Chudek & Robert Boyd, *The Big Man Mechanism: how prestige fosters cooperation and promotes prosocial leaders*, (2015) Phil. Trans. R. Soc. B 370. See also ELMAN R. SERVICE, ORIGINS OF THE STATE AND CIVILIZATION: THE PROCESS OF CULTURAL EVOLUTION (1975) (“modern ethnohistorical records argue powerfully for the presence around the world of varyingly developed chiefdoms, intermediate forms that seem clearly to have gradually grown out of egalitarian societies and to have preceded the founding of all of the best-known primitive states” *id.* at 15-16); TIMOTHY EARLE, HOW CHIEFS COME TO POWER: THE POLITICAL ECONOMY IN PREHISTORY (1997) (arguing that “the origin of states is to be understood in the emergence and development of chiefdoms” *id.* at 14).

⁵² Cf. CHARLES DARWIN, THE ORIGIN OF SPECIES 153 (1859) (describing natural selection as preserving “variations in some way advantageous, which consequently endure” and observing that “any form represented by few individuals will, during fluctuations in the seasons or in the number of its enemies, run a good chance of utter extinction”). *Id.*, at 154: “The forms which stand in closest competition with those undergoing modification and improvement, will naturally suffer most. ... [E]ach new variety or species, during the progress of its formation, will generally press hardest on its nearest kindred, and tend to exterminate them.”

⁵³ Weber, *supra* note 13, 46–62. Weber opined that leadership likely emerged among early humans through their recognizing and appreciating some persons’ “exceptional powers or qualities. These are as such not accessible to the ordinary person, but are regarded as of divine origin or as exemplary, and on the basis of them the individual concerned is treated as a leader.” *Id.*, at 48.

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large nations with stable governments.⁵⁴ Charismatic authority is singular. It is an emotional bond to the *person* who is followed. It organises people who would otherwise be disorganised because they lack sophisticated systems of law and government. We live in large societies that were built with its aid. We are naturally drawn to the notion that we need it still. Its atavistic allure converges with the ambitions of would-be leaders⁵⁵ in gravitating constitutional design toward letting one person be the face of the nation. Charismatic leadership once rescued us from danger. But now it puts us in danger. It stops us from perfecting the power sharing that protects from tyranny. It leaves within our constitutional democracies a straightforward way for elected leaders to destroy them.

When constitutional designers articulate the case for a singular chief executive, emotions mostly go unmentioned. Instead, one person at the helm is said to be necessary for effective governance, governance that is energetic and responsible and speedy.⁵⁶ Yet Swiss experience shows that each of these needs can be satisfied by well-structured executive power sharing.⁵⁷ And for preserving liberty and democracy, power sharing matters as much inside institutions as between them. We have long recognised this when designing the other two branches in Montesquieu's schema – we share power among many minds in multi-member, multi-chamber legislatures and on multi-person judicial benches. Yet despite the sophistication of our modern legal systems, we have so often let one person be chief executive.

⁵⁴ “[I]n every case, princely power and those groups having interests vested in it—that is, the warlord’s following—strive for legitimacy as soon as the rule has become stable. They crave for a characteristic which would define the charismatically qualified ruler.” MAX WEBER, *ESSAYS IN SOCIOLOGY* 27 (H. H. Gerth & Wright Mills trans., 1st ed., 1946). “Genuine charisma rests upon the legitimation of personal heroism or personal revelation. Yet precisely this quality of charisma as an extraordinary, supernatural, divine power transforms it, after its routinization, into a suitable source for the legitimate acquisition of sovereign power by the successors of the charismatic hero.” *Id.*, at 39.

⁵⁵ Thomas Paine marvelled at post-Revolutionary France’s brief success in bringing power sharing to its executive. He marvelled precisely because a design so untainted by ambition was so unusual. “Those who formed the Constitution cannot be accused of having contrived for themselves. The Constitution in this respect is as impartially constructed as if those who framed it were to die as soon as they had finished their work.” 3 MONCURE DANIEL CONWAY (ED.), *THE WRITINGS OF THOMAS PAINE* 349 (1895), reprinting Paine’s 1797 pamphlet *The Eighteenth Fructidor*.

⁵⁶ See, e.g., 1 RECORDS, *supra* note 39, at 65 (Madison’s notes, Jun. 1, 1787) (James Wilson) (“giving most energy dispatch and responsibility to the office”).

⁵⁷ See Part III, *infra*.

Through its powers to hire and fire and spend and command, the role of chief executive can enable its occupant to subvert the system and ultimately control everyone else. If we want to prevent all the reins of government ending up in one pair of hands, we need to share power inside our executives too.

PERFECTING POWER SHARING

When billionaire businessman Christoph Blocher's Swiss People's Party won more votes than any other party in Swiss national elections,⁵⁸ the Swiss Federal Assembly elected him to Switzerland's national executive, the Federal Council.⁵⁹ But Blocher's elevation to the executive did not let him control it. He could not control the executive because he could not control the legislature. The Swiss people elect the first chamber of the Swiss national legislature through a voting method that ensures proportional representation.⁶⁰ All parties that attract significant support win seats, even parties that do not have the most support in any geographic area. A party that wins ten per cent of the national vote, spread thin across the nation, wins close to ten per cent of the seats. Under a districted, first-past-the-post voting model of the kind that applies in elections for the United Kingdom House of Commons and the United States House of Representatives, such a party would likely win no seats.

Proportional representation gives voters more real party choices.⁶¹ Candidates have a real chance to win a seat even when they stay in small parties that more faithfully reflect the candidates' beliefs about what

⁵⁸ See Elizabeth Olson, *A Billionaire Leads the Campaign to Keep Switzerland Apart*, N.Y. TIMES., Feb. 24, 2002, <https://www.nytimes.com/2002/02/24/world/a-billionaire-leads-the-campaign-to-keep-switzerland-apart.html>; *Swiss Election Upsets Traditional Stability*, DEUTSCHE WELLE, Oct. 10, 2003; Mathieu von Rohr, *A Limited Victory for Blocher*, SPIEGEL INTERNATIONAL, Oct. 22, 2007, <https://www.spiegel.de/suche/?suchbegriff=a%2Blimited%2Bvictory>.

⁵⁹ SWITZERLAND CONST. arts. 174-87.

⁶⁰ SWITZERLAND CONST. art. 149(2).

⁶¹ See MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* (Barbara & Robert North, trans., 1954); DOUGLAS W. RAE, *THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS* (1967); William H. Riker, *The Two-Party System and Duverger's Law: An Essay on the History of Political Science*, 76 AM. POL. SCI. REV. 753-766 (Dec. 1982).

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government should do. That helps keep parties more about advancing ideas than following leaders. And it helps stop any one party from winning a majority of seats in the legislature. As no party can gain control of the legislature, no party can gain control of the executive.⁶² For election to the Federal Council, candidates must enjoy multipartisan support in the Federal Assembly. This long ago led the major parties in Switzerland to agree on a “magic formula” under which representatives from each major party are elected to the national executive.⁶³

The seven members of the Federal Council are constitutionally obliged to act collegially in administering the nation together. Each member heads a department of the government, but all major decisions are made collectively by the seven in a way that prevents each of them from shifting the spotlight to themselves.⁶⁴ This executive power sharing lets Swiss political parties concentrate on promoting policy ideas in the legislature rather than on trying to capture the executive.⁶⁵ James Bryce, who famously coined the *laboratories of experiment* metaphor for policy initiatives in the American states,⁶⁶ observed

⁶² SWITZERLAND CONST. arts. 157, 175. The need for broad support promotes choosing moderate candidates. See HANSPETER KRIESI & ALEXANDER H. TRECHSEL, *THE POLITICS OF SWITZERLAND: CONTINUITY AND CHANGE IN A CONSENSUS DEMOCRACY* 80 (2008). See also THOMAS A. BAYLIS, *GOVERNING BY COMMITTEE: COLLEGIAL LEADERSHIP IN ADVANCED SOCIETIES* (1989); ROLF KEISER & KURT R. SPILLMAN (EDS.), *THE NEW SWITZERLAND: PROBLEMS AND POLICIES* (1995); JAN-ERIK LANE (ED.), *THE SWISS LABYRINTH: INSTITUTIONS, OUTCOMES, AND REDESIGN* (2001); WOLF LINDER & SEAN MUELLER, *SWISS DEMOCRACY: POSSIBLE SOLUTIONS TO CONFLICT IN MULTICULTURAL SOCIETIES* (4th ed., 2021).

⁶³ “The election of two Social Democrats to the Federal Council in 1959 established the so-called ‘Magic Formula’ 2-2-2-1, which meant two cabinet seats each for the Radicals, Christian Democrats and Social Democrats, and a single seat for the People’s Party. This arrangement remained stable for more than 40 years. ... The growing power of the People’s Party in the past two legislatures has led to a realignment of the 2-2-2-1 system, with Christian Democrats having to cede one of their seats to the People’s Party after the 2003 elections.” One for seven, seven for one, SWI, May 26, 2007. On the path to the magic formula, see KRIESI & TRECHSEL, *supra* note 62, at 76-79.

⁶⁴ SWITZERLAND CONST. art. 177. See KRIESI & TRECHSEL, *supra* note 62, at 76.

⁶⁵ “While Swiss institutions thus limit the power of any individual cabinet member and counteract monarchical or dictatorial tendencies, the separation of survival ... liberates the assembly majority from the task of keeping the cabinet in office, so that different legislative coalitions can be formed on different issues.” STEFFEN GANGHOF, *BEYOND PRESIDENTIALISM AND PARLIAMENTARISM: DEMOCRATIC DESIGN AND THE SEPARATION OF POWERS* 24 (2021).

⁶⁶ 1 JAMES BRYCE, *THE AMERICAN COMMONWEALTH* 468 (1888), echoed in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

that “*strife for office and the sweets of office felt as always present in the background of debates in the assemblies of England, France, and other parliamentary countries, finds little place in the Swiss legislature.*”⁶⁷

Christoph Blocher did not fit in well on the Federal Council⁶⁸ and was unable to attract majority support in the Federal Assembly for a second term. He declared himself “*torn between relief, disappointment and outrage*”⁶⁹ by the Federal Assembly’s rejection and took his party into opposition. But Switzerland’s multipartisan, consensual executive proved resilient against that opposition. The popularity of Blocher’s party gave them clout in the legislature that could really affect governing policy, but not enough clout to upend the system and install Blocher as the one true leader or elect seven Blocher puppets.⁷⁰ Eventually, his party agreed to nominate two people to fill a later vacancy on the Federal Council. The Federal Assembly chose the person who was not Christoph Blocher.⁷¹

Switzerland’s plural executive deplatforms demagogues. Yet Swiss experience shows that a plural executive can govern with the energy, responsibility, and dispatch long attributed to singular executives.⁷² Christoph Blocher was held responsible for his conduct on the Swiss Federal Council when the Federal Assembly chose not to reelect him. And judged by public satisfaction, Swiss governance compares favourably with that of other European nations.⁷³ Even when confronted with violent separatist

⁶⁷ 1 JAMES BRYCE, MODERN DEMOCRACIES 347 (1921).

⁶⁸ See, e.g., *Rifts appear in power-sharing government*, SWI, Oct. 4, 2004.

⁶⁹ Derek Scally, *Ousted politician leads party into Swiss opposition*, IRISH TIMES, Dec. 14, 2007. See also Nick Cumming-Bruce, *Swiss parties eject far-right leader Blocher from cabinet*, N.Y. TIMES, Dec. 12, 2007.

⁷⁰ See Clive H. Church & Adrian Vatter, *Opposition in Consensual Switzerland: A Short but Significant Experiment*, 44 GOVT. & OPPOSITION 412-37 (2009).

⁷¹ *Id.* at 412, 423-26.

⁷² 1 RECORDS, *supra* note 39, at 65 (Madison’s notes, June 1, 1787) (James Wilson).

⁷³ See, e.g., KRIESI & TRECHSEL, *supra* note 62, at 81-83. “[I]n 1999, the situation in Switzerland was still better than in the majority of the fifteen EU member states: with regard to trust in government, Switzerland comes fifth in this comparison.” *Id.* at 83. See also LINDER & MUELLER, *supra* note 62, particularly at 167-203. “Institutionally, consensus democracy has proven its worth in stormy weather. Surveys show that consensus democracy gets rising popularity and is even more appreciated by ordinary citizens than by the Swiss elites ... [I]n the near future, one should not expect the Swiss to be willing to abandon consensus democracy in favour of a majoritarian system with less direct democracy.” *Id.* at 202-03.

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agitation in one region, the Federal Council was able to resolve the conflict in a democratic way.⁷⁴

Would the Swiss model work in a more polarised polity? A plural executive was Switzerland's solution to the extreme polarisation of the modern nation's founding moment. In 1848, the Swiss were being torn apart by religious disagreements that amplified their ethnic and cultural differences. There was a civil war. The winners of the war imposed a new national constitution on the losers. That new constitution's plural executive freed the disparate inhabitants of Switzerland from having to tussle over whether someone from their tribe would be the one true leader. Removing the role took away that distraction from the actual business of governing. The first Federal Council included both Protestants and Catholics. It included members from the German-speaking majority and the French-speaking and Italian-speaking minorities.⁷⁵ It has been a vehicle for inclusion ever since.⁷⁶ The plural executive model has a *depolarising* influence on political dynamics that holds the key to its deparadoxing impact on constitutional democracy.

Swiss democracy is a *real* democracy, not an elitist precursor like the representative governments that Walpole and Jefferson led. Yet Swiss democracy keeps charismatic leaders at bay, unable to control government fully, even more effectively than elitism kept Walpole and Jefferson at bay. Swiss democracy is both real and *realistic*. Almost two centuries of Swiss experience show it is up to meeting the challenges of governance for which singular leadership was once thought necessary.

⁷⁴ See Michel Bassand, *The Jura Problem*, 12 J. PEACE RES. 139-50 (1975); Carole Villiger, *Political Violence: Switzerland, A Special Case?*, 25 TERRORISM & POL. VIOLENCE 672-687 (2013); *Separatist Swiss canton celebrates 30 years*, SWI, Sept 24, 2008; *Switzerland's German town votes to join French-speaking side*, AFP, Mar. 28, 2021.

⁷⁵ For helpful background, see OLIVER ZIMMER, *A CONTESTED NATION: HISTORY, MEMORY AND NATIONALISM IN SWITZERLAND 1761-1891* (2003). See also CLIVE H. CHURCH, *THE POLITICS AND GOVERNMENT OF SWITZERLAND* (2003); MICHAEL BUTLER ET AL. (EDS.), *THE MAKING OF MODERN SWITZERLAND 1848-1998* (2000).

⁷⁶ See, e.g., *Politicians unite in calling to elect two more women to Federal Council*, SWI, Sept. 30, 2018. SWITZERLAND CONST. art. 174 cl. 4: "In electing the Federal Council, care must be taken to ensure that the various geographical and language regions of the country are appropriately represented." KRIESI & TRECHSEL, *supra* note 62, at 79.

CONCLUSION

The separation of powers was Montesquieu's response to the orthodoxy of his time that insisted sovereignty was *indivisible*.⁷⁷ Montesquieu argued that power to govern could be sustainably divided by *kind* – legislative, executive, judicial.⁷⁸ The truth toward which his theory shone light is that power can be *shared*, regardless of its kind. Sharing the executive is just the final step in a process of power sharing that was already underway in England when Montesquieu visited. A century after Montesquieu published his account, Switzerland took that final step. The claim that executive government needs one true leader has been a lingering relic of the old indivisible sovereignty orthodoxy that Montesquieu began to debunk. Sovereignty can be shared sustainably. Swiss experience shows this is just as true for the executive as it is for legislative and judicial powers. Comparative constitutional experience shows how much our constitutional democracies need such sharing. As Socrates saw, singular leadership sets democracy up to slide into tyranny. The resolution of Socrates' paradox resides in a perfected power sharing that we now know is possible.

⁷⁷ See, e.g., JEAN BODIN, SIX BOOKS OF THE COMMONWEALTH 52-55 (M.J. Tooley trans., orig. publ. 1576, 1955); THOMAS HOBBS, LEVIATHAN, ch. 18, ¶16 (orig. publ. 1651, 1981); SAMUEL VON PUFENDORF, AN INTRODUCTION TO THE HISTORY OF THE PRINCIPAL KINGDOMS AND STATES OF EUROPE 282 (8th ed., 1719); SAMUEL VON PUFENDORF, OF THE LAW OF NATURE AND NATIONS 679 (4th ed., 1729).

⁷⁸ MONTESQUIEU, *supra* note 18, at 151-62.

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ANUBHAV KUMAR ¹ & NEHA TRIPATHI²

Article 14 of the Indian Constitution, which guarantees the right to equality, has evolved significantly, shifting from the old reasonable classification test to considerations of arbitrariness. Justice Bhagwati's opinion in E.P. Royappa introduced the doctrine of arbitrariness as intrinsic to equality, a view later revived and extended by Justice Robinton Nariman in Shayara Bano, where "manifest arbitrariness" was proposed as a ground for striking down legislation. While this development has attracted academic interest and judicial application, it has also faced criticism regarding the scope of judicial review and a potential encroachment on legislative intent. This paper explores the historical development of Article 14, examines the contours of arbitrariness as a constitutional doctrine, critiques the basis and application of manifest arbitrariness, and argues that courts should exercise caution in extending the doctrine to legislative review under Article 14. In conclusion, the paper argues that the post-Shayara Bano expansion of the arbitrariness doctrine under Article 14 departs from the Constitution's core equality principles and risks unsettling the institutional balance between the judiciary and the legislature. Accordingly, judicial review under this doctrine should be exercised with measured restraint when assessing the validity of legislation.

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INTRODUCTION

The arbitrariness doctrine, devised by Justice Bhagwati in *E.P. Royappa v. State of Tamil Nadu*³ has seen a peculiar development with Justice Rohinton Nariman’s opinion in *Shayara Bano v. Union of India (Triple talaq)*⁴ extending “arbitrariness” as a ground to successfully challenge plenary legislative enactments. This has evoked mixed reactions from jurists, litigators and academicians alike on its viability in jurisprudence. *Manifest Arbitrariness* is, as Justice Nariman holds, for himself and Justice U.U. Lalit, “*Must be something done by (the) legislature capriciously, irrationally and/ or without adequate(hy) determining principle and it would be a ground to negate legislation*”.⁵

This is a significant departure from the settled legal principles around arbitrariness, as it opens up avenues for not only unwarranted Judicial interventions but also tacitly hurts the principle of Separation of Powers. Interestingly, Article 14 of the Constitution, providing for the “*right to equality*”,⁶ has undergone various shifts in its understanding, which included moving away from the old test of “*reasonable classification*” to the test of “*arbitrariness*”. While the test of arbitrariness was initially limited to executive actions only, now *Shayara Bano* has extended its applicability to legislative actions as well. This effectively means that the judiciary can now look into the motive of the legislature and hold a law arbitrary under Article 14, consequently, holding it unconstitutional. This interpretation has far-reaching consequences since it has birthed another “*undefined*” principle upon which laws can be invalidated as unconstitutional in India, in addition to the instances where a law could be struck down only if either it was

³ *E.P. Royappa v. State of T.N.*, (1974) 4 SCC 3.

⁴ *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

⁵ *Id.*

⁶ INDIA CONST. art. 14.

inconsistent with Part III of the Constitution⁷ and/or the legislature lacked competency in enacting it.⁸

The judicial creativity of “*manifest arbitrariness*” which provides for a judicial enquiry on “*intent of legislature*” while deciding constitutionality of a plenary legislation or statute, might lead the court to trench into the arena of the legislature while the task at hand is limited to an examination based on rights and competence.⁹ Hence, today there is a growing concern regarding arbitrariness not only as a basis for review, but also for its increasing use by the judiciary to strike down laws extensively in cases like *Navtej Johar v. Union of India*¹⁰, *Joseph Shine v. Union of India*¹¹ & *Hindustan Construction Company v. Union of India*¹². More recently, while striking down the Electoral Bond scheme, the constitution bench of the Supreme Court in *Association of Democratic Reforms & Anr v. Union of India & Ors*¹³ not only employed the doctrine of manifest arbitrariness but also went a step further and ventured into the domain of testing the “*purpose*” of enacting a provision. It is in this context that the conceptualisation and usage of the doctrine through an unruly horse-like interpretation have received an acerbic criticism.

Through this article, the authors endeavour to present the case that the doctrine of manifest arbitrariness, in its current form, is not in consonance with the established constitutional values and its usage to invalidate plenary legislation is tantamount to excessive and unwarranted judicial intervention. Regular employment of this doctrine by the judiciary would also increase the risk of “*Juristocracy*” and undermine the principles of the Separation of Powers.¹⁴ In the course of this paper, the authors will argue that a) the expansive reading of arbitrariness in Article 14 after *Shayara* is not the correct understanding of the object of equality as carved in the

⁷ INDIA CONST. art. 13, cl.2.

⁸ State of A.P. v. McDowell, (1996) 3 SCC 709.

⁹ RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, 82-84 (Harvard University Press, 1978).

¹⁰ Navtej Johar v. Union of India, (2018) 10 SCC 1.

¹¹ Joseph Shine v. Union of India, (2019) 3 SCC 39.

¹² Hindustan Construction Co. Ltd. v. Union of India, (2020) 17 SCC 324.

¹³ Association for Democratic Reforms v. Union of India, (2024) 5 SCC 206.

¹⁴ RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM, 222 (Harvard University Press, 2007).

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Constitution, and hence, courts should exercise restraint in deploying manifest arbitrariness to strike down statutes; b) the test of arbitrariness is out of purview of Article 14 for plenary legislation and “presumption of constitutionality” is not a barrier, but a tool in judicial interpretation; c) the doctrine of manifest arbitrariness is constitutionally unsustainable and is hit by settled precedents and; d) the doctrine is not defined normatively and its application is prejudicial to established constitutional principles.

However, at this stage, it is pertinent to trace the historical development of equality in the Indian Constitution in regard to its inception, the constituent assembly debates and the evolution of reasonable classification through different cases to give a context to the underlying debate and understand this constitutional tussle.

REASONABLE CLASSIFICATION AND EQUALITY: DEVELOPMENT OF ARTICLE 14

Article 14, as it stands today, is a strategic blend of twin concepts, namely “*equality before law*” and “*equal protection of law*”. However, it is interesting to note that this was not a standalone provision in the draft Constitution of 1948 and was initially included in draft Article 15 (Article 21 now).¹⁵ It was only on 3rd November, 1949 in a letter to the President, the Drafting Committee of the Constituent Assembly mentioned that “*we have considered it more appropriate to split this article into two parts and to transfer the latter part of this article dealing with equality before law to a new Article 14 under the heading ‘Right to Equality’*”.¹⁶

Sir B.N. Rau, the advisor to the Constituent Assembly, explaining equality in the Indian Constitution, said “*that we cannot have a notion of formal equality because it treats equality and fact as necessary to drawing equality in law.*”¹⁷ The evolving tale of Article 14 has been inspired by the U.S. jurisprudence

¹⁵ Drafting Committee, Report on Draft Constitution of India (1948), <https://www.constitutionofindia.net/committee-report/draft-constitution-of-india-1948/>.

¹⁶ INDIA CONST. art. 14.

¹⁷ See generally, Sripathi Vijaushri, *Towards Fifty years of Constitutionalism and Fundamental Rights in India: Looking Back to see ahead (1950-2000)*, 14 AM. U. INT’L L. REV. 413 (1998).

under the Fourteenth Amendment.¹⁸ As said before, Article is a blend of two “*facets*” of equality, first of the two facets of Article 14, which is *Equality before law*, is said to be inspired by the British doctrine of the rule of law¹⁹ however, traces are even found in Article 118 of the Weimar Constitution.²⁰ It is often referred to as a “*negative concept implying the absence of any special privilege by reason of birth, creed*” or the like in favour of any individual and the equal subjection of all classes to the ordinary law. The other facet, *equal protection of the laws*, is a more positive concept, implying the right of equality of treatment in equal circumstances.²¹ Equality before law is the corollary of Dicey’s²² concept of the rule of law, which is that all people shall be subject to the same ordinary law. It is pertinent to note that both connotations i.e., equal protection of law, and equality before law were subject to challenges in the constituent assembly by notable members such as Sir Alladi Krishnaswamy Iyer²³ and K.M. Munshi²⁴ respectively as they were “*vague and open to any interpretation*”, however, when the Constitution was finally adopted, both the terms were added as a compromise.²⁵

The Judiciary, in order to devise a tool to interpret the right to equality, naturally turned to the United States, where the Court in the *Gulf, Colorado & Santa Fe Ry. Co.*²⁶ had already developed the “*Classification Doctrine*” in 1890 and said that the legislature had the right to classify for the purpose of equality but the classification must be based on some “*substantive*

¹⁸ U.S. CONST. art. 14.

¹⁹ Bhasheshar Nath v. The Commissioner of Income Tax Delhi, 1959 AIR 149.

²⁰ Grundgesetz [GG] [Basic Law], art. 118, (1919).

²¹ DD BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 100 (LexisNexis, 27th ed., 2024).

²² A.V. DICEY, J.W.F. ALLISON (ED.), THE LAW OF THE CONSTITUTION, 120 (Oxford University Press, 1st ed., 2013).

²³ The phrase “equal protection of the laws” has been considered vague and open to varied interpretation. See e.g., CONSTITUENT ASSEMBLY DEBATES, Book No. 7, November 30, 1948 *speech by* ALLADI KRISHNASWAMY IYER 494-95 (1948).

²⁴ The phrase “equality before the law” was found to suffer from similar concerns. See, eg., CONSTITUENT ASSEMBLY DEBATES, Book No. 7, November 30, 1948 *speech by* K.M. MUNSHI 497-98 (1948).

²⁵ Sarath Chandran, *The Doctrine of Manifest Arbitrariness*, YOUTUBE (MAY 21, 2020) <https://www.youtube.com/watch?v=S3P6j5ld0Ek>.

²⁶ *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150 (1897).

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distinction” and the classification must also have a nexus to the object of the classification.²⁷ Indian courts have adopted this classification doctrine, which makes explicit what was already implicit in the very concept of the rule of law.²⁸ One may very well argue that the classification doctrine is therefore a product of the “*equality paradox*”²⁹ which is aimed at reconciling discrimination (which is bound to happen when the legislature classifies people) and simpliciter right of equality.

Traditionally, Courts in India held that Article 14 does not forbid all classification but only that which is discriminatory. In *State of West Bengal v. Anwar Ali Sarkar*,³⁰ while striking down a criminal law in early 1951, the Hon’ble Supreme Court affirmed the application of the test of reasonableness in relation to Article 14. The following two tests were laid down by Justice S. R Das: *First*, the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others; and *second*, the differentia must have a rational nexus/relation to the object sought to be achieved by such legislation.³¹ In *Bidi Supply Co. v. Union of India*,³² Justice Vivian Bose moved a step further and took the object of the classification into consideration. He said, “*It is not merely classification. If the object of the Act itself is condemnable the question of resorting to classification would never arise*”. Justice Subba Rao in the case of *Khandige Sham Bhatt v. Agrl ITO*³³ added another facet of Article 14 when he held that “*in applying Reasonable test, you must take care of the impact (uneven) of the law*”. However, in ensuing years the court continued to follow the “traditional

²⁷ *Id.*

²⁸ *State of W.B. v. Anwar Ali Sarkar*, (1952) 1 SCC 1.

²⁹ The author defines equality paradox by explaining that while there have been many broad declarations proclaiming equality” to be a right inherent in all human beings, in practice, the concept of equality has been given a far more limited effect. *See, eg., Navroz Seervai, Article 14 and the Paradox of Equality*, BAR & BENCH, (Aug. 2, 2020). <https://www.barandbench.com/columns/article-14-and-the-paradox-of-equality#:~:text=The%20article%20argues%20that%20although%20%E2%80%9Cequality%E2%80%9D%20is%20proclaimed,analyze%20Article%2014%20and%20the%20paradox%20of%20equality.>

³⁰ *State of W.B. v. Anwar Ali Sarkar*, (1952) 1 SCC 1.

³¹ *Id.*

³² *Bidi Supply Co. v. Union of India*, (1956) 1 SCC 427.

³³ *Khandige Sham Bhat v. Agricultural Income-tax Officer, Kasaragod*, AIR 1963 SC 591.

approach” as devised in *Anwar Ali Sarkar* to test the constitutionality of a legislation on the anvils of Article 14.

One may therefore outline the following features of the reasonableness doctrine which are that: (a) the classification can be done through state action only (b) it relates to “*State action*” governing vertical relationships between an individual and the State (c) the classification doctrine entails an equal treatment principle (d) this doctrine is highly deferential in the sense that the court gives a lot of weight to the State’s claim about what the facts are, how they ought to be evaluated, and whether they breach certain norms.³⁴ At this stage, it is important to reiterate that until pre-Royappa, the classification doctrine’s scope was limited to state action only and any executive action was out of the purview of the test. Further, the old doctrine did not take into account “*arbitrariness*” to test the constitutionality of a legislation simply because not all arbitrary actions may be violative of equality and some of them are created by the “*state*” to further both facets of equality; much like the “*Equality Paradox*”.

This doctrine, therefore, asks only two sets of questions while taking the right to equality into account, which are (a) *whether the classification made is based on intelligible differentia or not* and (b) *whether this differentia has a rational nexus with the object that the rule seeks to achieve*. These two questions, as Prof. Khaitan argued, are formalistic and ignore the real-life impact. It was this apparent error or limitation which induced the court in 1974 to devise a new doctrine in *E.P. Royappa*, which introduced the facet of “*arbitrariness*” in Article 14.

DOCTRINE OF ARBITRARINESS AND ROYAPPA

In 1974, the Supreme Court in the case of *E.P. Royappa v. State of Tamil Nadu*³⁵ expanded the ambit of Article 14 by laying down “*non-arbitrariness*” as a limiting principle in the context of executive actions. It also declared that “*equality is (an) antithesis to arbitrariness*”.³⁶ The Doctrine of arbitrariness as devised by Justice Bhagwati, has always been a beleaguered doctrine and

³⁴ Tarunabh Khaitan, *Equality: Legislative Review under Article 14*, in SUJITH CHAUDHARY ET AL. (EDS.), *THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION* 699–719 (Oxford University Press, 2016).

³⁵ *E. P. Royappa v. State of T.N.*, (1974) 4 SCC 3.

³⁶ *Id.*

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has faced fierce criticism on two fronts, i.e., some attack it for its “*imprecise import*” which is most likely to affect equality while many believe that it is not a new test but simply a reassertion of the reasonable classification or the nexus test.³⁷ The view held by the latter group of jurists finds support from the fact that the term ‘arbitrary’ was not a new addition to the lexicon of constitutional adjudication concerning Article 14.³⁸ The doctrine reads “*arbitrary*” for “*discriminatory*” under equality and the most moving and convincing criticism of the same was by the renowned constitutional law jurist H.M. Seervai, who noted, “*The new doctrine hangs in air, because it propounds a theory of equality without reference to the language of Article 14.*”³⁹ This also furthers another limb of a significant criticism which is, as Prof. Tarunabh Khaitan argues of “*Constitutionalization of Administrative law*” as arbitrariness was essentially the ground to check administrative actions or subordinate legislation in India and it has caused damage to both constitutional as well as administrative law in India.⁴⁰

Prof. Khaitan argued that while the “*old doctrine*” of equality is excessively narrow in its scope, the solution to it cannot be a “*new doctrine*” of arbitrariness. Instead, there is scope to develop the old doctrine with contextualised and more sound legal understanding to counter the existing gap. It has faced this backlash because “*arbitrariness*” was believed to be inherent in the first part of equality, and in preceding judgements, the Court, while locating intelligible differentia or reasonable nexus, had already noted that the classification shall not be “*arbitrary, evasive or artificial*”. This, therefore, created confusion on the usage of the arbitrariness test as to whether it was a standalone test or part of reasonable classification. Before we delve into a detailed critique of the arbitrariness doctrine, its

³⁷ See, Jahnvi Sindhu & Vikram Aditya Narayan, *Reasonable Classification Versus Equality Under the Indian Constitution*, 17 NAT'L L. SCH. J 187 (2023). Also see, Rethinking “Manifest Arbitrariness” in Article 14: Part I – Introducing the Argument, I. CON. LAW PHIL. (May 6, 2020), <https://indconlawphil.wordpress.com/2020/05/06/rethinking-manifest-arbitrariness-in-article-14-part-i-introducing-the-argument/>.

³⁸ Shivam, *Arbitrariness Analysis under Article 14 with Special Reference to Review of Primary Legislation*, 84 ILI LAW REV. (2016).

³⁹ H.M. SEERVAI, CONSTITUTIONAL LAW OF INDIA 438 (Universal, 4th ed., 1991).

⁴⁰ Farrah Ahmed & Tarunabh Khaitan, *Constitutional Avoidance in Social Rights Litigation*, 35 OXFORD J. LEGAL STUD. 607 (2015).

Constitutionalization and application to legislative actions, it is important to understand the observations made by Justice Bhagwati.

While enunciating this doctrine, Justice Bhagwati discarded a narrow reading of Article 14 and held,

*“Equality is a dynamic concept with many aspects and dimensions, and it cannot be cribbed, cabined and confined within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact, equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch.”*⁴¹

Where an act is arbitrary, it is implicit that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14.⁴²

This opinion was reaffirmed in subsequent cases of *Maneka Gandhi v. Union of India*⁴³ and *Ajay Hasia v. Khalid Mujib*⁴⁴. It was also a redemption measure that the Court took the stance of an activist to shed the baggage of blot (*Judiciary’s subdued constitutional adjudication in times of declared emergency*) which *ADM Jabalpur v. Shiv Kant Shukla*⁴⁵ brought with itself. It is however, interesting to note that at this stage, Justice Bhagwati himself in *Ajay Hasia* clarified that “arbitrariness” is a vital and dynamic concept which was underlying Article 14 latently, and *Royappa* did nothing but to bring it to light. It is, therefore, fair to conclude here that arbitrariness is hence not a standalone doctrine devised by the judiciary but something which was already homed in reasonable classification.

A staunch critic of “arbitrariness”, jurist H.M. Seervai observed that the new doctrine suffers from the “fallacy of undistributed middle” in that “*whatever violates equality is not necessarily arbitrary, though arbitrary actions are*

⁴¹ E.P. Royappa v. State of T.N., (1974) 4 SCC 3, ¶85.

⁴² Khaitan, *supra* note 34.

⁴³ Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

⁴⁴ Ajay Hasia v. Khalid Mujib, (1981) 1 SCC 722.

⁴⁵ ADM Jabalpur v. Shivkant Shukla, (1976) 2 SCC 521.

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ordinarily violative of equality”⁴⁶. It is important to note that inequality and arbitrariness are not the same. Courts have misunderstood the relation between “*arbitrariness*” and “*discrimination*”. Seervai adds that it appears, from the Court’s own reasoning, that “*arbitrary*” involves a voluntary action of a person on whom the power has been conferred⁴⁷. However, according to Seervai, one cannot attribute will or intention to a legislature. With the advent of the Manifest Arbitrariness doctrine, Seervai’s fear of attributing intent to legislature has become true as Justice Nariman held that the courts can enquire into “*intent*” of legislature while striking down a law, thus in effect enunciating new grounds apart from violation of Fundamental right or exceeding legislative competence which was used to strike down a statute. Seervai also held his ground on “*whatever that violates equality is not necessarily arbitrary, though arbitrary actions are ordinarily violative of equality*”.⁴⁸ The proposition that equality is antithetical to arbitrariness needs to be reconsidered in its proper context, as the antithesis of equality is discrimination and “*arbitrary*” needs to be understood specifically in this sense. The Doctrine of Arbitrariness in constitutional law therefore, brings nothing new to the table that the reasonable classification doctrine could not. The statutes could be struck down if they were unconstitutional, even with the old reasonable classification doctrine. In essence, it led to constitutional development apart from confusion amongst the court.

However, in the case of *State of A.P. v. McDowell*⁴⁹ Justice Reddy, speaking for a majority in a three-judge bench, held that “*no enactment can be struck down by just saying that it is arbitrary or unreasonable. Some or other constitutional infirmity has to be found before invalidating an Act*”, thus, rejecting the argument of extending the test for legislative actions. It is also interesting to note that Justice Nariman was the senior counsel in this matter and argued in favour of Manifest Arbitrariness.

⁴⁶ Seervai, *supra* note 39.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *State of Andhra Pradesh v. McDowell*, (1996) 3 SCC 709.

The final blow to the application of the arbitrariness test on primary legislation was struck by the decision of the division bench in *Rajbala*,⁵⁰ wherein it was held,

“[I]t is clear that courts in this country do not undertake the task of declaring a piece of legislation unconstitutional on the ground that the legislation is arbitrary since such an exercise implies a value judgment and courts do not examine the wisdom of legislative choices unless the legislation is otherwise violative of some specific provision of the Constitution. To undertake such an examination would amount to virtually importing the doctrine of substantive due process employed by the American Supreme Court at an earlier point of time while examining the constitutionality of Indian legislation.”

Last, the incorporation of “non-arbitrariness or arbitrariness doctrine in constitutional law to review a statute is an extension of administrative law standards of arbitrariness. This is effectively available to subordinate or delegated legislation. This extension and interchangeable usage of arbitrariness is criticised by academicians across as the degree and standards of arbitrariness vary in administrative law and constitutional law, vary in degree and weight of application.⁵¹ As we have maintained throughout the paper, Justice Bhagwati, while emancipating Article 14, used “arbitrary” and “unreasonableness” interchangeably, which is not correct. Prof. Khaitan⁵² hence argued that non-arbitrariness was a particularly ill-advised choice of a test if the purpose of the new doctrine was “to crystallize a vague generality like Article 14 into a concrete concept”⁵³. The doctrine was therefore never settled and was on shaky grounds on its viability, but with Shayara Bano, it seems to be developing into a monster which no one thought of when it was conceived.

While Prof. Khaitan argued in favour of non-application of arbitrariness doctrine to legislative actions, in 2008, renowned Advocate Abhinav Chandrachud in his essay, argued in favour of applying doctrine of arbitrariness to the legislations while criticising the “Presumption of

⁵⁰ *Rajbala v. State of Haryana*, (2016) 2 SCC 445.

⁵¹ Seervai, *supra* note 39.

⁵² Khaitan, *supra* note 34.

⁵³ *Ruma Pal, Judicial Oversight or Overreach* (2008) 7 SCC J 9, 116.

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Constitutionality”⁵⁴. The premise of the essay was that there is an extensive use of “Doctrine of Presumption of Constitutionality” which acts as a barrier, while deciding cases dealing with constitutional validity. He argued that “*the presumption of validity of statutes is acting as a barrier from applying this doctrine to legislations*”, since there is a “*presumption*” in favour of the constitutionality.⁵⁵ It is therefore pertinent to understand whether the presumption of constitutionality is an actual hurdle in constitutional interpretation. The general principle of construction of statute is that the reasonable doubt must be resolved in favour of the legislative action and the act sustained. Therefore, there is a presumption of constitutionality,⁵⁶ a law will not be declared unconstitutional unless the case is so clear as to be free from any doubt. The argument holds to the extent that there is a presumption of constitutionality of a legislation, but it falters since that presumption is not absolute. Over the years, adoption of the reasonable classification doctrine has actually led to the striking down of laws *via* amendments, if the classification is evasive or there is no nexus found between the classification and the object, i.e., on the touchstone of the traditional classification doctrine⁵⁷. Hence, the courts do oblige the scope of presumption of constitutionality, however, to theorise it in favour that this presumption has acted as a hurdle for the judiciary is a misplaced understanding. It is not the “*doctrine of presumption of constitutionality*” which acts as a barrier in extending the arbitrariness doctrine for striking down laws, but it is because “*arbitrariness*” itself is out of the purview of Article 14.⁵⁸

⁵⁴ See generally, Abhinav Chandrachud, *How Legitimate is Non-Arbitrariness? Constitutional Invalidation in the Light of Mardia Chemicals v. Union of India*, 2 INDIAN J. CONST. L. 179 (2008).

⁵⁵ *Id.*

⁵⁶ V.M. Syed Mohammad & Co. v. State of Andhra, (1954) 1 SCC 360, ¶54.

⁵⁷ See, Deepika Sharma & Radhika Gupta, *Doctrine of Arbitrariness and Legislative Action: A Misconceived Application*, 5 NALSAR STUDENT L. REV. 22-34 (2010).

⁵⁸ *Id.*

MANIFEST ARBITRARINESS AS A TOOL TO STRIKE DOWN LEGISLATIVE ACTION: UNRULY POWER?

The fears of jurist H.M. Seervai were turned into reality when Justice Nariman in *Shayara Bano*⁵⁹, crafted the doctrine of manifest arbitrariness and later, when the Supreme Court in *Navtej Johar v. Union of India*⁶⁰ extended the scope of “arbitrariness” holding that it can be used to strike down legislative actions. The confusion regarding the arbitrariness doctrine was not resolved by the judiciary as regards to its application, and another limb to it was added, which is a dangerous precedent as it enables intervention of the judiciary in legislative domains and allows Judicial Powers greater than prescribed, which has the potential to hurt the balance in the separation of powers. Justice Nariman, while laying down the doctrine, said, “*The thread of reasonableness runs through the entire fundamental rights Chapter. What is manifestly arbitrary is obviously unreasonable and being contrary to the rule of law, would violate Article 14.*”⁶¹ To give a legal backing to his decision, he also traced the doctrine in cases like *Ajay Hasia*⁶² where in the year 1982, the Court held:

“It must therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because any action that is arbitrary, must necessarily involve negation of equality. The doctrine of classification which is evolved by the courts is not Paraphrase of Article 14 nor is it the objective and end of that Article. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore constituting denial of equality... Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of “authority” under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non- arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution”

Manifest Arbitrariness, therefore, is something, as held in *Shayara Bano*, “*done capriciously, irrationally and/or without determining principle. Also, when*

⁵⁹ *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

⁶⁰ *Navtej Johar v. Union of India*, (2018) 10 SCC 1.

⁶¹ *Shayara Bano v. Union of India*, (2017) 9 SCC 1.

⁶² *Ajay Hasia v. Khalid Mujib*, (1981) 1 SCC 722.

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something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary."⁶³ However, there is no suggestion made in the definition to give clarity on the need for the doctrine and how the old doctrine of reasonableness was unable to tackle the issue. As we saw throughout the article, the arguments are furthered with the understanding that every arbitrary action is detrimental to equality, an understanding which Seervai and other jurists have urbanely critiqued. It is therefore a case of a theory which involves "*fallacy of the undistributed middle*" since it rides on the premise that all arbitrary actions are violative of equality. In doing so, the courts have opened up avenues and ways of unbridled powers to intervene in the legislative domain of law-making.

Justice Nariman, in his opinion, concurred by Justice Kurian Joseph, went on to hold Justice Reddy's opinion in *McDowell* as bad in law, as it did not take into account the earlier judgment of *Ajay Hasia*, by holding:

*"That a constitutional challenge can succeed on the ground that a law is "disproportionate, excessive, or unreasonable", yet such [a] challenge would fail on the very ground of the law being "unreasonable, unnecessary or unwarranted". The arbitrariness doctrine when applied to legislation obviously would not involve the latter challenge but would only involve a law being disproportionate, excessive, or otherwise being manifestly unreasonable. All the aforesaid grounds, therefore, do not seek to differentiate between State action in its various forms, all of which are interdicted if they fall foul of the fundamental rights guaranteed to persons and citizens in Part III of the Constitution"*⁶⁴

In continuation, Justice Nariman highlighted the subsequent use of the doctrine post *McDowell* to strike down a legislation in *Maple Vishwanath v. State of Maharashtra*⁶⁵. However, there has been an inconsistency in reading the precedents, which is highlighted in the subsequent section.

The Supreme Court in *Navej Singh Johar* went on to use "*manifest arbitrariness*" as a tool to strike down laws. The constitution bench was

⁶³ Shayara Bano v. Union of India, (2017) 9 SCC 1.

⁶⁴ Shayara Bano v. Union of India, (2017) 9 SCC 1.

⁶⁵ Maple Vishwanath v. State of Maharashtra, (1998) 2 SCC 1.

coherent in this opinion and found that Section 377 was manifestly arbitrary. Again, the employment of doctrine in this case as well was not normative and no tests were devised to test the “*manifest arbitrariness*” of the legislation. This paved the way for the actual use of doctrine in striking down legislation on “*arbitrariness*” and inquiring into the intent of the legislature. These apprehensions were put forth in the use of “*manifest arbitrariness*”, and it came to life in *Hindustan Construction*⁶⁶ lately when the Court held that a provision can be held unconstitutional only because it purportedly reversed the clock on an earlier amendment. More recently, in *Association of Democratic Reforms & Anr v. Union of India & Ors*,⁶⁷ while striking down the Electoral Bond scheme, the Supreme Court not only employed the doctrine of manifest arbitrariness but also went a step further and ventured into the domain of testing the “*purpose*” of enacting a provision. The Court held that,

“... The doctrine of manifest arbitrariness can be used to strike down a provision where: (a) the legislature fails to make a classification by recognising the degrees of harm; and (b) the purpose is not in consonance with constitutional values.”

While it did endeavour to lay down a twin test to determine if any legislative action is manifestly arbitrary, upon a close enquiry, these appear to be repackaged tests of old classification doctrine and proportionality doctrine. The criteria as to what would be manifestly arbitrary still remain unclear. The only progress we seem to have made is through this test, allowing this judicial creativity to take over the legislative domain. The consequences of the doctrine are such that Dhruva Gandhi and Sahil Raveen, in a blog post, said that it is a matter of time when “*the doctrines will become arbitrary*”.⁶⁸

⁶⁶ *Hindustan Construction Co. Ltd. v. Union of India*, (2020) 17 SCC 324.

⁶⁷ *Association for Democratic Reforms v. Union of India*, (2024) 5 SCC 206.

⁶⁸ Dhruva Gandhi and Sahil Raveen, *Hindustan Constructions – Another Instance of the Failings of Manifest Arbitrariness*, I. CON. LAW PHIL. (APR. 4, 2020), <https://indconlawphil.wordpress.com/2020/04/04/hindustan-constructions-another-instance-of-the-failings-of-manifest-arbitrariness/>.

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TESTING MANIFEST ARBITRARINESS ON PRECEDENTS

With the enunciation of the doctrine of manifest arbitrariness, the Court also held *McDowell*⁶⁹ as *per incuriam* and subsequent judgement to be bad in law. While holding *McDowell*⁷⁰ bad in law, Justice Nariman held that it overlooked the precedents from constitutional benches decided way earlier as Justice Bhagwati had handed down a new doctrine in *Royappa* in 1974, which was affirmed by him in *Ajay Hasia* in 1980, which is applicable to legislative action thus laying new dimensions of Article 14. However, the reading that Justice Bhagwati's opinion is final insofar as "arbitrariness" is concerned, for it was affirmed in *Ajay Hasia*, is rather an inconsistent reading. Therefore, the premise of the doctrine of manifest Arbitrariness in *Shayara Bano* is on shaky grounds. To understand this, it becomes quintessential to refer to Justice Bhagwati's opinion in *R.K. Garg v. Union of India*⁷¹ a 1982 decision, after *Ajay Hasia*. In this case, Justice Bhagwati holds in paragraph 8,

"...that takes us to the principal question arising in the writ petitions namely, whether the provisions of the Act are violative of Article 14 of the Constitution. The true scope and ambit of Article 14 has been the subject matter of discussion in numerous decisions of this Court and the propositions applicable to cases arising under that Article have been repeated so many times during the last thirty years that they now sound platitudinous. The latest and most complete exposition of the propositions relating to the applicability of Article 14 as emerging from "the avalanche of cases which have flooded this Court" since the commencement of the Constitution is to be found in the Judgment of one of us (Chandrachud, J. as he then was) in Re: Special Courts Bill It not only contains a lucid statement of the propositions arising under Article 14, but being a decision given by a Bench of seven Judges of this Court, it is binding upon us."(emphasis added)

This is therefore, in stark contrast to the opinion of Justice Nariman, which relied on *Ajay Hasia* when Justice Bhagwati himself, in a later case of *R.K. Garg*, held that the true scope of Article 14 is laid down in a 7-judge bench

⁶⁹ State of Andhra Pradesh v. McDowell, (1996) 3 SCC 709.

⁷⁰ State of Andhra Pradesh v. McDowell, (1996) 3 SCC 709.

⁷¹ R.K. Garg v. Union of India, (1981) 4 SCC 675.

of *In re Special Courts Bill*.⁷² Therefore, creation of deduction of doctrine of manifest arbitrariness is unsustainable on precedents and further, that Justice Bhagwati, contrary to as held by J Nariman, did not develop a ‘new doctrine’ in *Ajay Hasia v. Khalid Mujib*⁷³ and instead in a seven Judge Bench in *R.K. Garg v. Union of India*⁷⁴ (decided on 13 November 1981, a year later to *Ajay Hasia*) clarified that there is no application of the *Royappa* Doctrine to the legislation.⁷⁵

Justice Nariman, in his observation, seems to have blurred the difference between “*arbitrariness*” in administrative and constitutional law, when he refers to *Om Kumar*⁷⁶ in holding that arbitrariness in legislation is very much a facet of equality, whereas the case pertained to administrative action per se. It is apparent that there are the inconsistencies in reading of the precedent which the author has relied upon to argue that doctrine of manifest arbitrariness is flawed both on precedent and on settled constitutional principles too, as manifest arbitrariness is vague and unclear which is not defined and offers nothing new except for seeking to extend a doctrine which is already inherent to Article 14 dangerously to enquire intention of legislature. The “*arbitrary*” action is, as the reasonable classification doctrine stands, already covered in it.

CONCLUSION

Justice Rohinton Fali Nariman’s contribution to liberal values and their interpretation is unmatched. Recently, on his retirement, many op-eds featured describing his legacy as “*when comes such another*”⁷⁷ and as “*leading prophet*” of the court⁷⁸. While analysing his role, it is pertinent to point out

⁷² Special Courts Bill, 1978, *In re*, (1979) 1 SCC 380.

⁷³ *Ajay Hasia v. Khalid Mujib*, (1981) 1 SCC 722.

⁷⁴ *R. K. Garg v. Union of India*, (1981) 4 SCC 675.

⁷⁵ *Vijaushri*, *supra* note 15.

⁷⁶ *Om Kumar v. Union of India*, (2001) 2 SCC 386.

⁷⁷ See generally, Sanjay Hegde, *Justice Rohinton Nariman’s Legacy: ‘Whence Comes Such Another?’*, BLOOMBERG QUINT (Aug. 11, 2021) <https://www.bloombergquint.com/opinion/justice-rohinton-narimans-legacy-whence-comes-such-another>.

⁷⁸ See generally, Arghya Sengupta, *Leading Prophet: The Legacy of Justice Rohinton Nariman*, THE TELEGRAPH (Aug. 18, 2021) <https://www.telegraphindia.com/opinion/the-legacy-of-justice-rohinton-nariman/cid/1826918>.

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his contribution to the development of Insolvency laws and arbitration, it is also true that his upholding rights and liberal values image shatters, taking NRC into account. In all of the buzz, his contribution to the Judiciary by providing a tool to strike down legislation by enquiring into the intent of the legislature is perhaps most striking.

In the course of this article, the author has endeavoured to explore facets of the right of equality granted in the Indian Constitution in the context of an expansive reading of Manifest Arbitrariness. The author has *first*, traced the reasonable classification doctrine under Article 14. *Further*, we saw the development of the arbitrariness doctrine and its criticism, and it was observed that the new arbitrariness doctrine was nothing but reasonable, the old nexus doctrine wrapped in a new cover. In the last two parts, the author went through the creation of manifest arbitrariness, its historical usage as argued and its philosophical foundation. The doctrine of manifest arbitrariness, apart from being constitutionally flawed, is also found to be bad in precedents.

It is safe to say that the doctrine of manifest arbitrariness, since its inception, has not been free from criticism for emulating administrative law standards in constitutional law and wrongly placing “*arbitrariness*” and “*equality*” in Article 14 on the same pedestal. This has faced criticism from jurists like H.M. Seervai, an academician. The doctrine also complicated the already existing effective test of “*reasonable classification*” and rational nexus test, and arbitrariness was inherently read in the first part of Article 14.

Courts rightly also refrained from striking down legislations on the basis of “*legislative intent*” as it was against the constitutional principles of testing legislation on constitutional standards, which involved a violation of Part III or in case of exceeding legislative capacity. Any decision which did not have a rational nexus is covered in the existing old test. In this context, the author argued that the doctrine of manifest arbitrariness is a concept which encroaches on the judicial domain in the inquiry of statute. It was also argued that the understanding of the doctrine conceptualised in Shayara Bano is inconsistent with precedents, as it wrongly proceeds on a ratio which is not binding, as a newer case with a larger bench observes a different reading. It is perhaps time to make a constitutional enquiry into

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the usage of the doctrine of manifest arbitrariness, as it has for some time complicated the usage of Article 14 in going beyond what is mandated, which has the potential to affect the constitutional structure of different institutions in the country.

DECRIMINALISING INDIAN POLITICS: SYNCHRONISING DEMOCRATIC PROBITY AND FAIRNESS IN INDIA'S ELECTORAL SET-UP

ARCHISA RATN¹ & ATHARVA DWIVEDI²

In a democratic polity, the importance of representation as a method for the people to govern themselves cannot be overemphasised. The modern democratic governments mostly act as people's representatives, exercising delegated agency for the performance of sovereign functions. The prosecution of criminals is one such important function performed by the State on behalf of society. Therefore, the logical corollary is that the State authority should itself be free from any kind of criminal vice, in order for it to exercise the moral authority for the prosecution of criminals. Section 8 of India's Representation of the People Act, 1951, thus prohibits anyone found guilty of a crime that carries a sentence longer than two years from holding a representative office. This paper reviews Sections 8 and 11 of the RoPA, whereby it is contended that the sceptre swayed by these legislative provisions is inadequate and impaired in its application. The authors critically examine the adequacy of the legislative provisions in achieving their objective of divorcing criminality from political participation, including from historical and modern standpoints.

The authors shall propose a novel approach to legislative reform, aimed at eliminating the menace of criminality in politics. This approach will strive to strike a balance between an unduly harsh and draconian disqualification and one that is toothless and ineffective in the context of convicted (and accused) politicians. For this purpose, the paper shall begin with the legislative history and the rationale behind Section 8, enlisting similar laws in other democracies. Thereafter, in the second part, the authors shall empirically examine the inadequacy of Sections 8 and 11 by exposition of instances of its impaired application. Finally, the authors shall propose a novel and nuanced approach which balances the need for ethical politics, devoid of criminality and also safeguards the freedom of people to contest elections.

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INTRODUCTION

India, the world's largest democracy with a population exceeding 1.45 billion, has conducted eighteen general elections since its independence. These elections are pivotal to the functioning of its democratic system, allowing citizens to elect representatives to legislate and govern. The legitimacy of these representatives is paramount, and ensuring their integrity is crucial for maintaining public trust in the electoral process. To safeguard the democratic process, the Representation of the People Act, 1951 ("**RoPA**"),³ establishes clear criteria for disqualifying individuals from holding public office if they are found guilty of criminal offences. Among these, Section 8 of the Act specifically disqualifies individuals convicted of crimes with sentences of two or more years.⁴ thereby aiming to preserve the integrity of the legislative body and prevent the entry of individuals with questionable moral standards into politics.

The introduction of Section 8 was motivated by the need to ensure that those entrusted with lawmaking are free from criminal backgrounds, thereby upholding the ethical standards expected of public office holders. Over time, the provision has been instrumental in barring individuals with serious criminal records from contesting elections and holding legislative positions. However, the application of Section 8 has raised significant

³ The Representation of People Act, 1951, No. 43, Acts of Parliament, 1951 (India).

⁴ The Representation of People Act, 1951, § 8, No. 43, Acts of Parliament, 1951 (India).

concerns regarding its scope and effectiveness. One notable issue arises from its potential misuse for political vindication, with accusations that it has been selectively applied to target political opponents. The recent defamation case against Rahul Gandhi in 2019⁵ and his subsequent disqualification from the Parliament have reignited debates on the fairness and utility of this provision in contemporary times. These developments prompt a critical examination of whether Section 8 still serves its original purpose or if it has outlived its relevance in the present political climate.

Part I of this paper will trace the legislative history of Section 8, beginning with its introduction in 1951 and the rationale behind its inclusion in the RoPA. It will explore how this provision was designed to address growing concerns about the criminalisation of Indian politics, a phenomenon that has become increasingly pervasive in recent decades. The prevalence of politicians with criminal records, including those charged with serious offences such as murder, corruption, and sexual assault, highlights the challenges faced by the Indian political system in enforcing ethical standards. This section will critically examine the extent to which Section 8 has been effective in curbing the influence of criminal elements in politics and will analyse whether its enforcement aligns with its original legislative intent.

Part II will focus on the contentious issue of the interpretation and application of Section 8(3), which deals with disqualifying individuals convicted of crimes with sentences of two or more years. One of the major concerns raised in recent years is the ambiguity surrounding the phrase “*any offence*” which has led to debates about whether multiple minor offences can collectively lead to disqualification or whether each offence must individually meet the two-year threshold. This section will analyse key judicial decisions, including the landmark case of *K. Prabhakaran v. P. Jayarajan*⁶ which addressed this issue. Furthermore, this part will delve into the misuse of Section 11, which grants the Election Commission of India (“ECI”) discretionary powers to reduce or remove the period of disqualification. There have been several instances where the ECI has been

⁵ Explained Desk, *Rahul Gandhi's 2019 Defamation Case and the Gujarat Court Verdict*, THE INDIAN EXPRESS, (Mar. 24, 2023), <https://indianexpress.com/article/explained/explained-law/gujarat-court-rahul-gandhi-defamation-case-explained-8514062/>.

⁶ *K. Prabhakaran v. P. Jayarajan*, (2005) 1 SCC 754.

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accused of favouring certain candidates by exercising this discretion arbitrarily. The paper will examine these cases to highlight the inherent biases that affect the fairness of the electoral system.

Part III will provide a comparative analysis of India's disqualification laws with those of the United Kingdom ("U.K.") which shares a similar democratic framework. While both, India and the U.K. have provisions that disqualify individuals convicted of serious criminal offences from holding public office, the two countries have adopted different approaches in defining the criteria for disqualification. This section will examine the British legal framework, which places greater emphasis on the severity and context of the offence, and contrast it with India's comparatively rigid approach under Section 8. The analysis will highlight potential reforms inspired by the British system to make India's laws more nuanced and effective in ensuring that only individuals with a clean record are allowed to hold political office.

Finally, Part IV of this paper proposes recommendations for reforming Section 8 and related provisions to ensure that they are applied fairly and justly. The paper will argue for narrowing the term "any offence" to consider the nature and gravity of the crime committed, rather than applying a blanket disqualification for all offences regardless of severity. Additionally, the paper will recommend that the ECI's discretion under Section 11 be more tightly regulated to prevent bias and ensure consistency in its application. By making these reforms, the paper asserts, India can better safeguard the integrity of its electoral process and uphold the ideals of democracy by preventing the criminalisation of politics while ensuring a fair and transparent legal framework for all candidates.

LEGISLATIVE HISTORY

A. THE BEGINNING

The roots of the RoPA were planted on 9 April, 1951, when it was introduced in the Provisional Parliament by Dr. B.R. Ambedkar, the then Law Minister of India. He introduced it as a Bill to further amend the Representation of the People Act, 1950. The main intent was to establish procedures and rules regarding the conduct of elections, the

qualifications and disqualifications for membership, and the resolution of doubts and disputes arising from such elections, etc., prior to India's first general election in 1951.⁷ The first Bill was passed after amendment on 19 April, 1951.

However, that was not the end of the journey. A second Bill was introduced for consideration on 15 May, 1951, wherein provisions regarding the Returning Officer, polling booths, disqualifications, etc., were thoroughly discussed among the parliamentarians. This Bill was passed after in-depth deliberation on 7 June, 1951. Enacted as Act No. 43 of 1951 by the Provisional Parliament under Article 327 of the Constitution of India, it was brought into force before the 1951 general elections.

B. MAJOR DEBATES REGARDING THE DISQUALIFICATION OF THE MEMBERS OF THE PARLIAMENT AND STATE LEGISLATURES

The Provisional Parliament discussed the whole Bill in great depth, and the thorough discussions regarding the different disqualification grounds were taken up by the members on 28 May, 1951. All the disqualification grounds were presented as Clause 7, which later became different sections in the Act. Section 8 of the present Act stems from Clause 7(b), which states the following:

“Clause 7 - Disqualifications for membership of Parliament or of a State Legislature. A person shall be disqualified for being chosen as, and for being, a member of either House of Parliament or of the Legislative Assembly or Legislative Council of a State- (b) if, whether before or after the commencement of the Constitution, he has been convicted by a court in India of any offence and sentenced to transportation or to imprisonment for not less than two years, unless

⁷ Statement of Objects and Reasons of the Representation of the People Bill, 1951 reads thus: “That the Bill to provide for the conduct of elections to the Houses of Parliament and to the House or Houses of the Legislature of each State, the qualifications and disqualifications for membership of those Houses, the corrupt and illegal practices and other offences at or in connection with such elections and the decision of doubts and disputes arising out of or in connection with such elections, as reported by the Select Committee, be taken into consideration.”

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a period of five years, or such less period as the ECI may allow in any particular case, has elapsed since his release.”⁸

The major point of contention among many members with this part of the clause was the “*any offences*” part; they wanted to restrict the ambit of it and hence brought motions to amend it and include certain offences by listing them down or mentioning the term “*moral turpitude*” for the offences. Members like Shri Syamnandan Sahaya, Pandit Thakur Das Bhargava, and Dr. Deshmukh, moved motions to add the term “*moral turpitude*” after the word “*offence*” in the sub-clause.⁹ The reasoning provided by them was that the original clause has a very wide ambit and shall restrict even members who commit technical offences and shall disqualify them, which was not desirable in the given context. They believed that the inclusion of “*moral turpitude*” as a limit would keep the individuals of questionable integrity outside the House and still not create a huge restriction on others to be qualified as members. The intention behind such inclusion was, firstly, to include black-marketing and profiteers under the ambit of disqualification, which was a major issue at that time.¹⁰ Shri Jangde from Madhya Pradesh presented a separate amendment to include a clause for disqualifying black marketers and profiteers from being elected as members.¹¹ Even other members like Prof. K.T. Shah presented amendments to include such a clause as the members wanted to stress the need to include such offences as allowing such individuals to stand for public office weakens public trust and sends the wrong message.¹² They argued that disqualifying those convicted of these offences would reflect society’s shared sense of justice and clearly show disapproval of actions that may harm the economy and violate public interest. They sought to lead society by example and

⁸ PROVISIONAL PARLIAMENTARY DEBATES, HOUSE OF THE PEOPLE, Official Report Vol. VII, 1951, May 28, 1951, p. 9474-9611, https://eparlib.sansad.in/bitstream/123456789/760707/1/ppd_28-05-1951.pdf.

⁹ *Id.* at 9487.

¹⁰ *Id.*

¹¹ *Id.* at 9537.

¹² *Id.* at 9491-9497.

therefore advocated for the inclusion of these offences under disqualification criteria, aiming to condemn such conduct until specific Bills or Acts could be enacted to address them. The other intention behind such inclusion was to ensure that issues of family disputes over parental property, which may lead to conviction, do not make some people ineligible to be elected again.

Prof. K.T. Shah, on the other hand, brought in multiple amendments, the most prominent of which was the addition of an explanation under Clause 7(b) to provide an exhaustive list of offences as grounds for disqualification.¹³ Some of these offences were treason, murder, rape, adultery, bigamy, robbery, tax-evasion, etc. He also introduced a motion to add another sub-clause stating that if a person is found to be directly or indirectly violating constitutional provisions, then he shall be disqualified. While explaining the motive behind such amendments, he stated that the choice of national representatives should exclude the right to get elected from persons who are convicted under any law passed for black marketing and profiteering, and establish an example for the society. He also advocated to make the disqualification irrespective of the nature of the punishment given to mark social disapproval for such individuals.¹⁴

Another major point raised by a lot of members was the issue of whether disqualification should be decided by the conviction period as stated in the proposed clause or the nature and the gravity of the offence. Regarding this, members of the house like Shri A. C. Guha, Shri Naziruddin Ahmad, and Shri Shiv Charan Lal presented their viewpoints. A.C. Guha stated that the offences should relate to moral turpitude and conviction for political offences should be exempted, as was also done in the British era. He remarked, “*It is not the duration of the sentence but the nature of the crime which should disqualify a person.*”¹⁵ Shri Naziruddin Ahmad presented his points along the same lines and stated that there should be a distinction between offences to be made and he even remarked, “*There are offences which may almost amount to virtuous indignation, and there are offences*

¹³ *Id.* at 9516.

¹⁴ *Id.* at 9517.

¹⁵ *Id.* at 9530.

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which make the offender a person of the blackest dye."¹⁶ Shri Shiv Charan Lal stated the same thing and presented the example of conviction of a person for private defence for three years, then his disqualification is not desired, and therefore, the offence should be the criterion to decide and not the sentence.¹⁷

If these concerns of the former parliamentarians are seen in the modern context, then we can say that the first contention finds relevance even today, as the disqualification grounds presented under Section 8 of the Act include certain offences whose conviction should not lead to disqualification as it is being misused by the political parties in the current scenario. A prime example of such an offence is defamation. A conviction for defamation may be strategically utilised by the ruling government to curtail the influence of political adversaries of the ruling establishment, or by political parties as a means of pursuing political retribution and vindication. Rahul Gandhi's 2019 defamation case showcases the imminent peril of not classifying serious offences which should attract disqualification and which offences do not need disqualification of the individual.

The other contention of the members regarding the nature of offence is that some offences like rape, murder, etc. do require serious consequences to set an example amongst others and thus disqualification should be given to convicted individuals of such heinous and grave offences. However, there are some other offences which do not require such strict debarment of six years. Hence, it cannot be said that the criterion of sentencing of two or more years is wrong, but it can be argued that the offences mentioned under this act need a strict classification and determination of disqualification should involve the evaluation of the nature of the offence.

C. AMENDMENTS BROUGHT TO SECTION 8 SINCE INDEPENDENCE

The RoPA¹⁸ has been amended many times, but Section 8 in itself has

¹⁶ *Id.* at 9533.

¹⁷ *Id.* at 9551.

¹⁸ *Supra* note 6.

faced only one major amendment in all these years – the 2013 ruling of the Supreme Court of India in the case of *Lily Thomas v. Union of India*.¹⁹ Here, the Court struck down section 8(4) of the Act,²⁰ which protected the parliamentarians, as unconstitutional, as it stayed the disqualification for three months, till the appeal was filed. The Supreme Court held it unconstitutional for violating Articles 102(1)(e) and 191(1)(e) of the Constitution. The Court reasoned that allowing convicted legislators to retain office by merely filing an appeal created an arbitrary distinction between candidates and sitting members, violating Article 14. Disqualification, it held, must operate immediately upon conviction unless the conviction itself is stayed. Emphasising the need to uphold democratic integrity, the Court concluded that Parliament cannot defer disqualification and must ensure equality and purity in the electoral process. Thus, if a person is convicted of an offence and given the mentioned punishment as in section 8 of the Act, then he shall be disqualified from the date of conviction itself and no stay till a future date shall be provided to the parliamentarian.

The Apex Court of the nation took such a step to address the issue of criminalisation in politics by ensuring that individuals with criminal records would not be able to hold public offices and influence governance by using their power and might. By striking down Section 8(4) of the RoPA, the Supreme Court closed a significant loophole that had enabled prolonged retention of public office despite serious criminal convictions. This decision reinforced the principle that lawmakers must be subject to the same standards of legal accountability as ordinary citizens. Consequently, it enhanced transparency and accountability in the political system, reaffirming public faith in democratic governance and the rule of law. However, in the following sections, we will see how the issue of criminalisation of politics persists in contemporary times, and how even well-intentioned provisions like Section 8 of the Act are strategically used by political parties to further their political agenda.

EXTENT OF CRIMINALISATION IN POLITICS

The Association for Democratic Reforms (“**ADR**”) and National

¹⁹ *Lily Thomas v. Union of India*, (2013) 7 SCC 653.

²⁰ The Representation of People Act, 1951, §8(4), No. 43, Acts of Parliament, 1951 (India).

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Election Watch (“**NEW**”)²¹ have conducted notable research, which highlights the grave concern surrounding the criminalisation of politics in India. A troubling trend emerges from an examination of 62,847 candidates who ran for State Assembly or Parliamentary seats from 2004 till 2013.²² Of these candidates, 11,063 people, or around 18%, had open criminal cases, with 27,027 charges in total. Even more alarming is the fact that 5,253 applicants, or 8% of the total, were found to have been involved in 13,984 major crimes, including violent crimes like rape, murder, extortion, and corruption.²³ Serious criminal charges are those that have the potential to result in penalties longer than five years, that need non-bailable warrants, that involve crimes against women, or that have to do with electoral violations.

The findings of the ADR also point to a concerning pattern in parliamentary elections, as an increasing number of elected Members of Parliament (“**MPs**”) are dealing with outstanding criminal accusations. About 24% of MPs had criminal cases outstanding against them in 2004; by 2009, that number had risen to 30%; by 2014,²⁴ it had risen to 34%; and by 2019, it had alarmingly reached 43%.²⁵ The purity of democratic institutions is being threatened by the ongoing escalation, which indicates a growing relationship between criminal groups and political authority. It has been shown that candidates from all major political parties have a history of violent crimes, including 455 other crimes against women, 1,229 murder cases, 2,632 attempted murder cases, 68 rape cases, and other violent crimes.²⁶ 9% of candidates on average from 19 political

²¹ National Election Watch, *Ten Years Of National Election Watch (2004 to May 2013) Report On Elections, Crime And Money*, ASSOCIATION OF DEMOCRATIC REFORMS, (Mar. 28, 2023), <https://adrindia.org/sites/default/files/Ten%20Years%20of%20National%20Election%20Watch%20Report.pdf>.

²² *Id.*

²³ *Id.*

²⁴ Trilochan Sastry, *Owning up to criminalisation in politics*, THE HINDU (Jul. 10, 2020), <https://www.thehindu.com/opinion/lead/owning-up-to-criminalisation-in-politics/article32035186.ece>.

²⁵ *Id.*

²⁶ *Supra* note 16.

parties, which won almost 90% of all seats, had serious criminal accusations against them, and 18% had a criminal past of some kind.²⁰

Regionally, the ADR's analysis of the Karnataka state elections reinforces this concern, revealing that nearly 45% of candidates faced criminal charges, with about 30% accused of serious offences, including violent crimes like murder and rape.²⁷ This widespread criminal influence at the national and regional levels highlights the important and expanding relationship between India's political system and criminality.

The pervasive criminalisation of politics raises grave concerns about the integrity of India's democratic process. A concerning acceptability of crime in political representation is shown by the rising number of candidates with significant criminal histories. This undermines the moral authority of elected leaders and erodes public faith in government. In addition, the protracted legal process in India makes matters worse by leaving many cases unsettled for years, which permits those facing severe accusations to be active in politics. This intersection of political power and postponed justice underscores the pressing need for election reforms to protect democracy from criminal meddling.

MISUSE AND AMBIGUITIES IN THE ENFORCEMENT OF SECTION 8(3) AND SECTION 11 UNDER ROPA, 1951

The criminalisation of politics in India has emerged as a pressing concern, threatening the very foundation of democratic governance. The RoPA,²⁸ designed to ensure the sanctity of the electoral process, includes provisions like Section 8(3) and 11 that aim to disqualify convicted individuals from holding public office. However, the enforcement of these provisions has been marred by ambiguities and potential misuse, contributing to the persistence of criminal elements within the political sphere.

A. MISUSE OF SECTION 8(3)

²⁷ *Ease of getting elected in Karnataka: Most candidates with money & criminal past did better, says ADR finding*, ASSOCIATION FOR DEMOCRATIC REFORMS (Mar. 28, 2023), <https://adrindia.org/content/ease-getting-elected-karnataka-most-candidates-money-criminal-past-did-better-says-adr>.

²⁸3 PROVISIONAL PARLIAMENT DEBATES, (May 23, 1951), https://eparlib.nic.in/handle/123456789/760707?view_type=search.

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The RoPA serves as a cornerstone in maintaining the sanctity of electoral processes in India. The disqualification measures in RoPA, 1951 are designed to keep those with criminal records or other disqualifying factors from contesting in elections, thereby protecting democratic governance in the process. Unfortunately, the modern use of these clauses has exposed their shortcomings, prompting serious concerns about their applicability and execution.

Section 8(3) of the RoPA²⁹ serves a crucial function in disqualifying individuals from contesting elections upon conviction of an “*offence*” that results in a sentence of two years or more.³⁰ However, the meaning and use of the term “*offences*” in this section has generated a great deal of legal discussion and contention, leading to situations in which the original intent of the legislation appears to have been misappropriated or overreached. Although the Clause is intended to keep those with major criminal convictions out of the electoral process, the wording “*any offence*” has created situations where disqualification seems unnecessary, considering the gravity of the underlying offences.

A question arises regarding whether an individual would be disqualified under Section 8(3) of the RoPA if they have been sentenced on multiple counts, where none of the individual sentences exceeds two years, but the combined duration of the sentences, ordered to run consecutively, totals two years or more. Disqualification pertains to “*any person convicted of any offence*,” as stated plainly in Section 8(3),³¹ implying that disqualification should only take place if a single offence carries a sentence longer than two years. However, the Supreme Court in *K. Prabhakaran v. P. Jayarajan*³², decided that the focus should be on the total length of incarceration rather than the gravity of the offence for disqualification under Section 8(3).³³ At

²⁹ The Representation of People Act, 1951, § 8, No. 43, Acts of Parliament, 1951 (India).

³⁰ The Representation of People Act, 1951, § 8, No. 43, Acts of Parliament, 1951 (India).

³¹ The Representation of People Act, 1951, § 8, No. 43, Acts of Parliament, 1951 (India).

³² *K. Prabhakaran v. P. Jayarajan*, (2005) 1 SCC 754.

³³ *Decriminalisation of Politics: Does Section 8 of the Representation of the People Act, 1951 Pass the Muster of Rationality*, SCC TIMES, (Sept. 10, 2021), <http://scconline.com/blog/post/2021/09/10/decriminalisation-of-politics/>.

that time, Justice K.G. Balakrishnan contended in his dissenting opinion that Section 8(3) should be interpreted strictly since it results in disqualification, and that disqualification should only apply when the circumstances precisely meet the criteria outlined in the provision — meaning that, if no single sentence exceeds two years, the person should not be disqualified.³⁴

It is crucial to understand that the court has the authority to decide whether to impose sentences simultaneously or consecutively, as this decision affects how the sentence is executed. Nevertheless, there are no clear rules or regulations in the Bharatiya Nagarik Suraksha Sanhita, 2023,³⁵ that specify the proper method of execution under particular conditions, and due to this judicial discretion, punishments for two people found guilty of the same offence may differ. Therefore, under Section 8(3) of the RoPA, a person serving consecutive sentences longer than two years would be automatically disqualified, whereas a person serving concurrent terms could still be able to run for office.³⁶ This discrepancy raises concerns under Article 14 of the Constitution, which mandates equality before the law, ensuring that all individuals in similar situations are treated equally without arbitrary distinctions.³⁷

The distinction between consecutive and concurrent sentences, in this case, has no rational nexus to the objective of Section 8(3) of the RoPA, which is to prevent individuals with serious criminal backgrounds from entering and holding public office. The legislative intent behind disqualification provisions is rooted in preserving the integrity of democratic institutions by ensuring that representatives are individuals of sound character, free from serious criminal taint. However, how Section 8(3) operates, disqualifying those serving consecutive sentences totalling more than two years, while potentially allowing those serving concurrent sentences of similar or even greater gravity to escape disqualification, creates an irrational and arbitrary distinction. This arbitrariness is constitutionally problematic when tested against Article 14 of the Constitution, which enshrines the guarantee of equality before the law.

³⁴ *Id.*

³⁵ Bharatiya Nagarik Suraksha Sanhita, 2023, No. 45, Acts of Parliament, 2023.

³⁶ *Supra* note at 30.

³⁷ Jagannath Prasad Sharma v. State of U.P., AIR (1961) SC 1245.

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Under the twin test formulated by the Supreme Court³⁸ for a law to withstand scrutiny under Article 14,³⁹ two requirements must be satisfied: *first*, the classification must be founded on an *intelligible differentia* that distinguishes persons or things grouped from those left out of the group; and *second*, the differentia must have a rational nexus with the object sought to be achieved by the statute in question.

The classification inherent in Section 8(3) fails the first prong of this twin test, as there is no logical or coherent basis for treating individuals differently purely on the procedural circumstance of whether their sentences run consecutively or concurrently, particularly when the substantive nature of their criminal conduct may be identical. For instance, two individuals convicted of the same offences and receiving similar sentences could be treated unequally under the law solely because of the sentencing order regarding concurrency or consecutiveness, a factor largely determined by judicial discretion and not by the nature of the offence itself. Moreover, even if an *intelligible differentia* could somehow be strained out, the classification still lacks a rational nexus with the objective of Section 8(3), as allowing an individual with multiple concurrent sentences for grave offences to avoid disqualification, while disqualifying another based on consecutive sentencing for lesser offences, ultimately subverts the legislative purpose of maintaining the moral and ethical standards of public representatives.

The extent of misuse under Section 8(3) has been seen through executive action, where the period of conviction was reduced, resulting in reversing disqualification. In the case of *Sarat Chandra Rabha v. Khagendranath Nath*,⁴⁰ the prisoner was granted remission, which allowed for a reduction in his sentence from two years. According to the Court, he will not be disqualified because the remission has shortened his term.⁴¹

Section 8(3) treats all convictions leading to such a sentence in an equal

³⁸ *State of W.B. v. Anwar Ali Sarkar*, (1952) 1 SCC 1.

³⁹ INDIA CONST. art 14.

⁴⁰ *Sarat Chandra Rabha v. Khagendranath Nath*, AIR 1961 SC 334, ¶ 7.

⁴¹ *Id.*

manner, regardless of whether the offence entailed moral turpitude or was a small infringement with a relatively light punishment. The two-year rule's uniform application fails to effectively convey the purpose of disqualification, which is presumably to maintain the moral standards and integrity of public service.⁴² The sole focus on the length of imprisonment under this section disqualifies individuals whose offences are not severe or morally reprehensible, while allowing those convicted of morally egregious crimes with lighter sentences to remain eligible for public office.⁴³ This lack of differentiation potentially undermines the law's objective of ensuring that only those of sound moral character serve in legislative positions. The absence of a clear consideration of the nature of the offence also leaves the provision open to criticism for its potential to produce inequitable outcomes. The rigid application of the two-year imprisonment rule fails to account for the context or circumstances of the crime, leading to a one-size-fits-all approach that may not always serve the broader goals of justice and fairness in electoral eligibility.

Section 8(3)'s wide scope makes selective prosecution possible, in which cases are brought or prosecuted against particular people based solely on their political associations. The result is clear that there will be automatic disqualification, which effectively removes the opponent from the political landscape without the need for electoral competition. The application of Section 8(3) of the RoPA has been subject to scrutiny, particularly in cases where its rigid application led to outcomes that appear disproportionate or politically motivated. A prominent example of this is the case involving Rahul Gandhi, who was disqualified from the Indian Parliament following his conviction in a defamation case.

B. RAHUL GANDHI'S CASE

In 2019, Rahul Gandhi, a senior leader of the Indian National Congress, was convicted in a defamation case for remarks he made during an election rally in Kolar, Karnataka during a campaign for the 2019 General Elections. During the rally he remarked, "*How come all the thieves have Modi as the common surname?*".⁴⁴ Later, the court sentenced him to two years of imprisonment, which is the minimum threshold for disqualification under

⁴² *Supra* note 6.

⁴³ *Id.*

⁴⁴ *Rahul Gandhi v. Purnesh Ishwerbhai Modi*, (2024) 2 SCC 595.

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Section 8(3) of the RPA.⁴⁵ As a result, Gandhi was disqualified from serving as an MP.⁴⁶

The crime for which Gandhi was found guilty was Criminal Defamation under Section 356 of the Bharatiya Nyaya Sanhita,⁴⁷ which does not usually entail moral turpitude unless with express malicious intent. The authors believe that defamation, especially in political cases, sometimes remains limited only to a speech-related violation, rather than tantamount to criminal conduct exposing the individual's moral conduct. Despite this, the two-year sentence triggered an automatic disqualification under Section 8(3), leading to significant political repercussions.⁴⁸

The Gandhi case also raised concerns about the coherence and justice of Section 8(3)'s implementation. The fact that the disqualification was automatic and did not take into account the circumstances or the seriousness of the violation raised the possibility that the law would be enforced differently depending on the political climate and the parties involved.

The disqualification of Gandhi raised concerns about the disproportionate impact of the law as the punishment and subsequent disqualification did not align with the nature of the offence, which can be seen as a minor legal infraction rather than a serious crime deserving of such severe consequences.⁴⁹ Gandhi's disqualification as a result of a defamation conviction highlights how Section 8(3) has been interpreted in a way that restricts free speech, especially political expression, which is crucial in democracies. While a conviction for defamation legally signifies

⁴⁵ The Representation of People Act, 1951, § 8, No. 43, Acts of Parliament, 1951 (India).

⁴⁶ M.R. Abhilash, *On Rahul Gandhi's conviction*, THE HINDU, (Jul. 16, 2023), <https://www.thehindu.com/news/national/on-rahul-gandhis-conviction/article67088017.ece>.

⁴⁷ The Bharatiya Nyaya Sanhita Act, 2023, § 356, No. 45, Acts of Parliament, 2023 (India).

⁴⁸ Suchismita Debnath, *Analyzing the Disqualification of Rahul Gandhi: What it Means for Indian Politics*, THE TIMES OF INDIA (Mar. 30, 2023), <https://timesofindia.indiatimes.com/readersblog/mera-anubhav/analyzing-the-disqualification-of-rahul-gandhi-what-it-means-for-indian-politics-52069/>.

⁴⁹ Subramanian Swamy v. Union of India, (2016) 7 SCC 221.

that the speech in question crossed the threshold of permissible expression and infringed upon another's right to reputation, such offences are inherently subjective and often context-dependent. In the realm of politics, where sharp criticism, satire, and provocative speech are commonplace and constitutionally protected under Article 19(1)(a), criminal defamation convictions can be misused to stifle dissent and opposition. This application of Section 8(3), therefore, raises concerns about its potential to chill legitimate political speech and disproportionately penalise individuals engaged in democratic dialogue. It calls for a more nuanced and balanced approach that distinguishes between genuinely criminal conduct and politically charged expression.

MISUSE OF SECTION 11

The ECI is the regulating body of the electoral process of India. However, there are some provisions as well which enlarge the domain and are not restricted to a mere regulatory one. An example of the significant authority granted to the ECI in the Indian election system is seen in Section 11 of the RoPA.⁵⁰ The section emphasises the Commission's function as a body that regulates as well as one that has significant control over candidate eligibility and the election process as a whole.

The section gives huge power to the ECI to reduce or remove the period of disqualification.⁵¹ The provision allows for flexibility and a measure in cases where strict application of disqualification under Section 8 may result in undue hardship. Over time, the provision has become a matter of concern due to multiple reasons.

The authors believe that the ECI uses the discretionary authority granted to it under Section 11 in a way that benefits particular political parties or persons. There is concern that this latitude may be abused to shorten the time required for disqualification for those with political ties or whose recovery would further certain political goals.⁵² This worry draws attention to the possibility that political influence might infiltrate what ought to be

⁵⁰ The Representation of People Act, 1951, § 11, No. 43, Acts of Parliament, 1951.

⁵¹ *Id.*

⁵² Om Marathe, *Sikkim CM gets EC's reprieve: Here are the Offences that Attract Debarment from Elections*, THE INDIAN EXPRESS (Oct. 1, 2019), <https://indianexpress.com/article/explained/sikkim-cm-prem-tamang-ec-election-debarment-6045442/>.

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an unbiased and equitable procedure.

The offences, particularly those serious and grave, should not be subject to reduction in disqualification periods. The reasoning for this is that the law should be followed without exception if it has been determined, in its “*solemnity and seriousness*,”⁵³ that particular conduct is grounds for a particular time of disqualification. The ECI, if allowed to change this time frame, would lessen the punishment's intended deterrent impact and send a message to the public that these kinds of offences are not regarded severely enough.

There are instances where the use of Section 11 has been the target of courts and critics. One of the major instances was the reduction of Sikkim Chief Minister Prem Singh Tamang's disqualification period from six years to just one year. He was accused and convicted of misappropriating funds in the procurement of cows when he was the Minister of Animal Husbandry of Sikkim during 1996-97.⁵⁴ The ECI argued that his conviction fell under a now-omitted section of the Prevention of Corruption Act, 1988.⁵⁵

Now, this interpretation sets a worrying precedent in which politicians with criminal convictions are quickly re-instated into public office by taking advantage of a legal loophole, as such use of Section 11 might inspire such future conduct and jeopardise the judicial system's ability to hold public officials responsible. Furthermore, the ECI's justification that people with relatively minor sentences should face shorter periods of disqualification weakens the deterrence principle, particularly when it comes to corruption charges. Corruption represents a severe breach of public trust, and by reducing disqualification periods, the ECI might inadvertently signal that such offences are less serious, thereby

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ ELECTION COMMISSION OF INDIA, COMMISSION'S ORDER REGARDING APPLICATION OF SHRI PREM SINGH TAMANG UNDER SECTION 11 OF THE REPRESENTATION OF THE PEOPLE ACT, 1951 (2019), <https://old.eci.gov.in/files/file/10777-commissions-order-dated-29092019-regarding-application-of-shri-prem-singh-tamang-under-section-11-of-the-representation-of-the-people-act-1951/>.

diminishing the deterrent effect that these legal sanctions are meant to enforce.

The ECI's judgement is made more difficult by the fact that it reduced Tamang's disqualification by using "*socio-economic-political factors*" as support.⁵⁶ This line of thinking raises the possibility that political factors may prevail over the requirement for moral and legal accountability, which could result in arbitrary and politically driven decisions. An approach like this might erode public trust in the ECI's impartiality since it would seem to favour powerful political figures over the principles of justice. The critics have drawn attention to the possibility that the reduction of Tamang's disqualification might exacerbate the existing issue of criminalisation in Indian politics.⁵⁷ Encouraging people with criminal records to return to politics swiftly undercuts attempts to preserve public trust and support moral principles in government. The necessity for strict implementation of disqualification laws is highlighted by the large number of Lok Sabha members who have unresolved criminal charges, making this matter more urgent.⁵⁸

To sum up, the enforcement of Sections 8(3) and 11 of the RoPA, 1951, reveals significant gaps and potential for misuse. The lack of clarity in the law and the wide discretion given to authorities have led to inconsistent and sometimes politically motivated outcomes. These issues highlight the need for clearer guidelines and more balanced implementation to protect the democratic process.

COMPARATIVE ANALYSIS

To critically assess the limitations inherent in India's disqualification framework, it is instructive to undertake a comparative analysis with the corresponding provisions in the U.K. Although both jurisdictions disqualify individuals convicted of serious offences, the U.K. adopts a

⁵⁶ *Supra* note 46.

⁵⁷ Dangerous precedent: *On Sikkim CM's disqualification*, THE HINDU (Sept. 30, 2019), <https://www.thehindu.com/opinion/editorial/dangerous-precedent-on-sikkim-cms-disqualification/article59779445.ece>

⁵⁸ Association for Democratic Reforms, *Almost Half of Newly-Elected MPs Face Criminal Cases, Reveals ADR Analysis*, ASSOCIATION FOR DEMOCRATIC REFORMS (June 7, 2024), <https://adrindia.org/index.php/content/almost-half-of-newly-elected-mps-face-criminal-cases-reveals-adr-analysis>.

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more discerning approach by evaluating the nature and context of the offence. In particular, disqualification in the U.K. tends to be triggered primarily by crimes involving dishonesty or a breach of public trust, thereby aligning the rationale for disqualification more closely with the principles of democratic integrity. As Pandit Thakur Das Bhargava observed during the Constituent Assembly Debates, “*We have copied most of our laws in this connection from the English law*,” referring specifically to the disqualification clauses.⁵⁹ This historical linkage underscores the necessity of examining both the convergences and divergences between the two legal systems not only to better understand the foundational underpinnings of Indian law, but also to evaluate the extent to which it requires recalibration in light of contemporary democratic imperatives.

When we trace the origins of the British law on disqualification, many legislations come up to facilitate this subject matter. The major legislation governing disqualification from the Commons is consolidated in the House of Commons Disqualification Act 1975.⁶⁰ However, the common law disqualifies a range of people, such as minors and aliens, amongst other categories.⁶¹ The arena of disqualification based on conviction of the member is regulated by Chapter 34 of the Representation of the People Act, 1981.⁶² It provides grounds to disqualify certain persons for election to the House of Commons. It states that any person who is detained in the British Isles or the Republic of Ireland for more than a year for any offence shall stand disqualified, and the election of such person shall stand void.⁶³

Apart from the general terms of the 1981 Act, there is a special set of provisions relating to persons whose crime consists of having committed corrupt or illegal practices at an election. This special provision is Section

⁵⁹ *Supra* note 6.

⁶⁰ House of Commons Disqualification Act 1975, c. 24 (UK), <https://www.legislation.gov.uk/ukpga/1975/24/contents>.

⁶¹ Parliamentary Research Briefing, The Representation of the People Act 1983, <https://researchbriefings.files.parliament.uk/documents/SN03221/SN03221.pdf>.

⁶² Representation of the People Act, 1981, c. 34 (U.K.).

⁶³ *Id.*

173 of the Representation of the People Act, 1983.⁶⁴ A conviction for any of these offences results in the immediate vacating of the M.P.'s seat. Furthermore, amongst other penalties, he may be disqualified from standing as an election candidate for 5 years (in the case of a corrupt practice) or 3 years (in the case of an illegal practice).⁶⁵

On the other hand, the Indian law on disqualification of parliamentarians is the RoPA, 1951.⁶⁶ Unlike the U.K.'s one-year threshold, Indian law requires a minimum two-year sentence for disqualification and imposes a uniform disqualification period of six years post-release, irrespective of the nature of the offence.

Thus, it can be seen that while the manner chosen to establish the grounds for disqualification run along the same lines in both nations and are similar in nature; however, the threshold of sentencing and the duration of the disqualification differ in both countries. While the U.K. has the threshold of one year conviction period, India requires sentencing of two or more years to disqualify and in the U.K., the duration of disqualification differs in cases of corrupt and illegal practices whereas in India, the period remains the same for all offences that is of six years from the date of disqualification. While both legislative Acts aim and strive to uphold the integrity and morality of the post, the Indian law is more extensive in description of the offences and criteria to disqualify a member of the Parliament, and the longer period of disqualification provides a stricter stance against criminality in politics in the nation. Still, both nations face the problem of deciding whether the criterion of duration of sentencing to decide disqualification has been able to help towards providing a just and fair system of election of members or not and as seen in the previous section of the paper, Indian cases do not answer this in the affirmative.

While the nations face such issues in contemporary times, they have been evolving in terms of their legal standards and are responding towards change as well with the changing political and social contexts in both nations.

⁶⁴ Representation of the People Act, 1983, c. 2, § 173 (U.K.).

⁶⁵ Joseph Jaconelli, *Constitutional Disqualification: A Critique of English and English-Derived Law*, 14 I.C.L.J. 167-197 (2020).

⁶⁶ *Supra* note 6.

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RECOMMENDATIONS

This section advances a set of legislative reforms aimed at enhancing the efficacy of Section 8 of the RoPA while minimising its potential for misuse. It is proposed that the legislature amend the language of Section 8(3) to more precisely define the term “*any offence*” in a manner that reflects the gravity and intent underlying the crime, thereby reducing the scope for arbitrary or overly broad application. Such a refinement would help prevent the imposition of disproportionate disqualifications arising from politically motivated or minor convictions, such as those about defamation, which may not necessarily indicate moral turpitude or a threat to democratic integrity.

Moreover, the discretionary power given under Section 11 should be controlled through clear statutory guidelines that lay down specific grounds and limits for its use. These could include factors like the type of offence committed, whether it involved moral turpitude, the severity of the sentence, and any special circumstances. For example, in the U.K., the *Representation of the People Act 1981* was passed to prevent prisoners serving more than one year from standing for Parliament, ensuring a clear rule without broad discretion.⁶⁷ Similarly, in Canada, the *Canada Elections Act* disqualifies individuals convicted of certain offences like election fraud for a fixed period, providing certainty and consistency.⁶⁸ Having such structured rules in India would help make the application of Section 11 more transparent and reduce the chances of political misuse. By recalibrating these provisions, the Indian legal framework can more effectively reconcile the imperative of purging the political arena of criminal elements with the foundational principles of due process, fairness, and inclusive democratic participation.

The report of the Committee to Take Stock of Criminalisation of Politics

⁶⁷ *Representation of the People Act 1981*, c. 34 (UK), <https://www.legislation.gov.uk/ukpga/1981/34/contents>.

⁶⁸ *Canada Elections Act*, S.C. 2000, c. 9, § 502(3), <https://laws-lois.justice.gc.ca/eng/acts/E-2.01/>.

(Vohra Committee)⁶⁹ paints a bleak picture of the relationship that exists in India between governmental elites and crime syndicates. It states that criminal organisations have grown so strong that they now control “a parallel government,” having close ties to the police, bureaucracy, and political parties. These criminal organisations are led by certain political leaders themselves, demonstrating that this infiltration of the political system has reached higher levels of authority than only the local or regional ones. This study serves as a sobering reminder of the difficulties India’s democratic institutions have in upholding the rule of law and making sure persons in positions of political authority are not engaged in illicit activity.⁷⁰

The Committee’s findings about the discrepancies in Section 8 of the RoPA point to a serious weakness in the current legal system. The example given shows how the law fails to preserve moral and ethical norms in politics i.e., a rapist found guilty and sentenced to 10 years in prison is only barred from office for six years and is even allowed to run for office during that time.⁴⁹ This disparity not only erodes public confidence in the voting system but also permits those with substantial criminal histories to remain active in politics.⁷¹

The authors agree with the recommendation of the Committee⁷² that the RoPA ought to be amended to specify that within a year of the charges being formally filed in court, any person accused of a crime carrying a maximum sentence of five years in jail or more would be ineligible to be elected to Parliament or a State Legislature. The disqualification shall last until the end of the trial if the person is not cleared within that year. In addition, the disqualification shall last for the whole term of the sentence as well as an extra six years after it ends if the accused is found guilty by a court and given a jail sentence of six months or more.⁷³

An increase in the proportion of candidates with untainted legal records

⁶⁹ VOHRA COMMITTEE REPORT, REPORT OF THE GROUP ON GOVERNANCE AND REFORM, MINISTRY OF HOME AFFAIRS, GOVERNMENT OF INDIA (1993).

⁷⁰ 244 LAW COMMISSION OF INDIA, REPORT ON ELECTORAL DISQUALIFICATIONS, MINISTRY OF LAW AND JUSTICE (2014).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

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is likely to enhance the integrity and credibility of the democratic process. The enforcement of disqualification provisions can serve as a genuine deterrent to individuals with criminal backgrounds, signaling the judiciary's commitment to addressing the criminalisation of politics—an effect supported by empirical evidence showing that Indian voters tend to penalise candidates with criminal charges through reduced vote shares.⁷⁴ This would further contribute to upholding the ethical standards expected from public servants and restoring public trust in the political system by preventing people like Engineer Rashid (charged under Unlawful Activities (Prevention) Act, 1967 (UAPA) for more than five years)⁷⁵ and Amritpal Singh (charged under National Security Act, 1980 (NSA) for more than a year).⁷⁶

The authors propose an amendment in Section 8(3) to restrict the wording of “*any offence*” and to take the nature and gravity of an offence into account. The wording of Section 8(3) includes both heinous and petty crimes, and the latter is often used to deter their rivals from standing in elections. Offences such as defamation, which do not inherently involve moral turpitude or a grave breach of public trust, are often classified as non-serious crimes. In contrast, serious crimes typically refer to offences

⁷⁴ Bhaskar Dutta & Poonam Gupta, *How Do Indian Voters Respond to Candidates with Criminal Charges? Evidence from the 2009 Lok Sabha Elections*, Working Paper No. 12/109, National Institute of Public Finance and Policy (2012), https://mpr.ub.uni-muenchen.de/38417/1/MPRA_paper_38417.pdf; see also Bhaskar Dutta & Poonam Gupta, *How Do Indian Voters Respond to Candidates with Criminal Charges? Evidence from Lok Sabha Elections*, IDEAS FOR INDIA (Aug. 26, 2020), <https://www.ideasforindia.in/topics/productivity-innovation/how-do-indian-voters-respond-to-candidates-with-criminal-charges-evidence-from-lok-sabha-elections.html>.

⁷⁵ Aaratrika Bhaumik, *Can Jailed Leaders Amritpal Singh and Engineer Rashid Function as MPs after Lok Sabha victories? Explained*, THE HINDU (Jun. 7, 2024), <https://www.thehindu.com/news/national/can-jailed-leaders-amritpal-singh-and-engineer-rashid-function-as-mps-after-lok-sabha-victories-explained/article68258062.ece>.

⁷⁶ Apurva Vishwanath, *Amritpal Singh in Punjab, Engineer Rashid in Jail: What Happens Next*, THE INDIAN EXPRESS (Jun. 5, 2024), <https://indianexpress.com/article/explained/explained-law/amritpal-engineer-rashid-win-jail-9373650/>.

that involve violence, corruption, economic fraud, or crimes punishable with imprisonment of three years or more—those which signify a direct threat to social order or public integrity. Nonetheless, the current inclusion of all convictions under the phrase “any offence” in Section 8(3) of the RoPA risks clubbing both categories together, leading to arbitrary and disproportionate disqualifications. This results in the automatic disqualification of the members.

The authors further suggest incorporating “*involving moral turpitude*” after offence. This recommendation is grounded in the existing practices within various statutes, such as the Uttar Pradesh (“UP”) Municipal Corporation Act, the U.P. Kshetra Panchayats and Zila Panchayats Adhiniyam, and the U.P.-Panchayat Raj Act, all of which bar individuals convicted of such offences from holding office,⁷⁷ and also in line with parliamentary debates.⁷⁸ Further, there should be a differentiation between the nature or gravity of the offences, potentially not allowing individuals convicted of morally reprehensible acts to participate in the electoral process after serving their sentence.

Holders of public office are supposed to uphold the highest moral and ethical standards. The addition of “*offences involving moral turpitude*” would guarantee that those who have carried out actions that are essentially immoral and go against the standards of justice, honesty, and integrity in society are not eligible to serve as public representatives. This is in line with the more general ethical and legal requirements that anyone serving in public office possesses high moral standards. Further, it will also prevent the disqualification of members who have not committed an immoral or non-heinous crime.

The third recommendation is to amend Section 11⁷⁹ to provide clear and explicit parameters under which the ECI can use its discretion. The criteria should examine elements such as the nature and severity of the offence, the individual’s conduct post-conviction. Furthermore, it is suggested that individuals convicted of egregious offences—defined as

⁷⁷ B.C. Shukla, *Offences involving Moral Turpitude*, THE HINDUSTAN TIMES (Mar. 7, 2010), <https://www.hindustantimes.com/india/offences-involving-moral-turpitude/story-5aQWtpl6xrjm0LOxyHEC0M.html>.

⁷⁸ *Supra* note 6.

⁷⁹ The Representation of People Act, 1951, § 11, No. 43, Acts of Parliament, 1951.

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crimes that involve grave harm to individuals or society and significantly undermine public trust—such as rape, murder, terrorism, large-scale corruption, or offences punishable with imprisonment of seven years or more, be expressly excluded from eligibility for reduction or removal of disqualification. This definition helps ensure clarity and consistency, distinguishing such offences from less serious or technical violations. This clause would stop people who have committed serious offences from abusing Section 11 to get their criminal records cleared. To ensure transparency and prevent political bias in decisions regarding disqualification relief, an independent advisory body may be constituted, comprising retired judges of the Supreme Court or High Courts, eminent members of civil society, and senior legal professionals with a proven record of public service. This body should be constituted as a statutory authority under the RoPA, with appointments made by a collegium including the Chief Election Commissioner, the Chairperson of the National Human Rights Commission, and the Chief Justice of India (or their nominee), thereby insulating the process from executive control. The body may consist of five to seven members, with fixed, non-renewable terms to safeguard autonomy. A parallel can be drawn from the U.K.'s House of Lords Appointments Commission, which operates independently to vet nominations and maintains public trust in the process.⁸⁰ Similar mechanisms also exist in Canada, such as the Independent Advisory Board for Senate Appointments, which emphasises merit-based, non-partisan selection.⁸¹

Further, it is suggested that these people should not be eligible for any reduction in disqualification if they are found guilty or demonstrated to have violated these standards. The aim of such disqualification is to show public disapproval and ensure accountability in public office. To avoid ambiguity, a clear provision could be added to disqualify those found guilty of serious misconduct while holding public or constitutional

⁸⁰ House of Lords Appointments Commission, *The Commission*, <https://lordsappointments.independent.gov.uk/the-commission-2>.

⁸¹ Government of Canada, *Independent Advisory Board for Senate Appointments*, <https://www.canada.ca/en/campaign/independent-advisory-board-for-senate-appointments.html>.

office—especially when it involves abuse of power or breach of constitutional duties. This would help target genuine violations and uphold democratic values without room for misuse

CONCLUSION

This paper undertakes a critical examination of the persistent issue of criminalisation in Indian politics, with a particular focus on the statutory framework governing disqualification under Sections 8 and 11 of RoPA. Through doctrinal analysis and legislative critique, the paper has demonstrated that existing legal provisions inadequately safeguard the democratic process from the participation of individuals with serious criminal antecedents. The lacunae in the law, coupled with discretionary misuse and procedural delays, have contributed to the erosion of public faith in electoral integrity and the rule of law.

In light of these findings, the paper advances a series of normative and structural recommendations aimed at harmonising democratic probity with constitutional values. Drawing upon the Vohra Committee Report, which exposed the entrenched nexus between organised crime and political actors, the study underscores the urgent necessity for reform. It supports the recommendation that individuals formally charged with offences punishable with five years or more of imprisonment should be disqualified from contesting elections within one year of the framing of charges. Such disqualification should endure through the pendency of the trial and, in case of conviction, for the term of the sentence and an additional six years thereafter.

Further, this study recommends a substantive amendment to Section 8(3) to limit the ambit of the term “*any offence*” and to incorporate the phrase “*offences involving moral turpitude*”. This would align the provision with existing jurisprudential standards and prevent the disqualification of individuals for minor infractions that do not implicate moral culpability or public trust. This approach is consistent with analogous disqualification clauses in other statutory frameworks, such as the UP Municipal Corporation Act and reflects the legislative intent discernible from parliamentary debates.

Additionally, the paper calls for a comprehensive revision of Section 11

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to establish objective and transparent criteria guiding the ECI's exercise of discretionary power in removing or reducing disqualification. It proposes that individuals convicted of grave offences such as terrorism, rape, or corruption be categorically excluded from such relief. To ensure impartiality and insulate the process from political influence, it recommends the constitution of an independent advisory committee composed of members of the judiciary, legal experts, and civil society representatives. Furthermore, those found to have violated fundamental constitutional values or rights should be deemed ineligible for any discretionary exemption.

In conclusion, the research reaffirms its central thesis: that the decriminalisation of Indian politics is not merely a legal imperative but a democratic necessity. The proposed reforms seek to restore normative coherence to the legal framework, enhance the ethical standards of public office, and reinforce citizens' trust in the institutions of representative democracy. By bridging the gap between law and legitimacy, these measures can contribute meaningfully to the consolidation of constitutional governance in India.

TO CONSOCIATE OR NOT TO CONSOCIATE: UNDERSTANDING THE PARADOX OF ELITE DOMINANCE AND CONSTITUTIONALISM

DAISY VERGHESE¹ & PARVATHY K ARUN²

Almost five decades since the inception of the political theory of consociationalism in understanding a divided society, the rise of populism has led to contrasting academic views on its effectiveness. Initially propounded by Arend Lijphart to mitigate ethnic disparities, the present contribution delves into the complex reality of the theory in the Indian context. India, in her post-independence era, was increasingly adopting the consociationalist polity that focused on balancing the interests of diverse groups in the country. However, the empowerment of the elite within the majority groups due to such polity arrangements resulted in a puzzlingly destabilised political structure. Beginning with an exploration of this theory and its intended aspirations, the paper navigates its complex application in the Indian scenario. With this backdrop, the paper posits the contemporary application of the theory that C the correlation between the theory and elite dominance, with the subsequent oppression of minority groups. It underscores a notable surge in ethnic violence during the post-Nehru consociational period in India, driven by the propensity of the backward classes to advocate for separate ethnic group recognition, each deserving of its own set of fundamental rights. The paper concludes by providing alternate policy structures that nullify such dominance by promoting social harmony. Thus, it is essential to understand the paradoxical nature of this theory to alleviate minorities' democratic representation and to ensure their constitutional rights and safeguards.

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**THE WOLVES AT THE DOOR OF A STABLE DEMOCRACY:
AN INTRODUCTION TO UNDERSTANDING
CONSOCIATIONALISM**

Consociationalism reflects a stable democracy coupled with a power-sharing mechanism, instituted in the backdrop of a country entrenched with deeply divided groups (religious, racial, linguistic, or otherwise).³ Social caveats such as language, ethnicity, religion or class often become impediments in achieving stability in a country's democratic system, especially when such caveats coincide.⁴ However, it has been postulated that despite the same, stable democracies have indeed existed.⁵ The reasoning behind this is based on the presumption of the elites coordinating with the varying groups of society, thereafter facilitating avoidance of conflicts.⁶ This forms the essence of the consociationalism theory. The main goals of this theory aim at achieving stability in governance, incorporating a power-sharing agreement, a surviving democracy, and finally, evading violent conflicts.

The first model of the theory of consociationalism has its origin stemming from the 1960s, authored by Arend Lijphart. The same focused on the puzzling dilemma of Belgium, Switzerland, the Netherlands, and their stable democratic systems despite the presence of varying religious and

³ AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* 32 (Yale University Press, 1st ed., 1977).

⁴ Sabine Saurugger, *The Theory of Elite Cooperation*, BRITANNICA (Apr. 13 2013), <https://www.britannica.com/topic/consociationalism>.

⁵ LIJPHART, *supra* note 3, at 37.

⁶ *Id.*

ethnic diversities.⁷ Lijphart concluded in ‘*Democracy in Plural Societies*’ that the only possible rationale behind this unique stability in their governance is the amalgamation of four policies, which he collectively termed as Consociationalism.⁸ He stated that the theory featured minorities in a method that grouped the latter in a ‘*grand coalition*’ which inculcated a greater sense of autonomy in their cultural diversities.⁹ The theory further granted minorities the power of veto in matters concerning legislations being passed, and made “*ethnic proportionality...the principal standard of political representation, civil service appointments, and allocation of public funds.*”¹⁰

Since its inception, scholars have elevated the theory to a pedestal, treating its principles not only as tools to resolve conflicts but as guidelines to avert ethnic conflicts globally. Other scholars, supporting Lijphart’s view, identified three countries - Lebanon, Colombia and Cyprus, where such consociational policies have reduced conflicts.¹¹ A prominent example of the same occurred in 1985, when Lijphart argued that, in keeping with the ethnically divided society of South Africa, consociationalism is the only method to successfully traverse such vagaries.¹²

Thus, this form of power-sharing essentially mandates the fair representation of all “politically-relevant” groups¹³ within the governance of the nation to impede violence and incorporate a system of checks on the possible rule by the majority groups. A majoritarian democracy is often characterized by the winner-takes-all governance, where a single party with a centralised and disproportional power heads the state. In contrast, a democracy under consociationalism is more stable, whereby it necessitates

⁷ Steven Ian Wilkinson, *India, Consociational Theory, and Ethnic Violence*, 40(5) ASIAN SURV. 767, 767 (2000).

⁸ LIJPHART, *supra* note 3.

⁹ *Id.*

¹⁰ LIJPHART, *supra* note 3, at 25.

¹¹ WILKINSON, *supra* note 7, at 768.

¹² *Id.*

¹³ Timofey Agarin, *Minorities in Consociational Power-sharing*, 50 SHADES OF FEDERALISM (2019), <https://50shadesoffederalism.com/uncategorized/minorities-in-consociational-power-sharing/>.

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the precondition of a power-sharing agreement, all the while maintaining the stance that the latter is not sufficient.¹⁴

Consociational theory has a substantive role in influencing interpretations in the domain of comparative politics. Consequently, the same has spawned a plethora of academic contributions with scholars ranging from Daalder and Powell stating the consociationalism theory as “*the most influential contributions to comparative politics*.”¹⁵ Scholars widely accepted this paradigm as a tool for understanding how power-sharing democracies operate in deeply divided societies; this includes the nations of Lebanon, Netherlands, Belgium, Austria, among others.¹⁶ Furthermore, as priorly mentioned, a consociationalist democracy proved to form a normative ideology in shaping a more stable Constitution in South Africa in the year 1988.¹⁷ Given its prominence as a normative model of a stable democracy in an ethnically divided nation, the theory has subsequently encountered a myriad of criticism,¹⁸ but has successfully held its ground barring a vulnerability; the glaring contradictory instance of Indian Democracy.

Lijphart, in his theory, had initially excluded the entry of India as a consociational state. However, he disputed this position in his later academic work in the 1990s, where he echoed Paul Brass’s work.¹⁹

This contribution is fundamentally centred on shedding light on the key dichotomy inherent in the consociationalism theory. The reader is apportioned to the introductory reflections as Lijphart propounded, thereafter in Part B, detailing the various pillars that form the foundation of the theory of consociationalism. For a comprehensive take on the theory, Part C deals with the various sophistries of the theory, thereafter offering an objective critique of the theory. In Part D, the complexities of

¹⁴ Arend Lijphart, *The Puzzle of Indian Democracy: A Consociational Interpretation*, 90 AM. POL. SCI. REV. 258, 258 (1996).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 259.

¹⁹ Katharine Adeney & Wilfried Swenden, *Power-Sharing in the World's Largest Democracy: Informal Consociationalism in India (and Its Decline?)*, 25 SWISS POL. SCI. REV. 450, 451 (2019).

the theory are decoded against the backdrop of the Indian scenario, with three differing eras of political change in the country: the pre-independence era, Nehruvian era, and concluding with the post-Nehru era. In Part E, the authors examine the prominence of Hindu Nationalism in the country. In Part F and Part G, the paper further explores the theory by examining its connection to the rise in ethnic violence in India; despite its seemingly contradictory theoretical position. Part H covers a comparative analysis with Netherlands as the country is known for its exemplary implementation of the consociational theory in managing conflicts within a deeply divided society. Lastly, Part I deals with alternate policy structures with an optimistic prospect of the same fitting within the confines of India's complex and puzzling democracy, leaving a tangent untouched for future academic contributions.

DECODING THE TENETS OF CONSOCIATIONALISM

Power sharing often remains the pinnacle of political strategy in maintaining peace, especially in instances concerning protracted conflicts. It is often seen that rival groups tend to negotiate and settle quicker when given a share of power. The theory of consociationalism is often seen as synonymous with the concept of power sharing,²⁰ insofar as the former is considered an institutional strategy specifically entailing the complexities of a deeply divided nation, as propounded by Arend Lijphart. The primary motive of this theory is the division of power among conflicting groups in order to usher in an era of consensus-based cooperation between differing ethnic groups.

The theory is grounded on four basic institutional pillars: first, the “*grand coalition*” of the various ethnic groups in the nation, second, “*segmental autonomy*”, third, “*proportionality*” and fourth, “*minority veto*”.²¹ The elements of grand coalition and segmental authority form the essential foundation of the theory which is then reinforced by the tenets of minority veto and proportionality.

²⁰ Devin Haymond, *Minority Vetoes in Consociational Legislatures: Ultimately Weaponisation?* 6 POL. IND. J. CONST. DESIGN 1, 1 (2020).

²¹ *Id.* at 2.

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The initial pillar of grand coalition entails representation of all the varying groups existing in the society.²² Thus, according to the tenet, a reasoned consensus-based decision-making process occurs through a coalition of all the leaders representing their respective groups for the purpose of national governance.²³ The tenet, however, mandates the precondition of a feeling of mutual cooperation among all the leaders for the said power-sharing form of governance.

Secondly, the next pillar of segmental autonomy parallels that of the ideal of federalism.²⁴ It has been elaborated upon by Ulrich Schneckener that the said pillar comprises two types: one, an aspect of territorial autonomy, and then one of personality.²⁵ The former deals with the autonomy of territory, i.e., federal structures, and the latter specifically entails a sense of “*elected, non-territorial, self-governing communal chamber...or private institutions which obtain certain responsibilities for each community.*”²⁶ The element of federalism is essential in the coalescence of decentralising non-general issues and keeping the ethnically diverse groups separate. The strength of this tenet is essential for the following pillar, i.e., in determining the fundamentals of a minority veto.²⁷

The third pillar deals with the tenet of minority veto. In a society characterized by significant ethnic diversity, the promulgation of policies and ordinances by the central government often results in the inadvertent marginalization of certain groups.²⁸ Thus, the justification of such a veto arises from the guarantee “...*of proportional representation of minority groups in a power-sharing assembly and/or executive are not sufficient to protect the vital interest of that minority because the latter may simply be outvoted.*”²⁹ If the decision-making

²² LIJPHART, *supra* note 3, at 25.

²³ *Id.*

²⁴ HAYMOND, *supra* note 20, at 2.

²⁵ *Id.*

²⁶ Ulrich Schneckener, *Making Power-Sharing Work: Lessons from Successes and Failures in Ethnic Conflict Regulation*, 39 J. PEACE RES. 203, 222 (2002).

²⁷ LIJPHART, *supra* note 3.

²⁸ *Id.* at 46.

²⁹ Shane Kelleher, *Minority Veto Rights in Power Sharing Systems: Lessons from Macedonia, Northern Ireland and Belgium*, ADALAH'S NEWSL. 1, 3 (2005).

process concludes in a manner inimical to the interests of the minority group, then the legitimacy of the said power-sharing bureaucracy is threatened. It is then that Lijphart propounds the grant of minority veto power to preserve the “*vital interests*” of the said minority groups.³⁰ Therefore, this element of minority veto in a democratic society essentially becomes an informal strategy that allows minorities to block attempts that could effectively eliminate or reduce the latter. Lijphart argues that the successful adaptability of the provision of a minority veto depends on (1) protection of the vital interests of the minorities, and (2) the minimalistic application of said power so that the same does not transmute to a political weapon against other co-existing groups.³¹

The final pillar of proportionality deals with “*allocating civil service appointments and scarce financial resources...in the form of government subsidies*” among the differing groups in the nation.³² In accordance with the said tenet, the electoral system of the democratic nation follows the essence of proportional representation. The plurality form of elections often tends to cause over-representation of the majority groups. To circumvent the same, the current power-sharing theory propounds the final tenet of proportionality in parliamentary seats and other governmentally-aided positions. Thus, the pillar essentially focuses on maintaining proportionality in representation at the political arena and civil service appointment.

PUNCTURING THE WONDERLAND WORLD OF CONSOCIATIONALISM: INTERPRETING THE SOPHISTRIES OF THE THEORY

Although initially asserted by Lijphart that there exists a general consensus of favouring the theory in the scholarly community, there has been an appraisal of questions regarding the very viability of the theory in a nation deeply divided in its ethnic groups.³³ It is to be noted that consociational institutions are not designed in a manner that would assist in predicting outcomes for every ethnically divided society. The reason for the same

³⁰ LIJPHART, *supra* note 3, at 36.

³¹ LIJPHART, *supra* note 14, at 262.

³² ADENEY & SWENDEN, *supra* note 19, at 455.

³³ LIJPHART, *supra* note 3.

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stems from the fact that consociations do not have an identical template and are rather tailor-made for accommodating all exigencies in a particular society.³⁴ The reasoning as to why this variance occurs, is due to instances wherein the consociations are fitted in a manner that assures various constituent groups' representation over others.³⁵ This occurs through fixed quotas for public or government sector positions. Such fixed quotas only further "*entrench and institutionalise...ethnic identities.*"³⁶

The proportional representation ("PR") strategy has been associated with several drawbacks in its attempt to stabilise the power-sharing arrangement. One such drawback of this system is its ability to foster the existence of extremist parties that consequently wish to impose their oppressional rigid ideologies.³⁷ Furthermore, there exists sufficient reason to believe that the strategy of PR leads to selective incentivization of a single party, thereby leading to a campaign strategy which would be perused in a centrifugal manner – that is, the most effective method of campaigning is courting of voters with relatively extremist views rather than ones with moderate views.³⁸ In a consociational society, parties that would be representing a particular ethnic group gain parliamentary representation that would be proportionate to the population of that group, and have their incentives aligned in a manner that would play up the ethnic differences. This strategy would only harden said ethnic differences rather than accommodate the vagaries and build for cross-ethnic parties or coalitions.³⁹

Furthermore, the requirement of power-sharing coupled with PR, would lead to a dense situation of governmental paralysis by increasing the necessity of having a governing coalition party, consisting of several

³⁴ Joel Selway & Kharis Templeman, *The Myth of Consociationalism? Conflict Reduction in Divided Societies*, 45 COMPAR. POL. STUD. 1543, 1551 (2012).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 1547.

³⁸ *Id.*

³⁹ WILKINSON, *supra* note 7, at 771.

parties.⁴⁰ The status quo of such systems will be heavily hit with built-in biases. Generally, in such a governing party comprising several varied ethnic groups, the passing of a legislation proves to be a tedious task.⁴¹ Therefore, the concern of an effective government continually lingers in a society with deeply rooted, long-standing, ethnic conflicts such as: Ethiopia, Liberia, Angola, Iraq and Congo.⁴² Thus, this particular tenet of consociationalism hinders the peaceful consolidation of the nation, due to the parallel growth in polarised and fragmented party system that only hinders the steepening challenge of governance in the nation.⁴³

Finally, academic rhetoric on federalistic arrangements has, by no means, reached a consensus either. Lijphart argues that federalism, an essential element in his consociationalism, is an excellent way of maintaining autonomy in a divided nation. However, for the same, there exists an assumption of such autonomy being the driving force in democratically consolidating the divided ethnic groups of the country – an assumption lying far from reality.⁴⁴ It has been shown through several studies that such a form of federal arrangement has only deepened such differences and adopted an increasing stance towards secessionist tendencies, consequently reinforcing territorial ethnic differences.⁴⁵ Further, decentralisation of the central authority with respect to each state's jurisdictional power has been linked to be the stepping stone of regional parties, the presence of which have been the propeller of conflicts, solely based on said secessionist tendencies.⁴⁶

⁴⁰ GEORGE TSEBELIS, *HOW POLITICAL INSTITUTIONS WORK*, (Princeton University Press, 1st ed., 2002).

⁴¹ *Id.*

⁴² PIPPA NORRIS, *DRIVING DEMOCRACY: DO POWER SHARING INSTITUTIONS WORK?* 11 (Cambridge University Press, 1st ed., 2012).

⁴³ Benjamin Reilly & Andrew Reynolds, *Electoral Systems and Conflict in Divided Societies* in PAUL C. STERN & DANIEL DRUCKMAN (EDS.), *INTERNATIONAL CONFLICT RESOLUTION AFTER THE COLD WAR* (National Academies Press, 1st ed., 2000).

⁴⁴ LIJPHART, *supra* note 14, at 262.

⁴⁵ PHILIP G. ROEDER & DONALD ROTHCHILD (EDS.), *SUSTAINABLE PEACE: POWER AND DEMOCRACY AFTER CIVIL WARS* 135 (Cornell University Press, 1st ed., 2005).

⁴⁶ SELWAY & TEMPLEMAN, *supra* note 34, at 1549.

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**NAVIGATING THROUGH THE TROUBLED WATERS OF
DEMOCRATIC INDIA**

	Pre-Nehruvian Era	Nehruvian Era	Post Nehruvian Era
Lijphart	<i>De-facto</i> consociational state (unstable and externally imposed)	<i>De-facto</i> consociational state (stable and internally maintained)	Decreasingly consociational
Wilkinson	Consociational	Non-consociational “ <i>ranked</i> ” state	Increasingly consociational

TABLE: TWO CONTRASTING VIEWS OF INDIA’S CONSOCIATIONAL CHARACTER⁴⁷

A. INDIA BEFORE NEHRU

In the words of Winston Churchill, India was merely “*a geographical term*” and was “*no more a united nation than the Equator.*”⁴⁸ This sentiment was echoed by Sir John Strachey, who argued that there was never any kind of unity in India, whether physical, political, social, or religious.⁴⁹ Such views were not unfounded, given the country's vast diversity of ethnolinguistic and religious groups, which rival that of the entire continent of Europe.⁵⁰ In an era where homogenized nation-states were emerging from fragmented empires, the British perceived Indian unity as a mirage.

⁴⁷ WILKINSON, *supra* note 7.

⁴⁸ *Supra* note 10, at 261.

⁴⁹ LIJPHART, *supra* note 14, at 262.

⁵⁰ *Id.*

Ironically, however, it was the British colonial administration that played a significant role in transforming this mirage into a concrete reality.⁵¹

The emergence of Indian nationalism can be traced back to the 1885 establishment of the Indian National Congress (“INC”), which ultimately led the country to independence and governed India for the first fifty years after independence.⁵² The objective of the INC was “*to mould Indians into a common state*” and establish the “*germ of a Native Parliament*” that would demonstrate India's readiness for representative institutions.⁵³ The INC thus aimed not only to create pan-Indian political structures, but also to foster a shared national identity among Indians, acknowledging that such unity was not yet fully realized.

The INC's efforts to unite diverse ethno-linguistic and religious groups, coupled with the British colonial framework for minority representation, contributed to a complex interplay of identities that shaped the trajectory of Indian nationalism and governance. Therefore, while India was not a consociational state *de jure*, many of its political dynamics during the pre-independence period reflected consociational thinking *de-facto*. Drawing on Lijphart's classification, the following section examines how key features such as minority proportionality, political representation, segmental autonomy and minority veto cultivated an informal, *de-facto* consociational model in pre-independent India.

Minority Proportionality in Government Employment

During the period leading up to independence, this principle was grounded in the governance of the state (provincial) and central governments. In 1925, in a bid to protect what they perceived as weaker sections of society, the colonial government allotted a share of the civil service employment to the minority groups.⁵⁴ The proportion allotted was based on the respective population sizes of the groups. Accordingly, Christians and Sikhs were allotted 8.3%, while Muslims received 25% (in keeping with

⁵¹ *Id.* at 258.

⁵² ADENEY & SWENDEN, *supra* note 19, at 454.

⁵³ *Id.*

⁵⁴ WILKINSON, *supra* note 7, at 774.

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their approximate population of 23.8%).⁵⁵ Elected provincial governments were granted the power to determine quotas based on factors such as religion, language and caste, attempting to maintain an equal share for each group and sub-group. However, sometimes this resulted in over-representation within the employment sector. For example, although Muslims comprised only 6% of the population in Madras, they made up nearly 17% of the police force. Similarly, in Bihar, the highest proportion of police positions were occupied by Bengali-speakers and Muslims; 28.5% and 17.8% respectively.

Political Representation

As power gradually shifted from the British to Indian politicians, particularly following the Government of India Acts of 1919 and 1935, Muslims became increasingly determined to maintain and expand their reserved seats and political weight. However, the Congress Party, initially led by an elite group from the anglicised upper-middle class, sought to eliminate reserved seats, viewing them as undemocratic and a hindrance to developing a shared Hindu-Muslim national identity.⁵⁶ This tension was further exacerbated when mass protests erupted against the British decision to divide Bengal, catching Congress leadership off guard and calling their conciliatory approach into question.

The Muslim League passed a resolution in March 1913 advocating for colonial self-government through constitutional means, aligning itself with the Congress Party's objectives. This set the stage for broader Hindu-Muslim political accommodation and cooperation.⁵⁷

For a grand coalition to materialise, groups that are small within the polity must be over-represented so that their voice is adequately heard.⁵⁸ The Lucknow Pact of 1916 exemplified such cooperation, as Congress politicians agreed to the Muslim League's demand for overrepresentation of Muslims in six Hindu-majority provinces, while Hindus and Sikhs

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ JUDITH BROWN, *MODERN INDIA: THE ORIGINS OF AN ASIAN DEMOCRACY* 281 (Oxford University Press, 2nd ed., 1994).

⁵⁸ WILKINSON, *supra* note 7, at 746.

would be overrepresented in three Muslim-majority provinces. The principles established by the Lucknow Pact were later applied to new municipal councils, district boards, and legislative bodies created following the 1919 constitutional reforms. For instance, in Bombay, Muslims, constituting 20% of the population, were guaranteed 33% of the seats in the provincial assembly, while the 4% Muslim minority in the Central Provinces was allocated 15% of the seats.⁵⁹

Princely states that established legislative assemblies in the 1920s and 1930s, such as Travancore, Cochin, and Mysore, followed suit by introducing reserved seats for religious and caste minorities. By 1947, various groups, including Christians, Sikhs, Europeans, Scheduled Castes, and speakers of regional languages were guaranteed representation in local legislatures.

Cultural Autonomy and Minority Veto

Pre-independence India also exhibited consociational principles such as cultural autonomy and minority veto. Different communities administered their own personal laws and Urdu enjoyed equal status with Hindi as an official language at both central and provincial levels.⁶⁰ However, the Muslim League's sweeping victory in the 1946 elections and its refusal to compromise with Congress created a political impasse that contributed to the partition of India in August 1947.⁶¹ This outcome highlighted the limitations of the INC's attempt to build a unified India, without formal power-sharing guarantees. Despite this, a significant number of Muslims chose to remain in India post-partition, affirming their place within the newly independent nation.

While the independence movement drew strength from local grievances and economic frustrations, it ultimately galvanized a national consciousness that transcended ethnic and religious divisions.⁶² This consciousness did not negate individuals' diverse identities; rather, it

⁵⁹ *Id.*

⁶⁰ BROWN, *supra* note 57, at 283.

⁶¹ WILKINSON, *supra* note 7, at 714.

⁶² ADENEY & SWENDEN, *supra* note 19, at 450.

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complemented them within a broader Indian identity.⁶³ Despite the lack of a formal system of minority veto powers, colonial governors were tasked with safeguarding the interests of the minority groups or often intervening by dissolving provincial assemblies.⁶⁴ This usually occurred in instances where concerns were raised against the majority for the former's abuse of power.⁶⁵

However, contrary to Lijphart's predictions, the consociational pre-independence period in India has paradoxically been marked by significant levels of ethnic violence. The Indian subcontinent witnessed a terrifying outbreak of sectarian violence, particularly severe in Punjab and Bengal during the Partition of 1947. Regions that had peacefully coexisted for centuries were engaged in a brutal conflict, primarily driven by entrenched religious disparities. The growing unity between Hindus and Muslims was perceived as a threat to British colonial rule, prompting a strategic move to exploit religious divisions.⁶⁶ The partition of Bengal into two provinces: West Bengal with a Hindu majority and East Bengal with a Muslim majority, was met with fierce opposition. Hindus feared a loss of political influence, while Muslims were under the threat of marginalisation in East Bengal. The partition of Bengal exacerbated the existing tensions between Hindus and Muslims, igniting a number of riots and communal violence that fostered separation and animosity between the two communities.⁶⁷

The extreme violence witnessed during the Partition of Bengal and Punjab thus serves as a critical warning. It sheds light on the fact that consociational policies can deepen ethnic conflicts rather than resolve them, leading to greater division and instability. This historical evidence should caution constitutional designers against solely relying on consociational approaches as a remedy for ethnic violence.

⁶³ *Id.*

⁶⁴ *Id.* at 451.

⁶⁵ WILKINSON, *supra* note 7, at 734.

⁶⁶ Ian Talbot, *The 1947 Partition of India and Migration: A Comparative Study of Punjab and Bengal* in CLAUDIA B. HAAKE & RICHARD BESSEL (EDS.), *REMOVING PEOPLES: FORCED REMOVAL IN THE MODERN WORLD* (Oxford University Press, 1st ed., 2009).

⁶⁷ *Id.*

To sum up, despite not being a consociational state, the pre-Nehruvian period in India incorporated key consociational features in practice, albeit informally. The British colonial framework coupled with the INC's inclusive rhetoric, fostered communal representation and segmental cultural autonomy for minorities to manage India's deeply entrenched ethno-religious and linguistic cleavages. However, the eventual collapse of this framework, evidenced by the Muslim League's political estrangement, the failure of the INC to build a unified polity and the catastrophic communal violence of Partition highlighted the limitations of power-sharing in the Indian context. Thus, consociationalism, while valuable, cannot be considered a panacea for inclusion. Lijphart's assumption that consociationalism helps mitigate ethnic violence is strongly rebutted by the extreme levels of violence during this era. The Indian experience clearly reflects that partially implemented or weakly institutionalized consociational frameworks may in fact entrench divisions rather than alleviating tensions.

B. INDIA DURING NEHRU

Arend Lijphart, in 1996, propounded India to be a *de-facto* consociational state, due to its relatively effective control over ethnic violence, coupled with the existence of conditions that paralleled the four pillars of this theory.⁶⁸ Lijphart argued that India, since its independence, was under the governance of the “*grand coalition*” with respect to the ethnically inclusive ruling party (for the time, it was the dominant Congress Party), which, through the enforcement of personal laws, aimed at achieving cultural autonomy. Congress was termed as a “*party of consensus*” relating to its ability in allocating “*a share of ministerships remarkably close to proportional*” to varying groups.⁶⁹ This practice then became the umbrella modus-operandi, i.e., it furthered its incorporation into the domains of education, and employment in government offices,, and the same was achieved through the system of reservation of seats (with respect to the SC, ST and OBC groups in the society).⁷⁰ According to Lijphart, the final element of the Theory, the power to veto among minority groups, stems from practices

⁶⁸ LIJPHART, *supra* note 14, at 258.

⁶⁹ *Id.*

⁷⁰ *Id.* at 258.

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such as retaining English as an official language (which occurred due to the veto power of the non-Hindu speaking community) and the reversal of the contentious *Shah Bano* judgment.⁷¹

It is these policies that Lijphart advocates to highlight the consociational essence of India's democracy, thus stating the reduced levels of ethnic violence until the mid-1960s. He further argued that, during the former era, the incident count of Hindu-Muslim in a 5-year span was 339, and the former only increased in 1980s, with the statistics soaring to a high 2000 and above.⁷²

However, Lijphart's classification of India as a consociational state has been subject to considerable critique on multiple interconnected grounds. The diversity of representatives in the Cabinet that Lijphart cites as evidence of a grand coalition was in reality "*Congressmen and women, very different from an ethnically defined elite cartel with authority over and autonomy from the community they represent.*"⁷³ These individuals were largely symbolic and lacked any substantive influence, thereby rendering them as '*token*' rather than '*representative*' figures.⁷⁴ Consequently, the so-called grand coalition cannot be understood as a "*deliberate or joint stabilising effort by elites*"; rather it was heavily reliant on the leadership and authority of a single figure-Jawaharlal Nehru.⁷⁵ Key groups (in particular lower castes and Muslims) continued to remain significantly underrepresented in proportion to their demographic presence, particularly in senior political, administrative and judicial offices. While there were certain instances where the Indian state allowed cultural autonomy, most notably in terms of the linguistic reorganisation of states, it was fiercely opposed by Nehru, who only conceded later on due to electoral pressures.⁷⁶

⁷¹ *Id.* at 261.

⁷² *Id.* at 259.

⁷³ Katharine Adeney, *Constitutional Centring: Nation Formation and Consociational Federalism in India and Pakistan*, 40 COMMONW. AND COMPAR. POL. 8, 12 (2002).

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Supra* note 37, at 238.

Lijphart's fallacious classification of India being a consociational state further stems from "*reading the Indian Constitution and central government policies, rather than by examining central and state government actions.*"⁷⁷ During the period of 1947-64, none of the major cabinet roles were given to Muslims.⁷⁸ The prime example of the same was the contentious issue surrounding the appointment of Rafi Ahmed Kidwai, the Muslim home minister of Uttar Pradesh, a Muslim, during 1946-47.⁷⁹ Mr. Rafi was forcefully persuaded to hand in his resignation and his appointment was believed to be a "*security risk*" by other Hindu leaders in the ministry.⁸⁰ In an attempt to evade humiliation, he was appointed to a rather unscrupulous post of the communications ministry with a stern pre-condition to not interfere with the politics of the state.⁸¹ This thereafter becomes a clear instance of keeping Muslim political candidates at bay from gaining political power.⁸² Such a practice furthered into other domains such as employment. For a better understanding, the following statistics present a clearer picture: there was a grave reduction in job quotas for the Muslim candidates in 1947 (4.5% in Central Province, 10% in Bihar, 14% in UP).⁸³

Following independence, governments majorly dominated by Hindus had completely done away with the practice of minority quotas. A significant reduction occurred in the employment sphere of police and civil services. This stems from four factors: the inherent practice of 'rewarding' loyal supporters (mostly Hindus) of the winning political party, the prejudice against minority groups especially post-partition, several Muslim officers emigrating to Pakistan, and finally, the rapid increase in Hindu officials from Pakistan. In the UP, internal government files reveal that the

⁷⁷ WILKINSON, *supra* note 7, at 771.

⁷⁸ A. B. KOHLI, COUNCIL OF MINISTERS IN INDIA 1947-1982 (Gitanjali Publishing House, 1st ed., 1983).

⁷⁹ *Id.*

⁸⁰ Omar Khalidi, *Muslims in Indian Political Process: Group Goals and Alternative Strategies*, EPW 43,45 (1993).

⁸¹ Anwar Jamal Kidwai, *An Unsung Hero of the Freedom Struggle: Rafi Ahmed Kidwai* 24 ISLAM & MOD. AGE 102 (1993).

⁸² *Supra* note 9.

⁸³ *Id.*

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proportion of Muslims among the senior police force and civil service officers dropped from 40% in 1947 to 7% in 1958.⁸⁴

Lijphart's argument that India meets the criteria for minority veto was further criticized for overlooking substantial evidence to the contrary. This not only includes the removal of reserved seats for religious minorities but includes the abolition of protection for Urdu speakers as well as the ban on cow slaughter in many states.⁸⁵ As observed by Lustick, the Indian state adopted many policies that marginalised non-Hindu groups.⁸⁶ The yearly reports of the Commission for Linguistic Minorities showed that the state governments tried to deny educational facilities and copies of government publications and civil service examinations in minority languages. For example, Tamil Nadu consistently refused to provide Hindi language education, while the government of Uttar Pradesh refused to open more Urdu high schools because it was simply not inclined to provide secondary education through the mother tongue of linguistic minorities.⁸⁷ Furthermore, the provisions that provided cultural autonomy for the linguistic or religious minorities within the newly created linguistic states were routinely ignored.⁸⁸ As Adeney argues Nehru "*deliberately ignored ethnicity as a means of legitimising the state, basing affiliation on a civic notion of territoriality.*" Though there may have been segmental autonomy in practice, the rationale behind its adoption was a non-consociational one.⁸⁹

Despite the retention of personal laws for Muslims and Christians, the absence of a minority veto resulted in "*state attacks on minority cultural autonomy*".⁹⁰ The Muslims, for instance, voted overwhelmingly in the 1946 elections for the Muslim League, a party dedicated to preserving the position of Urdu, job reservations for minorities and guaranteed Muslim

⁸⁴ File No. 49H/1958, *Inquiry Made by the Government of India About the Employment of Members of the Minority Communities*, UTTAR PRADESH STATE ARCHIVES (1958).

⁸⁵ WILKINSON, *supra* note 7, at 774-775.

⁸⁶ *Id.*

⁸⁷ WILKINSON, *supra* note 7, at 770.

⁸⁸ *Supra* note 63, at 778.

⁸⁹ *Supra* note 14, at 450.

⁹⁰ WILKINSON, *supra* note 7, at 778.

representation at all levels of government.⁹¹ After mid-1947, though, Hindu majorities could do what they pleased. They unilaterally abolished job reservations for minorities, guaranteed political representation, the special status of Urdu, and minorities' right to slaughter cows for food and religious sacrifices.⁹² Additionally, despite linguistic reorganization giving linguistically defined states representation in the upper house, such representation was roughly determined on the basis of population, thereby ensuring "*the domination of the larger populated Hindi-speaking states of the north in both the lower and upper chambers of the central legislature*".⁹³

Therefore, though India was a consociational state before independence, from 1947 to 1964 it was a non-consociational state in which lower castes, religious minorities and linguistic minorities within states were denied cultural rights and largely excluded from government jobs and political power.⁹⁴

C. INDIA AFTER NEHRU

Lijphart pointed to a decline in consociationalism after the Nehruvian era on the grounds that "*the Congress Party evolved from an internally democratic, federal, and consensual organisation to a centralised and hierarchical party*." He further posited the increasing centralisation of the federal system through the partisan use of President's rule and the increasing support for parties such as the Bharatiya Janata Party ("BJP") who protest at the "*government's alleged pandering to minorities*."⁹⁵

However, this characterisation has been contested vigorously by Wilkinson who argued that rather than Indian democracy becoming less consociational after Nehru, the latter had in fact become more consociational.⁹⁶ The gradual decline of Congress and the fragmentation of the party system from one party dominance played an important role in

⁹¹ *Id.*

⁹² *Id.* at 779.

⁹³ Katharine Adeney, *Constitutional Centring: Nation Formation and Consociational Federalism in India and Pakistan*, 40 COMMONWEALTH AND COMPAR. POL. 8, 23 (2002).

⁹⁴ Wilkinson, *supra* note 7, at 767.

⁹⁵ *Supra* note 10, at 263.

⁹⁶ *Id.*

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strengthening the consociational traits of India's federal system. These included increased quotas in education and government employment, the institutionalism of linguistic protections and reservation of seats in legislatures to the under-represented minorities.⁹⁷

The prominence of identity-based mobilisation further played a significant role in the political transformation of India. According to Wilkinson, politicians increasingly sought to woo newly mobilised minority and lower caste voters, thereby making India's electoral landscape more proportional than it ever was.⁹⁸ One major development strengthening political representation in the post-Nehru period was the implementation of the Mandal Commission recommendations, initially formulated in the 1980s and later revived in the 1990s, which introduced the implementation of quotas for Other Backward Classes ("**OBC**").⁹⁹ In addition to the existing 22.5% quotas for SCs and STs, the Commission proposed a 27% reservation in public sector employment and higher educational institutions to OBCs, cementing a shift towards broader representation.¹⁰⁰

Similarly, recruitment rules were revised to mandate that every seventh or eighth new recruit was from an SC or ST background, resulting in a gradual increase in the representation of these minority groups in central and state government employment during the late 1970s and 80s. As shown in the following table, there was a significant statistical change among the SC and STs, with the proportion ranging from 1.54% and 2.99% (1963), increased to 10.75% and 13.65% (1989), with respect to employment at the central government.¹⁰¹

⁹⁷ Mihir Desai, *The Need for Reservations: A Reply to Shourie and Others*, LOKAYAN BULLETIN 9, 32 (1990).

⁹⁸ Wilkinson, *supra* note 7, at 782.

⁹⁹ Ira N. Gang, Kunal Sen, Myeong-Su Yun, *Was the Mandal Commission Right? Living Standard Differences between Backward Classes and Other Social Groups in India*, 46(39) ECON. & POL. WKLY. 7, 33 (2008).

¹⁰⁰ *Id.*

¹⁰¹ Wilkinson, *supra* note 7, at 783.

TABLE 2 *Scheduled Caste and Scheduled Tribe Representation in Central Government Employment*

	1963		1989	
	<i>Total Employees</i>	<i>Percentage of SC & ST Employees</i>	<i>Total Employees</i>	<i>Percentage of SC & ST Employees</i>
Group I	18,176	1.54	61,176	10.75
Group II	29,482	2.99	86,018	13.65
Class III	1,007,415	8.90	2,224,212	19.37
Class IV	1,063,525	20.69	1,092,175	26.87

SOURCES: *Report of the Commissioner for Scheduled Caste and Scheduled Tribes for the Year 1962-63*, 12th report, part 1; and Tenth Lok Sabha, Committee on the Welfare of Scheduled Castes and Scheduled Tribes (1993-94), *Formulation, Implementation, and Monitoring of Reservation Policy*, 24th Report (New Delhi: Lok Sabha Secretariat, 1993).

NOTE: SC = Scheduled Caste; ST = Scheduled Tribe.

The move towards proportionality in government employment was accompanied by an increased emphasis on the proportional allocation of government resources. In the early 1980s, both central and state governments sharply increased the budget allocations for programs targeting SCs, STs, and Backward Castes. The proportion of government expenditure explicitly earmarked for the SCs and STs, rose as a result from 0.96% in 1970 to 7.77% in 1990.¹⁰²

The increased importance of minority veto in the post-Nehru period further influenced state governments in reversing earlier exclusions and reasserting the cultural and linguistic rights of minorities. For instance, during the 1980s and 1990s, the state governments of Bihar and UP reinstated Urdu as a second official language and granted Muslim religious schools the same official status as state-run schools.¹⁰³ Similarly, linguistic minorities in West Bengal, Kerala and Andhra Pradesh were provided with official recognition by their state governments.¹⁰⁴

¹⁰² Giridhar Goinango, *Constitutional Provisions for the Scheduled Castes and the Scheduled Tribes*, HIMALAYA PUBL'G 1, 14-15 (1992).

¹⁰³ *Id.*

¹⁰⁴ Wilkinson, *supra* note 7, at 784.

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The *Shah Bano* case was a significant episode that underscored the relevance of minority veto in shaping national legislation.¹⁰⁵ The Supreme Court's judgement which upheld the right of a divorced Muslim woman to claim maintenance under Section 125 of the Criminal Procedure Code was subsequently reversed due to political backlash for overriding certain interpretations of Muslim Personal Law.¹⁰⁶ Consequently, the Congress Government, facing pressure from the Muslim Personal Law Board and its Muslim support base, enacted the Muslim Women's (Protection of Rights on Divorce) Act 1986, effectively nullifying the Supreme Court judgement.¹⁰⁷ In this instance, the Muslim minority exercised its veto-right to restore the authority of the Muslim Personal Law Board in an aspect of personal law.¹⁰⁸

THE HINDUIZATION OF INDIA: THE USHERING AGE OF HINDU NATIONALISM

While the traverses in gaining territorial autonomy, and the rise of backward castes have increased,¹⁰⁹ the gradual erosion of representation for religious minorities, particularly Muslims, presents a troubling trend. This decline in representation is evident across various prominent institutions such as the Lok Sabha, the Cabinet and key political offices.¹¹⁰ While the forward caste's dominance had been restored by the rise of the elite-led Congress and BJP, especially with the context of representation in the Union Cabinet, there has been an equal under-representation of the Muslim minority; executive positions almost lacked such a provision for the former to apply for.¹¹¹ Backward classes particularly the Muslim

¹⁰⁵ Mohd. Ahmed Khan v. Shah Bano Begum, (1985) 2 SCC 556.

¹⁰⁶ ARUN THIRUVENGADAM ET AL. (EDS.), *COMPARATIVE CONSTITUTIONALISM IN SOUTH ASIA* 245–246 (Oxford University Press, 2017).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 240–41.

¹⁰⁹ *Supra* note 98.

¹¹⁰ Katherine Adeney et al., *Power-Sharing in the World's Largest Democracy: Informal Consociationalism in India (and Its Decline?)*, 25(4) SWISS POL. SCI. REV. 450, 463 (2019).

¹¹¹ Steven Ian Wilkinson, *India, Consociational Theory, and Ethnic Violence*, 40(5) ASIAN SURV. 767, 767 (2000).

minority have consistently been underrepresented in senior executive positions. The level of underrepresentation for Muslim minority has, however, had a progressive increment in the 1980s. The 16th Lok Sabha had the most significant contentious figure of not having a single Muslim in its Cabinet of 282 MPs. Such underrepresentation is often paralleled in the population of Buddhist, Sikh, and Christian minorities.¹¹² With the introduction of OBC reservations, there has been a significant improvement in their representation in administrative positions. This is contrasted to the community of Muslim minorities. The lack of representation quotas that are group-centric have impeded a fair representation in central government posts.¹¹³ The following table entails the statistics of the said representation in 1980 and 2006. The percentage of Muslim representation is at a meagre value; proportional to their population, it is valued at over 10%.

	1980	2006
Indian Administrative Services	2.99	3
Indian Police Services	2.85	4
Indian Foreign Services	NA	1.8
Total Central Services	6.80	NA

TABLE: REPRESENTATION OF MUSLIMS IN CENTRAL GOVERNMENT SERVICES IN 1980 AND 2006¹¹⁴

With respect to the tenet of segmental autonomy, that is not along the lines of territorial sovereignty, the enforceability of personal laws in relation to Muslims and Christians, effectuate the said criteria. However, it is pertinent to understand the lack of the same to the ethnic groups such as Sikhism, Buddhism or Jainism despite the latter coming under the umbrella constitutional interpretation of a ‘Hindu’.¹¹⁵ Despite the present discourse, the current political backdrop of the country has taken a deliberative stance on the applicability of personal laws. While predicting the abolition of personal laws would be too superficially optimistic, the current wave of dissonance towards such laws are bringing a change in the political atmosphere of the country, therefore positing that Hindu nationalism

¹¹² Adeney, *supra* note 110, at 456.

¹¹³ *Id.*

¹¹⁴ *Id.* at 467.

¹¹⁵ *Id.*

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eroded support for religious accommodation. Thus, we find clear evidence of the progressively deteriorating representation of the largest religious minority group, i.e., the Muslims. Although Muslims have historically been underrepresented, their situation has deteriorated since the mid to late 1990s, that paralleled the rise of Hindu nationalism.¹¹⁶

In the late 19th century, Hindu Nationalism – a revivalist movement which aimed to modernise Hinduism – gained widespread recognition. This in turn has led to the marginalisation of the Muslim minority in contemporary India, perpetuating a vicious cycle of exclusion, discrimination and violence. The phenomenon of cow vigilantism, Ayodhya dispute and Gujarat riots fuelled by religious nationalism has further intensified the situation leading to a surge in hate crimes and mob violence against Muslims.¹¹⁷

A. THE CONTROVERSY SURROUNDING THE BABRI MASJID

Despite BJP's leading success in the political arena, the former's 1989 and 1991 triumphs were founded on two elements: an unapologetic stance that focused on revitalising nationalist and patriotic ideologies, coupled with exploiting the sentiments of the prevailing Hindu majority. Per their personal interpretation on mythology, the BJP centred its political campaign around Ayodhya, a site of deep religious significance.¹¹⁸ This narrative fuelled by public sentiment, resulted in the demolition of Babri Mosque on 6th December 1992 by a militant mob of the Hindu nationalists, sparking communal riots and provoking a Hindu-Muslim polarization.¹¹⁹ Consequently, the doctrine of Hindutva and Hindu majoritarianism rose to prominence, leading to the marginalization of the Muslim community, deprived of their sacred site.¹²⁰

¹¹⁶ *Id.*

¹¹⁷ Iqra Sarfraz et al., *Rise of Hindu Nationalism in Contemporary India: An Analysis of Muslim Marginalization*, 5(2) J. DEV. SOC. SCI. 218, 223 (2024).

¹¹⁸ Ramesh Thakur, *Ayodhya and the Politics of India's Secularism: A Double-Standards Discourse*, 33(7) ASIAN SURV. 645, 650 (1993).

¹¹⁹ *Id.* at 654.

¹²⁰ Sarfraz, *supra* note 470, at 221.

Thus, the grievances addressing the sense of Hinduism were manipulatively and politically exploited, leading to the dismal disarray of events in Ayodhya. The ultimate push that set the sequence of events in motion was the creeping malaise that cast its shadow over the democratic Constitution of India. Thus, it was argued by academic scholars that “*Principled dogmatism prevailed over expedient pragmatism*”.¹²¹ The price paid for the loss of the country’s constitutionalism was the mosque’s destruction in the most controversial way: wretched by a mob consisting of Hindu nationalists, who took the liberty to take law under their control and convenience.¹²² Hindus now aware of their ‘numerical superiority’ due to the leaders’ one-sided political agendas, have led to the imposition of a ‘lose-lose’ situation for Muslims. Such a position of “*self-imposed marginalization*” that leaves no room for bargaining, Muslims now lack the opportunity to influence any political outcome.¹²³

B. THE UNFOLDING OF THE GUJARAT RIOTS (2002)

The Gujarat riots that broke out in the wake of the 2002 Godhra incident was a notable event that garnered international attention to India.¹²⁴ For several weeks, there were deadly sectarian riots between Hindus and Muslims which resulted in the demise of thousands of civilians, particularly Muslims. The atrocities and human rights violations, including torture, rape, assault and abuses were documented by international agencies such as Amnesty International and Human Rights Watch. These organizations have reported the violence committed as a ‘pogrom’ and demonstrated the alleged involvement of state officials indicating a clear pattern of hindu majoritarian power.¹²⁵ The alleged involvement of the leaders of Hindu nationalism groups has created a distinct group identity between Hindus and Muslims that has impeded Gujarat society. Group identity is thus crucial to the nationalist party’s mobilization efforts as contemporary

¹²¹ Girilal Jain, *Beyond Ayodhya's Watershed: Muslims Have to Reckon with Realities*, THE TIMES OF INDIA, Dec. 14, 1992.

¹²² *Id.*

¹²³ *Supra* note 84.

¹²⁴ Mohammad Jamil Akhtar, *Babri Masjid: A Tale Untold* 173 (1997).

¹²⁵ *Supra* note 45.

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democratic systems enable capitalism to exacerbate social problems inside communities.¹²⁶

The Godhra riots were far more than an isolated incident of violence brought on by a disagreement within the community. Rather, they were elements of a wider scheme to purge Muslims from the Gujarati populace as a whole. It has thus been widely argued that the purpose of this “*Hindutva experiment*” is to create communal violence and tensions between Muslims and Hindus.¹²⁷

C. THE INCREASING POLARISATION OF POLITICAL AND RELIGION RHETORIC IN INDIA

The rise of Hindutva ideology and religious polarization of the society can be traced back to the landslide victory of 2014 elections, which was marked by the propagators of Hindu nationalism and a growing anti-Muslim sentiment. During the elective campaigns, political leaders of Hindu nationalist groups pledged to restore ‘*Akhand Bharat*’ driven by their aim to present the Hindu nation as the best nation.¹²⁸ One of the major steps taken was the repeal of Article 370-A, along with the associated Article 35A of the Indian Constitution, which had granted special status to the Muslim dominated region of Jammu and Kashmir. Although officially justified on grounds of national integration and economic development, the abrogation of the constitutional status proved to be prejudicial to the region’s socio-political sentiments.¹²⁹ These concerns drew international attention with the United Nations Human Rights Council warning that the constitutional changes could curtail the political participation of Muslims and potentially lead to discrimination in employment and land ownership.¹³⁰ While the Central Government maintained that the repeal

¹²⁶ *Supra* note 96, at 647.

¹²⁷ Tracy Wilichowski, *Premeditated Causes of the 2002 Gujarat Pogrom: A Comprehensive Analysis of Contributing Factors that Led to the Manifestation of the Riots*, 7 OSHKOSH SCHOLAR 128, 139 (2020).

¹²⁸ Sarfraz, *supra* note 117, at 222.

¹²⁹ *Id.*

¹³⁰ Press Release, United Nations Human Rights Office of the High Commissioner, India: UN experts say Jammu and Kashmir changes risk undermining minorities’ rights (Feb 18,

was intended to benefit all citizens equally,¹³¹ its immediate and disproportionate consequences for the region's Muslim-majority population suggested the contrary. The region witnessed a rise in security measures entailing curfews, restrictions of communication, as well as augmentation of the military forces which were closely associated with the political transformations.¹³² These arbitrary measures not only affected the social life of the citizens but also incited cases of human rights violations, further exacerbating divisions in an already polarized region.¹³³

Moreover, the Indian government has passed strict laws to prohibit cow slaughter and beef consumption. Many Muslims have been lynched by Hindutva mobs on the allegation of beef consumption.¹³⁴ The report, '*Violent Cow Protection in India: Vigilante Groups Attack Minorities*', specifically entails the Hindutva propaganda spurring vigilantism against beef consumption and those engaged in cattle trade. India, in consonance with its traditional normative ideology on sacredness of cows, imposed norms on restricting the slaughter of cows. In February 2019, the government announced a national commission for cow protection which in turn disproportionality harmed the livelihood of minority communities.¹³⁵

Hindutva ideologies gaining traction, through its legitimization and the consequent indoctrination of the normative theology among the masses has subsequently fuelled sentiments lining to an anti-Muslim communal hatred. The theology of '*saffronization*' unfortunately inclines India to

2021), <https://www.ohchr.org/en/press-releases/2021/02/india-un-experts-say-jammu-and-kashmir-changes-risk-undermining-minorities?LangID=E&NewsID=26758>.

¹³¹ Alina Fayaz, *The Abrogation of Article 370 and 35A in Kashmir: The Role of the UNSC*, MODERN DIPLOMACY, (Aug. 3, 2024), <https://modern diplomacy.eu/2024/08/03/the-abrogation-of-article-370-and-35a-in-kashmir-the-role-of-the-uns/>.

¹³² Jon Lunn, *Kashmir: The effects of revoking Article 370*, House of Commons Library, (Aug.8, 2019), House of Commons Library, <https://commonslibrary.parliament.uk/kashmir-the-effects-of-revoking-article-370/>.

¹³³ *Id.*

¹³⁴ Sarfraz, *supra* note 117, at 222.

¹³⁵ Human Rights Watch, *India: Vigilante 'Cow Protection' Groups Attack Minorities*, HUMAN RIGHTS WATCH (Feb. 18, 2019, 10:30 PM EST), <https://www.hrw.org/news/2019/02/19/india-vigilante-cow-protection-groups-attack-minorities>.

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become a prominent ‘*Hindu-State*’ lest the country does not idly lay back these religion-based political ideologies.¹³⁶ This trajectory risks cementing the structural marginalization of Muslims, normalising the discrimination against such minority communities. It is thus the need of the hour to confront the rising tide of religious polarization and re-direct India’s constitutional commitment to secularism and pluralism in order to safeguard the nation’s democratic fabric.

**THE PUZZLING DILEMMA OF THE QUID PRO QUO
RELATION BETWEEN CONSOCIATIONALISM AND RISING
ETHNIC VIOLENCE**

The present contribution clearly illustrates that India’s consociationalistic policies have historically been coupled with higher levels of violence between ethnic groups. While there does exist a possibility of a coincidence in the relation of consociationalism and that of ethnic violence, however the explanation for the same seems rather superfluous.¹³⁷ Several mechanisms exist that can correlate the proportional relation between the theory and ethnic violence.

First, there is a fundamental flaw in the presumption that merely allocating a share of power among each of the sub-divided ethnic groups would leave the latter satisfied. The multidimensional nature and oppositional forces working against this structure are too complex because such settlements of power are bound to leave out a few groups. The multi-dimensionality exists due to instances wherein a single member could be part of more than one ethnic group, and oppositional due to the fact that a person’s ethnicity is often connected with the latter’s opposition to another ethnic group and the former’s control over political power or economic resources.¹³⁸ This is an essential part of understanding the relation in contention because even if the theory ensures an even distribution of the resources of a state across all the groups, the same tends to become an uneven distribution within each of the groups. Take India for example; state benefits directed towards

¹³⁶ *Supra* note 49.

¹³⁷ Wilkinson, *supra* note 111, at 787.

¹³⁸ FREDERIK BARTH, *ETHNIC GROUPS AND BOUNDARIES: THE SOCIAL ORGANIZATION OF CULTURE DIFFERENCE* 14 (Waveland Press, 1998).

the priorly classified 'untouchables' often end up being accumulated within the so-called wealthier/well-educated sub-castes, that include the Mahars (West), Chamars (North), and the Malas (South).¹³⁹ Another instance of the same can be drawn to the fact wherein, a majority of the benefits often enrich only a few of the sub-castes within the OBCs, such as Yadavs, rather than being equally distributed to the Koeris and Kurmis.¹⁴⁰

It has been acknowledged by Lijphart that the cycle of reforming and subdividing of ethnic groups emerged as a thaw to a successful settlement using the theory.¹⁴¹ A rather superficial solution of conducting regular elections through the PR system was proposed, however, the technicalities of such a conduction on a larger scale was left unanswered. While this solution seems favourable and feasible, in practice however, it remains dicey whether the groups that are currently benefitting from such quotas and reservations would be willing to sacrifice a portion of their share in power to accommodate newer ethnic groups. This uncertainty in such self-sacrifice is further aggravated by the method of 'minority veto', that allows the group receiving the disproportionate amount of benefits, to merely stop the emerging group from getting their rightful share.¹⁴²

The *second* method of the theory invigorating an increased violence is its fallacy in understanding the influential role political leaders have over their voters,¹⁴³ and their ability in convincing the former in following through the deals they are brokering. Violence has further occurred when such leaders suffer a lapse in judging the opposition belonging to their own communities to consociational benefits rather than focussing on cultural issues. For example, the 1989 announcement in UP that declared Urdu as the second official language for the state, sparked off an intense anti-Muslim hatred and riots in the district of Budaun that injured over 200 people and caused the deaths of 26 people.¹⁴⁴ Parallelling the same, when Chief Minister Moily of Karnataka promulgated a nightly-Urdu news

¹³⁹ *Supra* note at 39.

¹⁴⁰ *Id.* at 788.

¹⁴¹ Arend Lijphart, *The Puzzle of Indian Democracy: A Consociational Interpretation*, 90 AM. POL. SCI. REV. 258, 263 (1996).

¹⁴² Wilkinson, *supra* note 111, at 789.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 790.

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channel, the same provoked a similar anti-Muslim riot, sparked by the Kannada-speaking group.¹⁴⁵

The *third* and final reason for the failure of the theory to impede violence among the different ethnic groups is its hopeful assumption that the leaders representing these groups would take a moderate and accommodative approach towards each other. Evidence however echoes the sad contradictory incentives of such leaders. A reason for the same has been propounded by Donald Horowitz, who stated that political leaders are often prone to attacks from other opposing parties who would accuse the former of brokering a prejudicial deal that would in a manner sell their group out for the leader's successful takeover of power.¹⁴⁶

Another reason for this extremity in demands by the leaders is due to their worrying stance on the fact that the people of their group would vote along lines that do not deal with the ethnic disparity or they would vote the opposing ethnic party to power.¹⁴⁷ The evidentiary value of the same has been highly cited in the case of Indian politicians. Initially, the electorate in India was overwhelmingly made up of the upper-caste community.¹⁴⁸ Now, the same category of community forms about 10-15% of the voters. Thereafter, politicians were forced to change their campaigning strategies in order to ensure mobilisation of voters within their own group and prevent defections. For the same, the tendency to promulgate an anti-Muslim wedge such as the former's practice of cow slaughter [which Hindus regard as sacred], among others.¹⁴⁹ These issues thereafter form a driving force in rallying voters to that particular party. Such strategies have however sadly deepened the division between Hindus and Muslims in the nation.

¹⁴⁵ *Id.*

¹⁴⁶ DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 571-87 (Berkeley: University of California Press, 1985).

¹⁴⁷ Steven Ian Wilkinson, *India, Consociational Theory, and Ethnic Violence*, 40(5) *ASIAN SURV.* 767, 790 (2000).

¹⁴⁸ HAROLD A. GOULD, *GRASS ROOTS POLITICS IN INDIA: A CENTURY OF POLITICAL EVOLUTION IN FAIZABAD DISTRICT* 52 (Oxford University Press, 1994).

¹⁴⁹ Wilkinson, *supra* note 111, at 790.

TIME TO TURN THE TIDE ON THE CASUISTRY OF DILEMMIC CONSOCIATIONALISM

As previously propounded by Lijphart, minority veto rights in consonance with a power sharing arrangement create the necessary balance required to effectuate a stable democracy. The current part of the paper would entail the interrelation between the pillar of minority veto and the remaining three pillars of the theory and thereafter, make its humble attempt in possible recommendatory policies and considerations for the future design of the former mechanism.

A. PROPORTIONALITY, FEDERAL STRUCTURE AND GRAND COALITION

The mechanism of minority veto can be incorporated in both the types of legislatures; unicameralist and bicameralist form of legislatures. With respect to the PR system, the same must be inculcated in a manner that ensures every group is represented, all the while, restricting the chances of outbidding using ethnic lines.¹⁵⁰ A federal system lays the groundwork for a stable electoral system especially concerning instances wherein veto rights can be enforced or revoked. Furthering the same, federalism prevents the same by presenting a legislative mechanism that nips the instance of a unilateral decision by taking sensitive issues off the table for legislative deliberations and thereafter gives the power for the same to each respective ethnic group. Drawing a conclusion from the nation of Northern Ireland, it has been argued that the lack of a federal system would lead to abuse of the veto system.¹⁵¹

The PR system in place would ensure no underrepresentation of a particular group in all stages of governance especially the stage of legislation. Adopting a more restrictive approach to veto rights would allow the same to be in moderation.¹⁵²

B. WHO WOULD BE THE VETO HOLDER?

¹⁵⁰ Devin Haymond, *Minority Vetoes in Consociational Legislatures: Ultimately Weaponisation?* 6 INDIANA J. CONST. DESIGN 1, 22 (2020).

¹⁵¹ *Id.*

¹⁵² *Id.* at 23.

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There exists no straightjacket formula for determining the person/group who would be acquiring the power to veto rights.¹⁵³ The determination of the same is context-specific in keeping with the backdrop of the ongoing societal conflict. The groups that receive the privilege to be part of negotiations concerning power-sharing arrangements, would explicitly prefer a corporate style of veto power that would be shared within the conflicting groups. If the corporate approach is taken, every minor group would be part of the power-sharing system and a stringent intra-group system for voting must be in place. The same can be paralleled to the entity veto system of Bosnia.¹⁵⁴ In Bosnia, the entities that hold direct representative authority of their state-based institution, form the primary level of overseeing and authorising funds and resources along with the legitimisation and enforcement of all political and civil rights.¹⁵⁵ The same thereafter includes possession of the power to veto over state policies.

C. ‘VITAL’ INTERESTS

It is essential to understand if vital interests of a community are to be self-determined or pre-determined.¹⁵⁶ Placing restriction on domains wherein veto rights can be invoked is a necessity to ensure no abuse of the said power. However, it is of paramount importance to have a clear-cut discussion on the subject matters that would be left out of the domain dealing with veto power.

The subject matters that are to be considered as “vital interests” are not determined by a pre-established template; it is to be done in consonance with the persisting political situation of the nation. Thus, the drafting of the said list must be done while ensuring every political leader is equally involved in the determination of vital interests. A system of including a

¹⁵³ *Id.*

¹⁵⁴ Wilkinson, *supra* note 111, at 787.

¹⁵⁵ Birgit Bahtic-Kunrath, *Of Veto Payers and Entity-Voting: Institutional Gridlock in the Bosnian Reform Process*, 39(6) NAT. PAPERS 899, 899 (2011).

¹⁵⁶ Haymond, *supra* note 150, at 24.

justificatory clause would better effectuate the legitimacy of the process.¹⁵⁷ The system is in place in the country of Belgium that requires every party to have an open discussion on the possible harm a particular legislation could cause on a vital interest. This adds a further level of political stabilisation by opening a channel of understanding and communication between the differing ethnic groups.¹⁵⁸

D. REVIEWAL PROCESS ON THE IMPACT OVER ‘VITAL’ INTERESTS

Consociationalism paves the path for a collaborative and consensus-based deliberative mechanism over the passing of legislation. Thus, a process of meaningful collaboration and dialogue makes it easier to prevent the implementation of prejudicial legislation. An illustrious example of the same can be seen in Bosnia, wherein, an institution of a joint commission occurs when the right to veto is invoked. If the said commission is unable to arrive at a conclusion, the matter is then sent to the constitutional court for review.¹⁵⁹

LESSONS TO TAKE HOME: THE COUNTRY OF NETHERLANDS

Netherlands has quite often been cited as a textbook example of successful consociationalism by various scholars.¹⁶⁰ Much like India, Netherlands consists of a deeply entrenched society divided along religious, ideological and social lines. In the early 20th century, the country adopted the power sharing model to administer these divisions effectively. By embodying the four tenets of the consociational model, Netherlands was successful in its attempt to maintain social cohesion and political stability. Over time, social cleavages weakened as Dutch elites ensured equal representation and a

¹⁵⁷ Wilkinson, *supra* note 111, at 792 (2000); Devin Haymond, *Minority Vetoes in Consociational Legislatures: Ultimately Weaponisation?*, 6 INDIANA J. CONST. DESIGN 1, 24 (2020).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 24.

¹⁶⁰ Bassel F. Salloukh, *The State of Consociationalism in Lebanon*, 30(1) NATIONALISM & ETHNIC POL. 8-27, (2023).

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stake in governance for various groups, solidifying lasting unity.¹⁶¹ This chapter will examine key factors that explain the Netherlands' nearly "perfect" consociationalism implementation. A thorough analysis of these factors will provide for a nuanced understanding of Netherlands ability to effectively manage and resolve conflicts by balancing diverse interests in a pluralistic society.

The first key factor is the non-antagonistic nature of the Dutch societal groups despite their diverse backgrounds.¹⁶² Though there was tension between the Dutch Calvinists and Catholics, rooted in the fight for independence against Spanish Catholics, these tensions did not escalate into deep seated antagonism for several reasons. Despite initial restrictions placed on the Catholics, the Dutch gradually became tolerant of different religions. Catholicism was no longer perceived as a crime and private worship and services were tolerated. Through persistent political battles, the Catholics gradually secured their religious and political freedom. The economic interdependence between the South and the rest of the country further prevented the Catholic population from becoming estranged from the greater Dutch nation. Additionally, the Catholic elites, predominantly clergymen, were guided by Church doctrine which did not condone revolution or secession. This stopped tensions from becoming truly antagonistic.¹⁶³ Another aspect which accounts for the lack of antagonistic historical narratives is the tradition of compromise and acceptance of diversity fostered by the Dutch political actors. The acceptance of different religious groups along with their shared experiences such as the battle against the Spanish imposition, a common monarch and a common language all played a role in unifying the very diverse Dutch society.¹⁶⁴

¹⁶¹ Pelle Berrends, *De-Consociational Transition: A Comparison of Three Consociational Democracies*, (unpublished M.A, thesis on file with the Major Papers, Univ. of Windsor) (2020).

¹⁶² *Id.* at 6.

¹⁶³ Rudy B. Andeweg, *Consociationalism in the Low Countries: Comparing the Dutch and Belgian Experience*, 25(4) SWISS POL. SCI. REV., 409-10 (2019).

¹⁶⁴ AREND LIJPHART, *THE POLITICS OF ACCOMMODATION: PLURALISM AND DEMOCRACY IN THE NETHERLANDS* 16-18 (University of California Press, 2nd ed., 1975).

Second, the ability of the Dutch elites to work together prudently sheds light on the political culture within the system which contributed to diminishing tensions within the country.¹⁶⁵ In the words of Lijphart, “*it is the conscious decision of the elites to work together and overcome their differences for the good of society that keeps a consociational democracy going.*”¹⁶⁶ In the Dutch consociationalism system, majoritarian rule was avoided in the favour of consensus and pragmatism. This approach can be attributed in the formation of surplus majority coalition governments, designed to achieve broad consensus and in the technocratic nature of Dutch coalitions which ensured prudent governance. Additionally, the pillarization of Dutch society through backroom deals and inclusive committees reinforced the importance of inclusive decision making thereby reflecting the country’s excellent elite leadership.¹⁶⁷

The third factor to be analysed is the existence of internal and external loads that put significant pressure on the political system. This factor finds its footings in Lijphart’s research, who noted that significant pressures on the system arising from controversial variables can affect elite leadership.¹⁶⁸ This in turn can result in an increasingly divided society. The success of the consociational regime in the Netherlands can be attributed to the latter’s lack of major loads straining the system. Despite the occasional political tensions, Netherlands managed to avoid major disruptions due to its strong unifying symbol and effective cooperation and compromise among elites.¹⁶⁹ A notable exception to this stability was Princess Irene’s conversion to Catholicism controversy which divided the society quite significantly.¹⁷⁰ Tensions arose between the religious blocs with the Catholics supporting the conversion which faced strong opposition from the Calvinists. To resolve the crisis, the Dutch utilized the tenet of grand coalition through the institution of an ad hoc council. Although the Labour Party was not formally included in this council, the council maintained

¹⁶⁵ Saurugger, *supra* note 4, at 7.

¹⁶⁶ *Id.* at 37.

¹⁶⁷ Erik Jones, *The Decline and Fall of Three Hegemonic Parties in Europe*, 37(1) SAIS REV. INT. AFFAIRS 79 (2017).

¹⁶⁸ Arend Lijphart, *Consociational Democracy*, 21(2) WORLD POL., 207-225 (1969).

¹⁶⁹ Rudy B. Andeweg, *Executive-Legislative Relations in the Netherlands: Consecutive and Coexisting Patterns*, 17(2) LEGIS. STUD. Q. 165-66 (1992).

¹⁷⁰ Saurugger, *supra* note 4 at 53.

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informal communication with the Labour leadership. This approach demonstrated the elite's prudent leadership to manage conflicts effectively.¹⁷¹

When drawing a comparative analysis with India, several parallels and contrasts on the application of this theory are brought forth. While both countries adopted consociationalism to manage their deeply divided societies, their outcomes have varied due to their unique historical and social backgrounds. Though India lacks a formal recognition as a consociational country, it has implemented a form of power sharing that resonates with consociational principles.

However, unlike the Netherlands where social cleavages weakened over time, India continues to grapple with persistent divisions. While compromise and tolerance were fostered among the Dutch elites to mitigate divisions, India's political landscape reflects majoritarian tendencies, particularly with the rise of Hindutva. This has in turn strained the country's democratic fabric. Furthermore, the Netherlands benefited from non-antagonistic historical narratives and prudent leadership of the elites which diminished tensions and facilitated societal cohesions. The country was also fortunate in avoiding a significant crisis that could have strained its consociational system. India however has faced numerous challenges including communal violence, regional disparities and socio-ethnic conflicts. These "*loads*" on the latter's political system have questioned the resilience of its power sharing arrangements and contributed to a destabilising society.

CONCLUDING THE PARADOX: WHERE THEORY MEETS PRACTICE

Almost five decades since the debut of the theory of consociationalism, the former has undergone tides of re-defining interpretations, continually sparking a growing interest among academicians. However, the popularity surrounding the same is less a reflection to the merits arising from the theory, than the coherent lack in other alternatives in dealing with ethnic conflicts. The normative orientation of the theory basically entails power-

¹⁷¹ *Id.*

sharing policies among different cultural groups. However, as has been priorly dealt with, such institutional policy changes lead to immobilisation of the process of making decisions and further makes the latter prone to misuse. This misuse often occurs due to the varied articulation of a 'better future' imagined by the different ethnic groups, and an inability to accommodate the same. This becomes the biggest fallacy of the theory, as it fails to explain the former.

The paradoxical nature of the merits of this theory is understood by the comprehensive literature detailed in the present contribution with the backdrop of Indian society, and that of Netherlands. It is pertinent to note that in the Netherlands, the theory promulgated the 'perfect' case study. The four pillars of the theory worked in favour of the ethnically different society of the Netherlands. However, there existed no prior antagonistic historical narrative between the groups thereafter paving way for an easier accommodative attitude to a power-sharing arrangement. This was not the case in India.

There existed severe tensions between the ethnic groups in India, with its historicity tracing decades before British Rule even began. The noteworthy antagonisms in India thereafter only deepened the strains between the elites and other groups, thus leading to a destabilised society. The leadership of the elites only exacerbated these tensions. Further, India is presently highly susceptible to the various political battles its neighbours impose on the country leaving the former's system destabilised to a point beyond repair. Thus, the presence of consociational policies have only been associated with an increase in ethnic violence. The rudimentary one-dimensional interpretation of the theory fails to incorporate the dynamic, multi-dimensional and rather oppositional-based ethnic identities of Indian society. The case of India's consociationalism also clearly evidentiates the various dangers that would arise from having informal power-sharing arrangements that lack a constitutional backing. An extension to this danger is the probability of it actually occurring, but with the consensus of the elite and a minute percent of minority veto or its complete lack thereof.

Ultimately, the paper presents certain areas of research necessitated to further understand the failure of the consociationalism theory in India. An essential research tangent includes assessing this theory at the state-level.

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This is because the intricacies involving religious minorities and the varying minority groups are seen at a better prominence, thereby shedding more light on elitist dominance.

The consequences of the growing Hindu nationalistic ideals are at the moment too complex to completely comprehend. The utmost comprehensible outcome is the grave threat the former poses in preventing the representation of minority groups within the various constituencies. The increase in exclusionary '*Hindu-istic*' policies jeopardises the minority rights and linguistic federal structures of the country's democracy. This is when minority veto power could play an essential role, if given the appropriate incentives. The design of such a power rests on its context, and thereafter there exists no straight-jacket formula for it. There exists a thin line between the rightful use of such veto power, and the weaponisation of the same.

Thus, demarcation of the same, coupled with intensive collaborative-intergroup dialogue is necessitated for an advantageous policy-making mechanism, rather than the rudimentary application of the consociationalism theory with respect to India's deep communal and ethnic divisions.

TRIBAL COMMUNITIES AND THE INDIAN CONSTITUTION: SOCIO-ECONOMIC RIGHTS OF TRIBES IN INDIA AND THE CHALLENGES OF CLIMATE CHANGE

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Climate change remains a pressing global concern, despite longstanding warnings from environmentalists and academicians. Those most vulnerable to climate change are often deeply connected to nature, relying on it not just for culture and identity but also for subsistence. Many tribal communities in India live in social isolation, employing traditional and conservative lifestyles. Their relationship with the environment differs significantly from that of non-tribal populations, making the impact of climate change on tribes more profound.

The constitutional framework that was laid down in an era succeeding the Second World War saw the tribal populace as ‘distinct people’, the administration of whom was attempted to be done effectively through the current Fifth and Sixth Schedules of the Indian Constitution. These two Schedules, along with the Panchayat (Extension to Scheduled Areas) Act, 1996 created a legislative framework that directly impacts tribal autonomy in administration and affects the socio-economic rights of tribes in India. This legislative web and its interactions with tribal participation in administration becomes an important area of study, especially in light of an impending climate crisis. Upon such analysis, possible constitutional remedies to counter the effects of growing industrialisation and more importantly, the absence of effective participation of tribal groups in decision-making can be discerned.

Against this backdrop, this paper aims to explore the constitutional protections and remedies available to India’s tribal population, faced with the effects of climate change, by tracing the participation of tribal groups in law-making and analysing the existing legal framework on tribal rights.

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INTRODUCTION

Despite regular warnings from environmentalists, climate change continues to grow as a rampant concern worldwide. In 2022, the Sixth Assessment Report of the Working Group II of the Intergovernmental Panel on Climate Change (“**IPCC**”)² extensively discussed the worrisome and possible consequences for India if no action is taken to curb the negative impact of climate change. Climate change will strike those the hardest who are connected innately to nature, not only as a marker of their culture or identity, but also for their subsistence and livelihood. One of the most noticeable vulnerable groups under such categorisation is the tribal population of India,³ which accounts for about 8.6% of the total

² Intergovernmental Panel on Climate Change, Climate Change 2022: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change (2022), https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf.

³ Here ‘tribal population’ refers to the population falling under the heads of Scheduled Tribes (“**STs**”) as notified under Article 342 of the Indian Constitution but also the Particularly Vulnerable Tribal Groups (“**PVTGs**”) whose population was accounted for in the Census of 2011.

population, and roughly translates to 10.43 crore tribal people in the country.⁴

The general definition for a tribe is “*a social group bound together by kin and duty and associated with a particular territory.*”⁵ Though all tribes may not share the exact same traits, tribes with certain variations as per regions, are classified as groups or communities living in isolation geographically and being homogenous and self-contained, as opposed to non-tribal groups.⁶ The most relevant definition of tribes in India, to facilitate a discussion on the Fifth and Sixth Schedules, is found in the Constitution in the form of Scheduled Tribes.⁷ This definition is significant to the discussion at hand for the representative nature and the administrative ambit of the Fifth and Sixth Schedules and cannot be effectively analysed without laying out precisely who is governed under these Schedules.

Several tribes in India have not only been socially disconnected from the rest of the country, but have also been using extremely conservative facilities and ways of living.⁸ The relationships that the tribal communities share with the environment as a whole are strikingly unique. Natural resources, most specifically land, have held great significance for tribal populations in India, not only for sourcing their livelihood but also for

⁴ Office of the Registrar General & Census Commissioner, India, 2011 Census Data, Population Enumeration Data.

⁵ *Tribe*, OXFORD DICTIONARY OF SOCIOLOGY (Oxford University Press, 4th ed., 2014).

⁶ Virginus Xaxa, *Empowerment of Tribes* in Debal K. Singha Roy (ed.), SOCIAL DEVELOPMENT AND THE EMPOWERMENT OF MARGINALISED GROUPS: PERSPECTIVES AND STRATEGIES 203 (Sage India, 1st ed., 2001).

⁷ INDIA CONST. art. 342, cl. 1. It states that “*The President [may with respect to any State [or Union territory], and where it is a State 3, after consultation with the Governor thereof], by public notification, specify the tribes or tribal communities or parts of or groups within tribes or tribal communities which shall for the purposes of this Constitution be deemed to be Scheduled Tribes in relation to that State [or Union territory, as the case may be.]*”

⁸ The digital divide that exists between the tribal and non-tribal populations in the country leads to a further marginalization of the tribes as it adversely impacts their ability to cope with sudden or unforeseen challenges, as was also witnessed during the COVID-19 pandemic. See Saksham Malik and Nausheen Akhtar, *Digital Divide and the Scheduled Tribes in India: Extent, Consequences, and Challenges*, SOCIAL & POLITICAL RESEARCH FOUNDATION (2022), https://sprf.in/wp-content/uploads/2024/12/SPRF-2022_DP_Digital-Divide-and-ST.pdf, at 5-6.

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defining their community identity.⁹ Hence, the impact of climate change on tribal populations cannot be dismissed as a generalised one.

It is in the light of the above considerations that this paper seeks to cover the ambit of constitutional remedies available to the tribal populations in India, so as to ensure protection of their socio-economic rights in the face of an impending global climate crisis. To achieve this, the paper shall look at the historical trajectory of the constitutional representation of tribes, the current status and challenges with respect to the realisation of the rights of tribal people and will discuss the possible remedies against the impact of climate change under the current constitutional set-up.

THE INDIAN CONSTITUTION AND TRIBAL REPRESENTATION

It is often alleged that the current Indian legal understanding of the tribal people and their identity has heavily relied on colonial ideas of the same.¹⁰ The initial understanding of tribal identity for colonial scholars and settlers was led by a Brahmanical understanding of the differences between the Aryans and native non-Aryans.¹¹ The “*Colonial Epistemology*”, as author Vinita Damodaran terms it, was built on the Brahmanical idea of caste and was reliant on ideas of race as prevalent during the eighteenth and nineteenth centuries.¹² A major point of debate and discussion during this period was The Tribal Question. The Tribal Question signified a raging, multi-faceted debate on the question of tribal rights and protection of tribal agency in India, with regards to the use of

⁹ Carol Upadhyaya, *Law, Politics and Adivasi Identity* in NANDINI SUNDAR (ED.), *LEGAL GROUNDS: NATURAL RESOURCES, IDENTITY, AND THE LAW IN JHARKHAND* 30 (Oxford University Press, 2009).

¹⁰ Saagar Tewari, *Framing the Fifth Schedule: Tribal agency and the making of the Indian Constitution (1937–1950)*, 56 MOD. ASIAN STUD. 1556-1594 (2022) (“Tewari”).

¹¹ Vineeta Damodaran, *Colonial Constructions of Tribe in India: the case of Chotanagpur*, 33(1) INDIAN HISTORICAL REV., 162-193 (2006) (“Damodaran”).

¹² Damodaran, *supra* note 10 at 163.

scheduling as an effective instrument for the same.¹³ The main warring contentions regarding the Tribal Question were closely intertwined with the Anthropological versus Nationalist debate¹⁴, also referred to sometimes as the Elvin-Ghurye Debate.¹⁵ This section looks at the prevalent notions of tribal identity prior to the making of the Indian Constitution and discusses the kind of tribal agency exerted in the Constituent Assembly, while contrasting the pre-constitutional position with the existing constitutional and legal position.

A. THE PRE-CONSTITUTIONAL POSITION OF TRIBAL RIGHTS IN INDIA

The ancient Indian idea of tribal identity was largely based on demarcating a clear difference between Aryans and non-Aryans, or the '*Dasas*'.¹⁶ Thus, the differentiation between upper-castes and tribals, who were termed as the successors of Ravana, was given considerable attention. This Brahmanical understanding was relied on by various authors in the 18th and 19th centuries to build upon the erstwhile caste system as seen in the later-Vedic ages.¹⁷ Such works were relied upon by colonial legislators, leading

¹³ Tewari, *supra* note 10, at 1558-1560. See also K.S. Singh, *Tribes, partition and independence* in S. Settiar and Indira B. Gupta (eds.), PANGS OF PARTITION 259-276 (MANOHAR PUBLISHERS, 2002).

¹⁴ The anthropologists, who primarily saw the Tribal Question as an issue of governance, believed that implementing electoral democracy would negatively impact tribal people. Therefore, they advocated for 'excluding' or 'partially excluding' the mainly tribal areas of British India from the legislative authority of elected assemblies and councils. In contrast, nationalists strongly opposed this policy of territorial segregation, viewing it as another tactic by the British to 'divide and rule'. They believed that the Tribal Question needed a legislative resolution because the enduring backwardness of tribal communities was arguably a result of the arbitrary colonial administrative system.

¹⁵ In scholarly discourse, the tribal issue is often framed as an ideological debate involving Verrier Elwin and G. S. Ghurye. They represent contrasting viewpoints known as 'Isolation/Protection' versus 'Intervention/Assimilation', as they debated the best policy approach to protect the interests of tribal communities within the British Indian empire.

¹⁶ Damodaran, *supra* note 11 at 163.

¹⁷ *Id.* at 165. The works of authors such as G.W. Stocking Jr., George Grey, Thomas Williams, Francis Galton and Alfred Russel Wallace were greatly relied upon for collection of data for Victorian ethnography. As Damodaran also notes in her work, after Darwin gave his theory of evolution, works on evolutions by W.W. Hunter, Herbert Risley and Forsyth, discussed ideas on caste and tribe as well.

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to them making their own bifurcations within the tribes. The colonial understanding of tribes then further split into classifying the North-eastern tribes of India as the “*true wild tribes of India*” while the central Indian tribes were classified as the “*broken tribes*” because the colonial administration could better recognise the North-eastern tribes with the Victorian ethnographical definitions of tribe.¹⁸

The 19th century Victorian ideas of civilisation greatly aided and encouraged the Brahmanical migration and occupation of tribal lands while simultaneously constructing an idea of a tribal model that identified tribes as uniform groups with set laws and structures for their governance.¹⁹ The encouragement of Brahmanical migration to tribal areas was not only a move to increase a geographical relocation of non-tribal populations to the tribal areas but was also a catalyst to promote the exploitation of the resources present in these areas. The first example of it being the Forest Act, 1878, which was then amended and re-introduced as the Indian Forest Act, 1927, that led to the isolation of village communities from their symbiotic relations with the natural resources, causing oppression of forest-dwellers.²⁰ This legislation prevented the usage of local forests, which eventually led to several adverse consequences for the forest-dependent communities, mostly the tribals.²¹

¹⁸ *Id.* at 164-165. The colonial administration, as Damodaran writes, found characteristics such as essential unity, clear customary law and unambiguous legitimacies as present in the northeastern tribes. Thus, those tribes were found to be better suited for assigning administrative autonomy and maintenance of public tranquility. See also Igor Kopytoff, *The Internal African Frontier: The Making of African Political Culture* in Igor Kopytoff (ed.), *The African Frontier: The Reproduction of Traditional African Societies* 3-87 (Indiana University Press, 1987).

¹⁹ Damodaran, *supra* note 11, at 164.

²⁰ The enforcement of the Indian Forest Act, 1927, gave the British government the right to acquire control over the reserved forests and the forest resources in these forests. See *The Indian Forest Act, 1927*, §§ 3-5, No. 16, Acts of Parliament, 1927, (India).

²¹ Jean Dreze, *Tribal evictions from Forest Land -Annexure 2*, PRS LEGISLATIVE RESEARCH (Mar. 2005), https://prsindia.org/files/bills_acts/bills_parliament/2005/bill53_2007010353_Nac_note_on_tribal_eviction.pdf.

The British, especially in the later part of the colonial period, viewed the tribal populace as a “*helpless and primitive*” group of people that required special attention. However, the Crown and the erstwhile Wavell administration did not wish to make excessive expenditures or efforts for securing the rights of the tribes.²² Nevertheless, under the administration of Pethick-Lawrence as the Viceroy, greater efforts were made towards securing the rights of the tribal minorities in India.²³ Due consideration was also paid to the recommendations of the Sapru Committee²⁴ by Lord Wavell himself, to suggest that areas inhabited by tribal people “*should be under the control of a commissioner who is selected for his special knowledge of, and sympathy for, the tribal people.*” There was also a great difference of opinion amongst the Provincial Governors in India, on the issue of the establishment of a central advisory board for tribal administrations, who stated that it could potentially violate the provincial autonomy. The idea of establishing such a central advisory authority was ultimately dropped.²⁵

Though we find more deliberation on actions regarding tribal welfare in colonial times, the impact of these ideas can be later seen in the constitutional mandate that India made for itself, providing greater relevance to the pre-constitutional set-up on tribal governance.²⁶

²² Tewari, *supra* note 10 at 1565.

²³ Tewari, *supra* note 10 at 1566.

²⁴ The suggestion to appoint a European special officer who was ‘sympathetic’ towards the indigenous people was an integral aspect of the anthropologists’ input into the scheduling discourse. By the mid-1940s, these concepts were embraced by Indians, albeit with a new title (commissioner) and the vision of Indians (rather than Europeans) fulfilling these constitutional roles. See Tej Bahadur Sapru, M. R. Jayakar, N. Gopalaswamy Ayyangar and Jagdish Prasad, *Constitutional proposals of the Sapru Committee* (1945) <https://www.constitutionofindia.net/historical-constitution/sapru-committee-report-sir-tej-bahadur-sapru-1945/>.

²⁵ Tewari, *supra* note 10, at 1567.

²⁶ The Sapru Committee's proposal for a commissioner with expertise and empathy towards tribal communities was implemented under Article 338 of the Indian Constitution, establishing the Office of the Commissioner of Scheduled Castes and Tribes. This commissioner would visit tribal regions annually and submit reports to the Government of India regarding their welfare. Similarly, Wavell's concept of central financial grants for tribal welfare was incorporated into Article 275 of the Indian Constitution.

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The prevalent mindset regarding tribal populations amongst members of the British administration, along with Victorian ideas of civilisation, manifested themselves as policy decisions around the 1940s. The contemporary political thought followed by the different political parties with warring ideas on assimilation and protectionism were also rampantly expressed in the constitution-making proceedings, which shall be discussed in detail in the next part.

TRIBAL REPRESENTATION IN THE CONSTITUTION- MAKING PROCESS: 1945-1950

A. CONSTITUTIONAL PROPOSALS AND THE DEBATES ON SCHEDULING

The Fifth and the Sixth Schedules of the Constitution of India have been particularly significant for India's tribal policy ever since its inception and finalisation in 1950. These Schedules contain provisions regarding the governance of tribal areas, devolution of powers, safeguards for traditions and land rights of the tribal people.²⁷

The Cabinet Mission Plan of 1946 proposed the establishment of an advisory committee on the rights of minorities, citizens and excluded areas which would provide full representation to such interested parties.²⁸ The issue with the Cabinet Mission Plan, 1946, however, was that even though it appeared to be inclusive and acknowledging the interests of all sections of the Indian population, it was largely focussed on the participation of the Indian National Congress ("**Congress**"), the Muslim League, and the groups affiliated to these parties.²⁹ As Tewari puts it, despite certain novel inclusions being made into it, the Cabinet Mission Plan, 1946 more or less followed the "*protective framework of exclusion and partial exclusion*" as had already been seen in the Government of India Act, 1935.³⁰ The Government of India Act, 1935,³¹ for the first time introduced the terms

²⁷ S. G. Malhotra, *Tribal autonomy undermined*, 49(13) EPW, 221–245 (2014).

²⁸ Tewari, *supra* note 10 at 1567.

²⁹ Tewari, *supra* note 10 at 1568.

³⁰ *Id.* at 1568.

³¹ Government of India Act, 1935, 26 Geo. 5 & 1 Edw. 8 c. 2, §91 (Eng.).

“*excluded and partially excluded areas*” and discussed how the British Crown had the power to include any area within the ambit of excluded or partially excluded areas. These were regions which majorly housed tribal populations and were believed to need special administrative provisions. Section 92 of the Government of India Act, 1935 discussed how in the administration of these areas, no Federal or Provincial law would be applicable unless the Governor so stipulated through a public notification.³²

B. THE CONSTITUENT ASSEMBLY AND REPORTS OF THE SUB-COMMITTEES ON TRIBAL, EXCLUDED AND PARTIALLY-EXCLUDED AREAS

The failure of the inclusionary policy as contained in the Cabinet Mission Plan gave rise to serious questions regarding the fate of *scheduling* as a policy instrument. During the colonial era of governance, scheduling was done to add certain areas to a notified list of places where special administrative regimes applied and where the laws applicable to the rest of British India were not applied.³³ It was so because the British, who were supporters of the Protectionist side of the debate on Tribal Area governance, were always in favour of scheduling but they were not accelerating the process of their exit from India. The Indian political parties were not supportive of the process of scheduling, as they believed that scheduling was just another manifestation of the British policy of divide-and-rule. This led to a strong mobilisation effort by the All India Excluded and Partially Excluded Areas Association (“**AIEPEAA**”) which collaborated with the Congress, to fight for ensuring that scheduling was not done in the Constituent Assembly, to ensure that the indigenous populations could work in tandem with the rest of their country-men

without the creation of another minority problem.³⁴ In this direction, the AIEPEAA on January 20, 1947, organised a conference in Delhi where an appeal was made for treating tribal people on the same footing as other

³² Government of India Act, 1935, 26 Geo. 5 & 1 Edw. 8 c. 2, §92 (Eng.).

³³ Tewari, *supra* note 10 at 1558.

³⁴ *File No. G-59* (Sept. 20, 1946), AICC PAPERS, at 49 (1947).

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citizens.³⁵ This conference was inaugurated by the then-Congress president J.B. Kripalani, who condemned the British policy of creating special administrative zones for tribal populations that set them apart from the rest of the country acting as exclusionary areas of isolation.³⁶ Four days after this conference, an Advisory Committee was elected by the Constituent Assembly to discuss representational democracy for tribal areas. This particular committee created a framework of pamphlets that created a framework in which the Nationalists were seeking to solve the Tribal Question.³⁷

The above-mentioned Committee then created three sub-committees: one each for provincial areas of Assam, non-Assam areas and the North-Western Frontier Province (“**NWFP**”) and Baluchistan. The sub-committees were expected to do ground research in the allotted areas and submit reports accordingly.³⁸ However, post-partition, it was declared that the sub-committee for the NWFP and Baluchistan did not need to perform the ground research. Since the areas to be covered were vast, the sub-committees missed their deadlines. The Assam sub-committee submitted its report in July, 1947 while the other non-Assam Areas sub-committee submitted its report in two drafts - one in August 1947 and the other in September 1947.³⁹ While the sub-committee report on the non-Assam areas formed the basis for the enactment of the Fifth Schedule, the sub-committee report on Assam acted as the foundation for the Sixth Schedule of the Indian Constitution.⁴⁰ When it comes to actual community

³⁵ Tewari, *supra* note 10 at 1558.

³⁶ *Id.*

³⁷ Constituent Assembly of India, *Advisory Committee (tribal and excluded areas), excluded and partially excluded areas—I and II*, GOVERNMENT OF INDIA PRESS (1948).

³⁸ Tewari, *supra* note 10 at 1571.

³⁹ The Assam sub-committee presented its report on July 28, 1947. The second sub-committee submitted its report in two parts: the initial interim report covering Madras, Bombay, Bengal, Central Provinces, and Orissa in August 1947; followed by the second report addressing Bihar, United Provinces, and Punjab in September 1947.

⁴⁰ See North-East Frontier (Assam) Tribal and Excluded Areas Sub-Committee, Report of the Sub-Committee on the North East Frontier (Assam) Tribal and Excluded Areas (1947). See also Excluded and Partially Excluded Areas (Other than Assam) Sub-Committee, Report of the Excluded and Partially Excluded Areas (Other than Assam)

representation of the tribal communities in the two sub-committees that formed the fundamentals of the current tribal policy in India, there were only two Adivasi members in the sub-committees, Jaipal Singh Munda and Devendra Nath Samanta.⁴¹

The most vocal and important tribal representative in the Assembly was Jaipal Singh Munda. Munda's role was significant not only as the representative of the Chhota Nagpur tribes,⁴² but also as an important non-Congress tribal voice. While the Congress largely followed the Nationalist or Assimilation train of thought, Munda was of the firm opinion that to actually correct the wrongs of the past, the dispossession and exploitation done against the Adivasis had to be stopped, including that which was done by non-British actors.⁴³ Though Munda was not a member of the Congress, he was not completely against the inclusion of tribals in the non-tribal population's activities. He even advocated for the inclusion of non-tribal actors in his Adivasi Mahasabha, as he believed that the cooperation between Adivasis and non-Adivasis would be of paramount importance to pave the way for a more just future for the tribal populace in the New India of Nehru's vision that sought to integrate the tribal population with the mainstream to make it an equal partner in the nation's progress.⁴⁴

Munda also periodically raised concerns about the inadequate Adivasi membership in the Assembly and the absence of sufficient Adivasi representation in the decision-making in the Assembly.⁴⁵ However, he also showed faith not particularly in the Congress's vision but in Nehru's vision

Sub-Committee (1947) <https://www.constitutionofindia.net/committee-report/joint-report-of-the-excluded-and-partially-excluded-areas-other-than-assam-and-the-north-east-frontier-assam-tribal-and-excluded-areas-sub-committee/>.

⁴¹ Tewari, *supra* note 10 at 1572.

⁴² Pooja Parmar, *Undoing Historical Wrongs: Law and Indigeneity*, 49(3) OSGOODE HALL L. J. 491, 504 (2012). The chairman of the Constituent Assembly presented Singh on December 11, 1946, identifying him as the spokesperson for the “*aboriginal tribes of Chhota Nagpur*”.

⁴³ *Id.* at 505.

⁴⁴ KL Sharma, *Jharkhand Movement in Bihar*, 11 EPW 41 (1976).

⁴⁵ Jaipal Singh, CONST. ASSEMB. DEB., ¶1.9.66 (Dec. 19, 1946), <https://www.constitutionofindia.net/debates/19-dec-1946/>.

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for a New India as he aimed to best portray the real sentiments of the populace's hearts.⁴⁶

C. FRAMING OF THE FIFTH AND SIXTH SCHEDULES IN THE CONSTITUENT ASSEMBLY

The clashes between Munda's thoughts and that of the Congress are very important in light of the then-prevailing contemporary events in the period 1945-1950. During this period, alongside constitutional discussions, several political uprisings and movements emerged in predominantly tribal regions of the subcontinent. These movements can be categorised into two types: those within British India (such as the Warli revolt in Bombay and the Tebhaga movement in Bengal) and those within princely states (including the Telangana revolt in Hyderabad and political protests in Orissa). A notable aspect of these movements was that the majority were led by Communist leaders.⁴⁷ This prevailing scenario further led the Congress to be convinced that an assimilation approach was best suited for the tribal areas so as to prevent the rise of the Communist influence in these areas as the Congress considered the Communists to be "*violent, lawless and anti-Indian*."⁴⁸ These movements led in tribal areas focussed on several political demands, mainly that of land alienation, where the Communists emphasized on the return of occupied land to the Adivasis by the landlords while the Congress sided with the local interest groups as they lent it aid, electorally and materially.⁴⁹ These contemporary instances and the Communist-Congress clash have been discussed briefly to establish a connection between the erstwhile political atmosphere of the period between 1945-50 and the influence it had on constitutional decision-making in the Assembly.

⁴⁶ Jaipal Singh, CONST. ASSEMB. DEB., ¶1.9.71 (Dec. 19, 1946), <https://www.constitutionofindia.net/debates/19-dec-1946/>.

⁴⁷ See S. R. CHOWDHURI, LEFTISM IN INDIA, 1917-1947 (SAGE Publications, 2nd eds., 2017).

⁴⁸ Leslie J. Calman, *Congress confronts communism: Thana district, 1945-47*, 21(2) MOD. ASIAN STUD. 330 (1987).

⁴⁹ Tewari, *supra* note 10 at 1577.

After the sub-committees submitted their reports, Patel suggested a joint meeting which was convened on 25th August 1947. This gathering acknowledged common issues like land protection, backwardness, illiteracy, healthcare, and communication across various regions. Despite Jaipal Singh Munda's repeated requests to discuss the sub-committee reports, this matter was delayed. The final discussions commenced on 5th September 1949 when Dr. B.R. Ambedkar presented the draft Fifth Schedule to the Constituent Assembly. This occurred on a Monday, with the draft being circulated among assembly members just the previous Friday.

Ambedkar introduced three significant changes to the original draft, and these suggestions were likely an impact of the contemporary Community-Congress clash, which has been discussed above. *First*, the provision for a Tribes Advisory Council (“**TAC**”) in states with Scheduled Areas or Tribes was amended, granting discretion to the President, allowing for the creation of a system of checks on the exercise of administrative autonomy by the tribes. *Second*, the Council was rendered ineffective in its role as representative of tribal interests before the governments, for the governors were allowed to override its advice on laws from Parliament or local legislatures. Ambedkar defended this, suggesting that it was preferable for the governor's discretion not to be unconditionally controlled. *Third*, the original draft's unamendable nature was altered, allowing the Parliament to make changes with a simple majority later on. Ambedkar argued that this flexibility was necessary to adapt to evolving circumstances, preventing the creation of rigid, unchangeable structures within the Constitution.⁵⁰

On behalf of the Drafting Committee, K.M. Munshi gave two reasons for the amendments in the Draft Constitution. *First*, that the earlier draft did not take into account the necessary variations needed in state-specific situations and *second*, that the earlier draft only catered to provinces while, post-independence, the scenario had considerably changed due to the accession of the princely states.⁵¹ Ultimately, Ambedkar's amendments were approved, while Jaipal Singh Munda's proposals failed to gain

⁵⁰ SAVYASAACHI, TRIBAL FOREST-DWELLERS AND SELF-RULE: THE CONSTITUENT ASSEMBLY DEBATES ON THE FIFTH AND SIXTH SCHEDULES 72 (INDIAN SOCIAL INSTITUTE, 1998).

⁵¹ Tewari, *supra* note 10 at 1590.

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Assembly approval, dominated as it was by Congress members. Despite Munda's objections, the TAC was established in a purely advisory role without supervisory authority. The Indian National Congress controlled the reception of Jaipal Singh's ideas, agreeing to include the Fifth Schedule but significantly limiting its effectiveness through late-stage amendments.

THE EXISTING CONSTITUTIONAL AND LEGAL PROVISIONS AND THEIR IMPACT ON THE GOVERNANCE OF TRIBAL COMMUNITIES IN INDIA

A. THE PRESENT CONSTITUTIONAL FRAMEWORK ON TRIBAL GOVERNANCE IN INDIA: AN ASSESSMENT

When it comes to the interaction with administration and governance of tribal areas, the most relevant provisions are contained in the Fifth Schedule,⁵² the Sixth Schedule⁵³ and the Panchayat (Extension to Scheduled Areas) Act, 1996 ("**PESA**").⁵⁴ The Fifth Schedule of the Constitution contains special provisions related to the administration and governance of Scheduled Areas in various states of India where indigenous tribal communities predominantly reside. Enacted to protect the interests and welfare of these tribal populations, the Fifth Schedule outlines specific measures aimed at ensuring their socio-economic development, preserving their culture, and safeguarding their rights over land and resources. Similarly, the Sixth Schedule pertains to special provisions for the administration of tribal areas in the states of Assam, Meghalaya, Tripura, and Mizoram. These areas are predominantly inhabited by tribal communities, and the Schedule aims to safeguard their unique socio-cultural identity, promote self-governance, and ensure socio-economic development within these autonomous districts.

⁵² INDIA CONST. sch. 5.

⁵³ INDIA CONST. sch. 6.

⁵⁴ The Panchayat (Extension to Scheduled Areas) Act, 1996, No. 40, Acts of Parliament, 1996 (India) ("**PESA**").

The term ‘*Scheduled Areas*’ denotes the tribal regions to which either the Fifth Schedule⁵⁵ or the Sixth Schedule applies.⁵⁶ The mechanisms for application and governance under these two Schedules vary greatly as per the jurisdictions that they govern. Prior to PESA, the Fifth Schedule was a fully centralised system in which provincial governors oversaw the affairs of the communities, the bulk of which were tribal. The Schedule gave each state’s governor the ability to “*make regulations for the peace and good government of any area in a state which is temporarily a Scheduled Area*”,⁵⁷ as well as the ability for the states to extend their executive authority to Scheduled Areas.⁵⁸ For Scheduled Areas and Tribes, the Governor served as the exclusive legislature, having the authority to enact legislation on any topic listed in the Union, State, and Concurrent lists of the Constitution. Essentially, the authority given to the Governor was of a very wide nature⁵⁹ and subject to only two bars on exercise: *first*, that the Governor would consult the TAC before enacting any regulation, and *second*, all the regulations thus enacted would require Presidential assent before becoming effective.⁶⁰

On the other hand, the tribes have traditionally had a great deal of autonomy under the Sixth Schedule. It assigns a specific tribe to each of the ‘*autonomous*’ territories that comprise the tribal areas in the North-eastern states of India.⁶¹

⁵⁵ For applying the Fifth or Sixth Schedule to an area, certain criteria are to be fulfilled such as: (i) the preponderance of tribal population, (ii) compactness and reasonable size of the area, (iii) the ability to form a viable administrative entity such as a district, and (iv) the area’s lack of economic development (its ‘backwardness’) as compared to neighbouring regions.

⁵⁶ The application of the Fifth and Sixth Schedules are done vide Article 244 of the Constitution of India.

⁵⁷ INDIA CONST. Sch 5 ¶ 2.

⁵⁸ *Id.*

⁵⁹ See Ram Kirpal Bhagat v. State of Bihar, (1969) 3 SCC 471; Hota Venkata Surya Sivarama Sastry v. State of A.P., AIR 1967 SC 71 at 74.

⁶⁰ INDIA CONST. Sch. 5, ¶ 4.

⁶¹ INDIA CONST. Sch 6, ¶ 1.

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The elected councils in the Sixth Schedule areas have the power to enact legislation on a wide range of topics,⁶² exercise judicial jurisdiction through conventional legal systems that incorporate elements of federal law,⁶³ and have administrative authority. The councils operate independently of the states' executive branch and are financially self-sufficient. Although the Sixth Schedule's design renders every administrative and legislative action taken by the councils subject to gubernatorial consent, higher courts have construed the governor's jurisdiction as being significantly limited.⁶⁴

In *Pu Myllai Hlychho v. State of Mizoram*,⁶⁵ the Supreme Court of India made it clear that courts must respect the legislative, executive, and judicial autonomy that the Sixth Schedule bestows upon District and Regional Councils, despite the fact that it is neither a stand-alone statute nor a constitution inside a constitution.⁶⁶ There were two main causes for the disparity in treatment among the tribes. *First* of all, it was thought that the tribes living in Fifth Schedule areas lacked the capacity for self-governance.⁶⁷ *Second*, some tribal populations in peninsular India co-existed with a minority non-tribal population, in contrast to the Sixth Schedule districts; in such circumstances, autonomy for the tribes seemed unfeasible. These were issues that had been long resolved before the

⁶² INDIA CONST. Sch. 6, 2(4). This paragraph states that “*laws can be made to regulate social customs, land use, forest management, and cultivation; or to appoint Chiefs or Headmen, and administer villages or towns. These laws become enforceable after the assent of the Governor of the state is received.*”

⁶³ The Councils are authorized to establish their own justice dispensation system with tribal courts that adjudicate disputes “between the parties all of whom belong to Scheduled Tribes”. See INDIA CONST. Sch. 6, 4(1) and ¶ 4(2). See also *State of Meghalaya v. Richard Lyngdoh*, 2005 SCC OnLine Gau 371, ¶ 17.

⁶⁴ *T. Cajee v. U. Jormanik Siem*, AIR 1961 SC 276. In this case, the Indian Supreme Court held that “*the administration of an autonomous district shall vest in the District Council and this in our opinion [is] comprehensive enough to include all such executive powers as are necessary to be exercised for the purposes of the administration of the district.*”

⁶⁵ *Pu Myllai Hlychho v. State of Mizoram*, (2005) 2 SCC 92.

⁶⁶ *Id.*, ¶21. (“*The Sixth Schedule to the Constitution is a part of the Constitution and cannot be interpreted by forgetting the other provisions in the Constitution.*”).

⁶⁷ See Ajay Skaria, *Shades of Wildness: Tribe, Caste, and Gender in Western India*, 56 J. ASIAN STUD. 726, 730-731 (1997).

country gained its independence.⁶⁸ So essentially, the founding fathers reinstated the colonial stereotype that the tribes' best interests rested more on skilful and compassionate leadership and protection from economic exploitation by their (non-tribal) neighbours than on swift political advancement.⁶⁹ When it stated that "*the tribals... need to be taken care of by the protective arm of the law, so that they may prosper and by an evolutionary process join the mainstream of the society,*" the Supreme Court even later backed this paternalist reasoning.⁷⁰

B. ENACTMENT OF PESA AND THE APPLICATION OF PART IX TO THE SCHEDULED AREAS

Thereafter, in 1996, the Parliament, in exercise of its legislative authority, enacted PESA to extend the application of Part IX of the Constitution to Scheduled Areas.⁷¹ Consequently, any habitation or hamlet "*comprising a community and managing its affairs in accordance with traditions and customs*" was now enabled to exercise self-governance to a constricted extent under the PESA.⁷²

Post this enactment, the tribal communities living in the Scheduled Areas as per the Fifth Schedule were directed to undertake democratic elections,

⁶⁸ The Government of India Act 1935, which introduced special measures for the protection of the tribes in India, had earlier reclassified the tribal regions of the country into "Excluded" and "Partially Excluded Areas" based on the preponderance of tribal communities and the feasibility of introducing civil administration in those regions. See Apoorv Kurup, *Tribal Law in India: How Decentralized Administration is Extinguishing Tribal Rights and Why Autonomous Tribal Governments Are Better*, 7(1) INDIGENOUS L. J. 87, 96 (2008). ("Kurup")

⁶⁹ Kurup, *supra* note 68, at 96.

⁷⁰ See Amrendra Pratap Singh v. Tej Bahadur Prajapati, (2004) 10 SCC 65, ¶15. The reasoning adopted by the Supreme Court in this particular case, supported the paternalistic outlook regarding the tribal populations, by stating that they would need the law to protect them from exploitation and to help them prosper.

⁷¹ INDIA CONST. art. 243-M(3A), cl. (b). This provision allows "*Parliament ... [to] extend the provisions of this Part [IX] to the Scheduled Areas.... subject to such exceptions and modifications as may be specified in such law.*"

⁷² PESA, § 4(g). It discusses the provision for giving half of the seats in the elected governments and the seat of the Chairperson at all levels in the Panchayat Hierarchy to tribal people to give greater regard and primacy to the tribal communities, both major and minor, in their governance.

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to follow the tiered structure as laid down in Part IX and to exercise the powers which were deemed “*necessary to enable them to function as institutions of self-government.*”⁷³

On the contrary, while decentralising authority to local communities, states were required to ensure that (i) their laws respect customary law, social and religious practices, and traditional management practices of community resources,⁷⁴ and (ii) the Gram Sabhas (consisting of individuals listed in the electoral rolls for the village-level Panchayat)⁷⁵ are capable of safeguarding and upholding the traditions and customs of the people, their cultural identity, community resources, and the customary methods of dispute resolution.⁷⁶

Many view the PESA as a logical extension of both the Fifth Schedule and Part IX of the Constitution.⁷⁷ However, despite its seemingly harmless nature, this top-down approach over the past decade has gradually deprived tribal communities of self-governance and their right to their community’s natural resources. This top-down system of hierarchy makes the tribal populations vulnerable to enactments and enforcements of law that can compromise their socio-economic rights in the interests of exploitation of natural resources in Scheduled Areas. We will now be looking at the aforementioned legal provisions and the forest frameworks in more detail in section C(II).

⁷³ INDIA CONST. art. 243G. The powers are subject to a number of “*exceptions and modifications ranging from general guidelines to specific demarcation of tribal administrative authority.*”

⁷⁴ PESA, § 4(a).

⁷⁵ PESA, § 4(c).

⁷⁶ PESA, § 4(d).

⁷⁷ See Ministry of Panchayati Raj, Planning at the Grassroots Level: An Action Programme for the Eleventh Five Year Plan, 84 (2005-06), http://planningcommission.nic.in/plans/stateplan/sp_scy2stat.pdf.

THE CHALLENGES OF CLIMATE CHANGE FOR TRIBES AND THE POSSIBLE IMPACT ON THEIR SOCIOECONOMIC RIGHTS

The above sections have dealt with how Indian tribes have been perceived by constitution-makers and policy makers. This section seeks to focus on how tribes perceive their connection to nature and how constitutional and legal provisions have affected their vulnerabilities in the governance hierarchy. In this section, we will be looking at *first*, how natural resources are an intrinsic part of tribal identity; *second*, how the politics over the natural resources has seeped into the execution of laws and affected the tribal people; *third*, what the potential impact of climate change will be on the socio-economic conditions of the tribes.

Indigenous tribes, across the globe, treat nature with a deep respect. For instance, for the Maori tribes of New Zealand, humans and nature are seen as kin to each other in view of their interdependence.⁷⁸ All natural resources, especially forests, hold immense significance in the lives of tribal and rural communities, playing a central role in their identity and livelihood.⁷⁹ The connection between tribals and forests is deeply intimate, as these communities have historically relied on forests for sustenance, shaping their entire social and cultural existence around forest resources.⁸⁰ Over thousands of years, forests and indigenous populations have co-evolved with tribes actively contributing to forest conservation through traditional practices.

Forest policies and legislation have been developed over time to govern the complex relationship between tribals, forests, and government authorities.⁸¹ However, these policies have undergone transformations, particularly with the progressive assertion of state monopoly rights over

⁷⁸ United Nations Environmental Programme, *Indigenous People and Nature: A tradition of conservation* (2017) <https://www.unep.org/news-and-stories/story/indigenous-people-and-nature-tradition-conservation>.

⁷⁹ B. Karthikeyan, *Tribes of Nilgiris and Environmental Laws*, 4(13) INT'L J. HUM. AND SOC. SCI. 242, 243 (2014).

⁸⁰ *Id.*

⁸¹ Arun Bandopadhyay, *The Colonial Legacy of Forest Policies in India*, 38 SOCIAL SCIENTIST 53-76 (2010).

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vast forest areas.⁸² For tribal communities, forests are not merely a source of material resources but also integral to their spiritual and cultural heritage.⁸³ Forests serve as repositories of traditional knowledge, medicinal plants, and sacred sites that hold profound significance in tribal rituals and ceremonies.⁸⁴ The rich biodiversity of forests sustains unique cultural practices, including hunting, gathering, and handicrafts, which are intrinsic to tribal identities.

The displacement of tribal populations from forests due to evolving forest policies has disrupted this delicate equilibrium, leading to social dislocation, loss of cultural heritage, and economic hardships. Evicted tribes often struggle to adapt to unfamiliar environments, losing access to traditional livelihoods and facing marginalisation in mainstream society. Forests are not only vital ecosystems but also cultural landscapes that shape the identities and livelihoods of tribal communities in India. Preserving forest rights and promoting inclusive conservation practices are essential not only for biodiversity conservation but also for safeguarding the rich heritage and well-being of indigenous peoples who depend on forests for their survival and cultural continuity.

The sheer interdependence that tribes have with their natural habitats, coupled with their isolation from mainstream society and the fewer educational and occupational opportunities that they get, make conservation of climate and the natural environment all the more important for tribes, especially the forest dwellers. While phenomena like climate change and global warming have become exceedingly worrisome for all people, they are exceptionally significant for vulnerable groups like tribes who will lose a lot more than the general citizenry in case of failure in protection of natural resources.

⁸² A great shift is seen in the treatment of tribal possession of land, right from the colonial regime where the Acts of 1874 and 1927 were extremely exploitation-driven laws that completely disregarded the tribal interests in nature and forests.

⁸³ Carol Upadhyay, *Law, Politics and Adivasi Identity* in NANDINI SUNDAR (ED.), *LEGAL GROUNDS: NATURAL RESOURCES, IDENTITY, AND THE LAW IN JHARKHAND* (Oxford University Press, 2009).

⁸⁴ *Id.*

A. THE POLITICS OVER NATURAL RESOURCES: PRESENT LEGAL FRAMEWORK AND THE DISEMPOWERMENT OF TRIBES

Despite having been around for so long, neither the Fifth Schedule nor the PESA has allowed for the recognition of tribal communities as “*viable and responsive people’s bodies*” as per the legislative intent that was enshrined in its creation.⁸⁵ Tribal governments working locally are often not included in the development schemes representationally and the intended benefits of the said schemes hardly reach down the ladder, creating a situation where outsiders are allowed to benefit at the cost of the tribal population’s interests.⁸⁶ The natural resources have acted as life-support for the tribes, but over the years large corporations have been allowed to have a greater control over these resources, impacting tribal livelihoods.⁸⁷ The non-tribal occupations that happened in the tribal areas over the years have resulted in non-tribal acquisitions that have become *de facto* tribal displacements, due to intensity and volume of the occupational impact.⁸⁸ Tribes are amongst the worst affected groups by operations like mining and hydroelectric projects which exploit natural resources in tribal areas which are generally resource dense, leading to an aversion of the tribes’ interests.

B. PESA AND ITS ADVERSE CULTURAL, SOCIAL AND RELIGIOUS IMPACT ON TRIBAL POPULATIONS IN SCHEDULED AREAS

A number of issues arose post the enactment of the PESA. First, the decentralization was not effectively carried out in states with tribal populations, being subject to unnecessary delays, and second, while legislating under the PESA, the state machinery is rarely cognisant of the social, religious and cultural practices of the local tribal communities.⁸⁹

⁸⁵ H.L. Harit, *Tribal Areas and Administration* in RANN SINGH MANN (ED.), TRIBES OF INDIA: ONGOING CHALLENGES 53 (M.D. Publications, 1996). *See also* Kurup, *supra* note 68, at 97.

⁸⁶ Govinda Chandra Rath, *Introduction* in GOVINDRA CHANDRA RATH (ED.), TRIBAL DEVELOPMENT IN INDIA - THE CONTEMPORARY DEBATE 28 (Sage Publications, 2006).

⁸⁷ Kurup, *supra* note 68, at 98. *Id.*

⁸⁸ *Id.*

⁸⁹ Kurup, *supra* note 69, at 99. Virginius Xaxa, *Empowerment of Tribes* in DEBAL K. SINGHA ROY (ED.), SOCIAL DEVELOPMENT AND THE EMPOWERMENT OF MARGINALISED GROUPS: PERSPECTIVES AND STRATEGIES 220 (SAGE Publications, 2001).

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Certain scholars trace this apathy seen in state behaviour to the first national commission on Scheduled Areas and Scheduled Tribes (“**Dhebar Commission**”), which is alleged to have favoured the creation of a minimum number of Scheduled Areas under the Fifth Schedule because it considered the Fifth Schedule to be a temporary mechanism until a full emancipation of the tribes was completed.⁹⁰

One of the major resources that tribes have had a hard time securing for themselves has been land. Land acquisition is done for various reasons in tribal areas, gradually shrinking the areas that the tribal populations live and work on. In India, the right to property can no longer be exercised as a fundamental right but only as a legal right,⁹¹ which can be overlooked in case the acquisition is done by the state by awarding just compensation and under the authority of law.⁹² The authority of law in the matter of acquiring tribal lands is provided under §4(i) of PESA which explicitly permits the acquisition of lands in Scheduled Areas.⁹³ The issue ignored here is that land and property do not mean the same to the tribes as they do to the general populations; for tribes, land is not just property, but rather a part of their social, cultural, and historical identity. Keeping in mind this connection, the threshold for acquisition of tribal land should ideally have been much higher under PESA but the low threshold still persists. The only bar that PESA provides against the state acquisition of land is that the state agencies are to consult the local governments before acquiring land in Scheduled Areas.⁹⁴ There is also no clarity as to what manner the consultations are to be done in or what is the standard with respect to procedural safeguards for protection of the ecosystem or tribal interests in the area in the face of the proposed “*public purpose*” of the project. Since there can be no judicial interference in the matter of

⁹⁰ Kurup, *supra* note 68, at 101. See *Report of the Scheduled Areas and Scheduled Tribes Commission 1960-61*, GOVERNMENT OF INDIA (1961).

⁹¹ INDIA CONST. art. 300A. Religious minorities are the only denomination guaranteed the fundamental right “to own and acquire movable and immovable property.” See INDIA CONST. art. 26(c).

⁹² INDIA CONST. art. 300A.

⁹³ PESA, § 4(i)

⁹⁴ PESA, § 4(i).

consultation, in absence of a clear provision in PESA, procedural clarity or consultation thresholds cannot be defined by the courts too.⁹⁵

C. DEPRIVATION OF TRIBAL POPULATION'S LAND RIGHTS VIA RAMPANT LAND ACQUISITIONS

In 2017, the Centre for Policy and Research conducted a comprehensive country-wide study of land acquisition disputes since India's independence⁹⁶ titled '*CPR Land Rights Initiative report on Land Acquisition in India: A Review of Supreme Court cases from 1950-2016*' ("**the Report**"). One of the key findings of the report was that the political and social disputes surrounding land acquisition arise from the inherently coercive nature of the process, leading to a significant power imbalance between the state and those losing their land. Much of this imbalance can be attributed to the Land Acquisition Act, 1894,⁹⁷ which created unequal conditions, exacerbated by executive disregard for legal norms.⁹⁸ Consequently, this situation resulted in profound inequity for the land losers.

The report also concluded that efforts to reform the land acquisition process under the Land Acquisition, Rehabilitation and Resettlement Act, 2013 ("**LARR Act**") must be supported by the government to rectify these disparities.⁹⁹ The report acknowledges that specific provisions of the LARR Act represent positive steps towards addressing the power asymmetry inherent in the Land Acquisition Act, 1894. These provisions empower both title-holders and those losing their livelihood to claim compensation and rehabilitation, adjust compensation rates to reflect current market realities, and introduce consent and social impact assessments.¹⁰⁰

⁹⁵ Such acquisitions are considered policy decisions in which, the Indian Supreme Court has made clear, the courts "will not interfere". See *Narmada Bachao Andolan v. Union of India*, (2000) 10 SCC 664. See also *R.K. Garg v. Union of India*, (1981) 4 SCC 675 at 413.

⁹⁶ Namrata Wahi, et al., *Land Acquisition in India: A Review of Supreme Court Cases from 1950 to 2016*, CENTRE FOR POLICY RESEARCH (2017) ("**The Report**").

⁹⁷ Land Acquisition Act, 1894, 51 Vict. (Eng.).

⁹⁸ The Report, *supra* note 96, at 29.

⁹⁹ *Id.*, at 9.

¹⁰⁰ *Id.*, at 15.

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Another finding was that by empowering previously marginalised land losers to seek redress under the LARR Act, the legislation can prevent extrajudicial conflicts, which often impede legitimate development projects. Therefore, it is crucial for the government to comply with, rather than undermine, the LARR Act to prevent such conflicts and promote sustainable development.¹⁰¹ In addition to legal reforms, administrative and bureaucratic reforms are essential to complement and effectively implement the LARR Act. The report emphasizes that legal changes alone are not sufficient to ensure fairness and efficiency in land acquisition.¹⁰² Without administrative and bureaucratic improvements, the objectives of the LARR Act will not be fully achieved, and existing inequities and inefficiencies will persist.

A similar legal deprivation can also be seen in the case of forest access for the tribal communities. Historical records show that non-tribal landowners consistently displaced tribal populations deeper into forested and hilly regions.¹⁰³ As a result, many tribal landholders became

unrecorded tenants or labourers in less fertile uplands, or bonded or semi-bonded workers in more fertile lowlands or forested areas. The British administration prioritized timber and other forest-related revenues, leading to laws designed to expel local residents.¹⁰⁴ Land settlement initiatives were introduced, granting transferable land titles to individual males upon payment. This shift meant that the state and courts mediated land relationships, effectively erasing the community's legal identity.¹⁰⁵

¹⁰¹ *Id.*, at 16.

¹⁰² *Id.*, at 22.

¹⁰³ Ramachandra Guha, *Forestry in British and Post-British India: An Historical Analysis*, 18 EPW 1882 (1983), at 1887 (“**Guha**”).

¹⁰⁴ *Id.* at 1883-1884.

¹⁰⁵ Satyakam Joshi, *Tribes, Land and Forests: Emerging Legal Implications with reference to PESA and FRA*, NATIONAL SEMINAR ON “GOVERNANCE, RESOURCES AND LIVELIHOODS OF ADIVASIS IN INDIA: IMPLEMENTATION OF PESA AND FRA”, (2018) *available at* http://nirdpr.org.in/nird_docs/srsc/srsc230217-22.pdf (“**Joshi**”).

The government enacted the Indian Forest Act, 1927,¹⁰⁶ allowing for the declaration of any government-owned forest or wasteland as a reserved area through official notification. However, due to incomplete rights settlement, large areas remained unsurveyed. Most tribal cultivators, unaware of administrative complexities, lacked official land titles. Forest areas were categorized as reserved, protected, or unclassified.¹⁰⁷ The Wildlife Protection Act of 1972 facilitated the creation of protected areas and wildlife habitats, leading to Adivasis losing access to lands and livelihoods dependent on forests. Unfortunately, rights settlements were incomplete, rendering all Adivasis as ‘encroachers’ when they cultivated lands they had worked for generations.¹⁰⁸

The Forest Conservation Act recognised the traditional rights of tribal people on forest land yet these rights were not adequately protected.¹⁰⁹ The forest department continued to view Adivasis as encroachers and destroyed their crops. Additionally, the department-initiated plantations on tribal lands to facilitate eviction strategies. Presently, forests remain reserved as resources, under the control of the Forest Department (“FD”).¹¹⁰

Ramachandra Guha argued that before 1947, forests served British imperial interests, shifting to the needs of the mercantile and industrial bourgeoisie post-independence. India had the opportunity to rectify this, yet the 1952 policy only adopted the phrase “*rights and concessions*.”¹¹¹ Forests were narrowly viewed as a source of timber, disregarding their complex ecological roles. The colonial government converted land without individual titles into state property, turning forest dwellers into ‘*encroachers*’. This trend continued post-independence. The Forest Conservation Act of 1980 (“FCA”) emerged as a crisis response under Prime Minister Indira Gandhi in the 1970s.

¹⁰⁶ See Indian Forest Act, 1927, 17 Geo. 5 (Eng.).

¹⁰⁷ Joshi, *supra* note 105, at 4.

¹⁰⁸ *Id.* at 5.

¹⁰⁹ *Id.* at 2.

¹¹⁰ The Forest Conservation Act, 1980, No. 69 of 1980, Acts of Parliament, §2.

¹¹¹ Ramachandra Guha, *Forestry in British and Post-British India: An Historical Analysis*, 18 EPW 1882 (1983).

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Remote sensing data highlighted significant forest cover decline (about one million hectares annually over a decade), prompting the Act to prevent forestland use for roads, dams, and buildings.¹¹²

The central government assumed sole authority in granting such permissions, neglecting small yet vital activities like school construction, electric poles, or bridges, which led to grievances. Uttarakhand, birthplace of the Chipko movement, witnessed the Jangal Kato (forest felling) Andolan in the 1980s against the Act. The FCA, a two-page document, reinforced the 1927 Act, granting the Minister decision-making power over forest lands. Tribal individuals, rooted in forests for ages, were viewed as encroachers under the FCA, sparking eviction fears.¹¹³

Tribal communities, NGOs, and radical activists protested against the Act, criticising its intention to deny customary resource rights, leading to forest degradation. Nationwide demonstrations ensued, compelling the government to address demands. The forest policy underwent a transformation in 1988, recognising the role of village communities in forest preservation and management, and paving the way for Joint Forest Management (“**JFM**”). JFM involved transferring certain rights to village communities for natural resource utilization.¹¹⁴ However, the absence of defined rights holders and unclear rights and sanctions impeded the establishment of social institutions. The top-down approach and limited people’s participation in planning contributed to JFM’s failure. The failure became evident in 2002, when the Inspector General of Forests directed state authorities to prepare eviction programs due to encroachment concerns, resulting in mass evictions of Adivasis.¹¹⁵

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 (“**FRA**”) marked a significant milestone in the

¹¹² Joshi, *supra* note 105 at 5.

¹¹³ RAMACHANDRA GUHA, *THE UNQUIET WOODS: ECOLOGICAL CHANGES AND PEASANT RESISTANCE IN THE HIMALAYA* (University of California Press, 1st ed., 2000).

¹¹⁴ Madhu Sarin, *Who Is Gaining? Who Is Losing? Gender and Equity Concerns in Joint Forest Management*, NATIONAL SUPPORT GROUP FOR JFM, SOCIETY FOR WASTELAND DEVELOPMENT (1996).

¹¹⁵ Joshi, *supra* note 105, at 10.

struggle of Adivasis and forest dwellers. The Act aimed to rectify historical injustices, granting forest communities a primary role in forest management. The Act's statement of object and reason attributed the delay in recognising forest rights to colonial rule's economic interests, persisting post-independence in the state's enthusiasm to protect natural resources.¹¹⁶ Tribal people's limited understanding of regulatory frameworks hindered their rightful claims, leading to insecurity and fear of eviction.

The FRA sought to vest forest rights and occupation with forest-dwelling communities integral to forest ecosystem survival, emphasising upon unrecorded rights. Court judgements favouring Adivasi rights often align with broader rights hierarchies, upholding Adivasi rights when deemed consistent with the “*greater common good*” or “*sustainable development*.” However, when these rights conflict with development projects, limitations are imposed.¹¹⁷

D. THE POTENTIAL CONSEQUENCES OF CLIMATE CHANGE ON THE SOCIOECONOMIC CONDITIONS OF TRIBES

“*Climate change affects us all, but it does not affect us all equally. The poorest and most vulnerable – those who have done the least to contribute to global warming – are bearing the brunt of the impact today.*”¹¹⁸ These words by the erstwhile United Nations Secretary General Ban Ki-moon, ring especially true when we look at how vulnerable tribes are in the face of climate change. If we are to define climate change, the most detailed definition to it has been provided by the IPCC, in its report, where climate change is defined as:

“A change in the state of the climate that can be identified (e.g., by using statistical tests) by changes in the mean and/or the variability of its properties and that persists for an extended period, typically decades or longer. Climate change may be due to natural internal

¹¹⁶ The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, No. 2 of 2007, Acts of Parliament, 2006, Statement of Object.

¹¹⁷ See T.N. Godavarman Thirumulkpad v. Union of India & Ors., (1997) 2 SCC 267 (India); Narmada Bachao Andolan v. Union of India, [2000] 10 S.C.C. 664 (India).

¹¹⁸ Ban Ki Moon, *Address to the High-Level Segment of the UN Climate Change Conference at Bali*, UNITED NATIONS (2007) available at <https://www.un.org/sg/en/content/sg/speeches/2007-12-12/address-high-level-segment-un-climate-change-conference>.

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processes or external forcings such as modulations of the solar cycles, volcanic eruptions and persistent anthropogenic changes in the composition of the atmosphere or in land use.”¹¹⁹

The IPCC is an intergovernmental panel established in 1988 by the World Meteorological Organization (“**WMO**”) and the United Nations Environment Programme (“**UNEP**”).¹²⁰ Scientists from around the world assess climate change research papers to produce a comprehensive report used by policymakers to develop strategies against climate change.¹²¹ The previous assessment report in 2014 provided the scientific foundation for the Paris Agreement in December 2015, and was adopted by 200 states at COP21.¹²² The three working group reports of the fifth assessment cycle presented various climate impact projections based on different emission scenarios.¹²³ Each scenario indicated a global mean temperature increase exceeding 1.5 degrees Celsius by 2100 compared to pre-industrial levels.¹²⁴ Consequently, many nations, including India, are committed to reducing carbon emissions and achieving carbon neutrality by 2030.¹²⁵

¹¹⁹ Glossary, *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*, CAMBRIDGE UNIVERSITY PRESS, 541-562 (2018).

¹²⁰ About the IPCC, Intergovernmental Panel on Climate Change, available at <https://www.ipcc.ch/about/>.

¹²¹ *Id.* For further clarity on the collection of data by the IPCC and the publication of reports, please refer to https://www.ipcc.ch/site/assets/uploads/2024/04/IPCCFactSheet_WhatIsIPCC.pdf vii sit.

¹²² What is the Paris Agreement? *The Paris Agreement*, UNFCCC Secretariat available at <https://unfccc.int/process-and-meetings/the-paris-agreement>.

¹²³ Intergovernmental Panel on Climate Change, *Climate Change 2014 Synthesis Report - Summary for Policymakers* (2014) available at https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf at 2-3., IPCC.

¹²⁴ *Id.* at 4-6.

¹²⁵ Ishani Kumar Singh, *IPCC Climate Change Report 2022 and its Implications for India*, WCS-INDIA (June 29, 2022) <https://india.wcs.org/Newsroom/Blog/ID/17734/IPCC-Climate-Change-Report-2022-and-its-Implications-for-India>.

Millions of indigenous individuals worldwide manage their forests and agriculture, which contributes sustainably to the capture and removal of greenhouse gases (“**GHGs**”) from the global atmosphere. However, in many regions, tribal and indigenous populations face challenges in protecting their natural resources and ecological wealth from deforestation and destructive activities such as mining for minerals, energy, oil, and gas¹²⁶. Indigenous communities advocate for sustainable production and consumption systems¹²⁷ in various local, regional, and international forums, highlighting the importance of these efforts. Of the 68.5 million individuals globally displaced by force, an average of 21.5 million have been displaced each year since 2008 due to climate-related factors.¹²⁸ In 2017 alone, 18.8 million people across 135 countries¹²⁹ experienced the impacts of storms, flooding, and tropical events.¹³⁰

While climate change affects everyone, vulnerable communities face significant challenges due to socio-economic factors such as poverty and limited access to natural resources. Indigenous and tribal communities, representing 15% of the world's poorest populations and safeguarding 80% of the planet's biodiversity, are among the first to encounter the direct consequences of climate change.

¹²⁶ *On the impoverishment of indigenous peoples in UN: State of the World's Indigenous Peoples*, UNITED NATIONS (2019), <https://www.un.org/development/desa/indigenouspeoples/publications/state-of-the-worlds-indigenous-peoples.html>.

¹²⁷ Tauli-Corpus and Lynge, *Indigenous Women, Climate Change Impacts, and Collective Action*, 29 HYPATIA 601 (2014).

¹²⁸ *UNHCR Figures at a Glance Global Trends: Forced Displacement in 2017*, UNHCR (2018) <http://www.unhcr.org/en-us/statistics/unhcrstats/5b27be547/unhcr-global-trends-2017>; *See also Global Report on Internal Displacement 2016*, INTERNAL DISPLACEMENT MONITORING CENTRE (2016), <http://www.internal-displacement.org/globalreport2016/>.

¹²⁹ *Global Report on Internal Displacement 2018*, INTERNAL DISPLACEMENT MONITORING CENTRE (2018) http://internal-displacement.org/sites/default/files/publications/documents/IDMC-quarterly-update_2018-QU2.pdf.

¹³⁰ The *Global Report on Internal Displacement 2018* stated that weather-related hazards triggered the vast majority of the new displacements, with floods accounting for 8.6 million, and storms, mainly tropical cyclones, 7.5 million.

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Indigenous and tribal communities are among the most vulnerable populations for several reasons. Their heavy dependence on natural resources makes them particularly susceptible to changes in resource availability and quality. The World Bank predicts that 13 million people in East Asia and the Pacific will collapse into poverty by 2030 out of the 100 million people worldwide who will be forced further into poverty because of climate change.¹³¹ In India, indigenous peoples face additional challenges due to existing discrimination and their traditional lifestyles, which have led to their marginalisation as excluded communities.¹³²

WHY IS CLIMATE CHANGE A BIGGER CONCERN FOR INDIAN TRIBES?

Climate change impacts in India could add about 50 million more poor people than otherwise projected by 2040 because of falling wages, rising food prices and slower economic growth, warned the Overseas Development Institute (“**ODI**”) Report in 2021.¹³³ In 2022, the Sixth Assessment Report of the IPCC¹³⁴ discussed how despite minimal contribution to global warming over the past century, India is amongst countries that face the highest risk from climate change’s impact, ranging from heat waves to cyclones and urban and rural displacement.¹³⁵

¹³¹ *Climate-Informed Development Needed to Keep Climate Change from Pushing More than 100 Million People into Poverty by 2030*, THE WORLD BANK (2015) available at: <https://www.worldbank.org/en/news/feature/2015/11/08/rapid-climate-informed-development-needed-to-keep-climate-change-from-pushing-more-than-100-million-people-into-poverty-by-2030>.

¹³² *Id.* ¶ 7.

¹³³ Angela Picciariello, Sarah Colenbrander, and Rathin Roy, *The costs of climate change in India: a review of the climate-related risks facing India, and their economic and social costs*, OVERSEAS DEVELOPMENT INSTITUTE (June 8, 2021) <https://odi.org/en/publications/the-costs-of-climate-change-in-india-a-review-of-the-climate-related-risks-facing-india-and-their-economic-and-social-costs/> (“**ODI Report**”).

¹³⁴ IPCC Report, *supra* note 2.

¹³⁵ Nitin Kumar, *India faces the highest risk from climate change's impact, says IPCC*, BUSINESS STANDARD (Mar. 20, 2023) https://www.business-standard.com/article/current-affairs/india-at-forefront-of-climate-change-impact-indian-ipcc-authors-123032001046_1.html.

As per the IPCC's Sixth Assessment Report, Working Group II, there are discernible impacts of climate change that are attributed to human activities, which have intensified recently with the occurrence of new extreme natural events.¹³⁶ These events have resulted in significant losses to both ecosystems and human societies. The sixth assessment report details various impacts including diminished food and water security, effects on social and economic systems, and impaired functioning of critical infrastructure due to heatwaves, air pollution, among other factors. It also forecasts detrimental effects on climate-sensitive sectors like forestry, fisheries, agriculture, energy, and tourism, along with humanitarian challenges such as climate-induced migration.

India is recognised as a global hotspot in the IPCC report¹³⁷ and domestic assessments like the Climate Vulnerability Index due to its geographical and socio-economic vulnerabilities. The National Action Plan on Climate Change is India's primary climate strategy, comprising eight sub-plans, each overseen by a different ministry.¹³⁸ However, there is no single statutory framework or body exclusively addressing climate change.

Like many nations, despite efforts to combat climate change, India is unlikely to fully meet IPCC recommendations unless policies prioritise climate action over all other development goals. Nonetheless, India's vulnerability is evident not only in the IPCC report but also in regional studies within the country.

States such as Assam, Andhra Pradesh, Maharashtra, Karnataka, and Bihar are particularly susceptible to climate-related hazards such as floods, droughts, and cyclones.

In such dire foreshadowing for India, the concerns for the socioeconomic rights of tribes intensify. India is home to approximately 360 tribal groups or communities speaking over 100 languages and dialects. As per the 2011

¹³⁶ See *Introduction*, IPCC Report, *supra* note 2, at 126, ch. 1.1.1.

¹³⁷ IPCC Report, *supra* note 2, at 67.

¹³⁸ Prime Minister's Council on Climate Change, *National Action Plan on Climate Change*, GOVERNMENT OF INDIA (June 30, 2008) https://moef.gov.in/uploads/2018/04/NAP_E.pdf.

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census, the tribal population in the country was 1,210,193,422, constituting 8.6% of the total Indian population.¹³⁹ Regions across several states or provinces, including Andhra Pradesh, Chhattisgarh, Odisha, Jharkhand, Madhya Pradesh, Rajasthan, Uttarakhand, Himachal Pradesh, West Bengal, and the North-East, inhabited by tribal people (Scheduled Tribes or STs), are designated as ‘Scheduled Areas’. These tribal communities primarily reside in forested and mountainous regions, closely connected to nature, with most Adivasis depending on forests and forest resources for their livelihoods.¹⁴⁰

Amongst vulnerable tribal groups, there is a further classification done on the basis of gender, for the impacts of climate change even on indigenous populations will not be gender neutral.¹⁴¹ Climate-induced displacement leading to loss of identity and risks associated with living in slums or informal settlements affect indigenous and tribal women differently from men. The United Nations Human Settlements Program (“**UN-Habitat**”) has cautioned that women, especially those from impoverished backgrounds, are frequently excluded from climate change planning and discussions, heightening their risk of injury or death during natural disasters.¹⁴² Discriminatory policies and conservative practices contribute to segregating certain communities into high-risk areas, with indigenous and tribal populations often excluded from decision-making processes,

¹³⁹ As per the figures provided for in the Census figures for 2011.

¹⁴⁰ GS Bandhopadhyay, *Climate Change, Endangered Environment and Vulnerable Aboriginals of India – A Critical Study*, RESEARCH ASSOCIATION FOR INTERDISCIPLINARY STUDIES CONFERENCE (2019).

¹⁴¹ Indigenous and tribal women face greater vulnerability to social and economic threats from climate change compared to both non-indigenous communities and indigenous men. These threats encompass exposure to crime and violence, limited access to social services, inequality, and a disproportionate concentration in occupations or industries with insecure and hazardous working conditions, often resulting in violations of labour and human rights. See *Guaranteeing indigenous people's rights in Latin America: progress in the past decade and remaining challenges*, ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN (2014), https://repositorio.cepal.org/bitstream/handle/11362/37051/4/S1420782_en.pdf.

¹⁴² *UN-Habitat: Cities and climate change: global report on human settlements 2011*, GLOBAL REPORT ON HUMAN SETTLEMENTS (2011).

education, healthcare, and knowledge of assistance and relief services.¹⁴³ These factors significantly increase the vulnerability of indigenous women to even minor shocks or disruptions.

Tribal women play vital roles in both traditional and non-traditional livelihoods, unpaid caregiving, and food security. However, due to growing economic insecurity, many are compelled to seek employment in the informal economy, engaging in activities such as agricultural labour in rural areas or domestic work in urban settings.¹⁴⁴ Despite juggling income generation, social responsibilities, and household chores, indigenous and tribal women often face violence from within and outside their communities, despite their significant contributions to their populations' financial, economic, and cultural well-being.¹⁴⁵

The effects of climate change on marginalised tribal women in India have been harsh and distressing. They face discrimination both as women and as indigenous people, impeding their access to resources and opportunities.¹⁴⁶ Historically, Adivasi/indigenous women have played key roles in preserving cultural identity and local resources sustainably. They have been integral as food producers and custodians of biodiversity, contributing to the maintenance of ecosystems and traditional practices in

¹⁴³ THE INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT (IFAD) 2002, <https://www.ifad.org/en/web/knowledge/publication/asset/39578687>.

¹⁴⁴ D. Vinding and E. Kampbel, *Indigenous women workers: with case studies from Bangladesh, Nepal and the Americas*, WORKING PAPER ILO (2012) https://www.ilo.org/wcmsp5/groups/public/---dgreports/---gender/documents/publication/wcms_173293.pdf.

¹⁴⁵ Martin Oelz and Rishabh Kumar Dhir, *Indigenous Peoples in the World of Work Snapshots from Asia*, ILO, (2015), https://www.ilo.org/wcmsp5/groups/public/dgreports/gender/documents/publication/wcms_389366.pdf.

¹⁴⁶ *Breaking the silence on violence against indigenous girls, adolescents and young women: a call to action based on an overview of existing evidence from Africa, Asia Pacific and Latin America*, UNITED NATIONS CHILDREN'S FUND (UNICEF), UNITED NATIONS ENTITY FOR GENDER EQUALITY AND THE EMPOWERMENT OF WOMEN (UN-WOMEN), UNITED NATIONS POPULATION FUND (UNFPA), ILO, OFFICE OF THE SPECIAL REPRESENTATIVE OF THE SECRETARY-GENERAL ON VIOLENCE AGAINST CHILDREN (OSRSG/VAC) (2013) https://www.unfpa.org/sites/default/files/resource-pdf/VAIWG_FINAL.pdf.

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medicine, pharmacology, botany, nutrition, and agriculture-based technologies crucial for biodiversity conservation.¹⁴⁷

Therefore, when it comes to an assessment of the impact that climate change may possibly have on India, the drastic upending of life that it will cause for indigenous Indian tribes cannot be ignored. With the issue of climate change quickly becoming a drastic concern, swift and effective steps taken at this juncture could somewhat lower the extent of predicted damage. A structured framework of curative and preventive action for ecological protection involving the corporations, the government and the citizens, can be one possible course of action to combat the intersectional adversarial impact of rampant climate change today, for a safer and better future. Considering the asymmetrical adverse impacts that climate change causes for indigenous women, it is also important to provide them with greater participation in policymaking to ensure an action plan that is not functioning in detachment from the ground realities that tribal groups face.

THE STATE'S RESPONSIBILITY TOWARDS TRIBES IN LIGHT OF THE CLIMATE CRISIS AND POSSIBLE REMEDIES

A. THE EXISTING CONSTITUTIONAL FRAMEWORK ON ENVIRONMENTAL RIGHTS IN INDIA

Article 48A of the Constitution states, “*The State shall strive to protect and improve the environment and safeguard the forests and wildlife of the country.*”¹⁴⁸ Similarly, Part IVA of the Constitution, introduced by the Constitution (Forty-Second Amendment) Act of 1976, outlines the Fundamental Duties of every Indian citizen. Article 51A(g) of this part emphasizes the importance of protecting the environment and forests.¹⁴⁹ Prior to 1976, forestry was within the state List, making it the responsibility of state governments to conserve and develop. The Government of India lacked statutory authority to intervene due to its classification as a state subject.

¹⁴⁷ INTERNATIONAL INDIGENOUS WOMEN'S FORUM DECLARATION, (2005) http://www.mdgfund.org/sites/default/files/FIMI%20project%20docs_0.pdf.

¹⁴⁸ INDIA CONST. art. 48.

¹⁴⁹ INDIA CONST. art. 51A, cl (g).

However, in 1976, the Central Government issued guidelines requiring states to consult the Government of India before diverting more than 10 hectares of forest land for non-forest purposes. Despite these guidelines, which were non-binding, many states disregarded them, resulting in continued diversion of forest lands at similar rates as before. Thereafter, by the 42nd Constitutional Amendment Act, 1976, the subject of Forests was moved from the State List to the Concurrent List.¹⁵⁰ Since the subject was placed under List III, both the Centre and the states could legislate on it, however, in case of a clash between the laws, the central law would have prevailed.¹⁵¹ At the central level, the Ministry of Environment, Forests and Climate Change (**MoEFCC**)¹⁵² is responsible for policy matters related to these subjects. Meanwhile, forest departments under the control of state governments implement national policies. The execution of environmental laws sometimes disrupts tribal settlements in India, leading to unexpected issues.

In India, environmental law and environmental rights have often been viewed solely from the individualistic perspective and not from a group rights perspective.

Group rights under the Constitution of India are mostly understood as conflict resolution mechanisms, and as useful tools in mitigating clashes between identity groups mostly defined along ethnic lines, which have been adopted by many post-conflict and ethnically divided societies.¹⁵³ Essentially, group rights are possessed by a group together instead of being available to each member severally. One of the best examples of group

¹⁵⁰ INDIA CONST. sch VII, List III, Entry 17A, as amended by the Constitution (Forty-second Amendment) Act, 1976.

¹⁵¹ INDIA CONST. art. 254.

¹⁵² The Ministry of Environment, Forest and Climate Change (MoEFCC) is the nodal agency for planning, promoting, coordinating and overseeing the implementation of environment and forest related policies and programmes in the central administrative structure of the Government of India. *See also* INDIA CONST. art. 48A.

¹⁵³ John McGarry, Brendan O'Leary, and Richard Simeon, *Integration or Accommodation? The Enduring Debate in Conflict Regulation* in SUJIT CHOUDHRY (ED.), CONSTITUTIONAL DESIGN FOR DIVIDED SOCIETIES: INTEGRATION OR ACCOMMODATION? 41-48 (Oxford University Press, 2008). *See also* Louise Tillin, *Asymmetrical Federalism* in SUJIT CHOUDHRY ET AL. (EDS.), THE OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 574 (Oxford University Press, 2016).

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rights under the Constitution is that of rights of cultural and linguistic minorities as enumerated in articles 29¹⁵⁴ and 30¹⁵⁵ of the Indian Constitution.

B. THE JUDICIAL CREATION OF ENVIRONMENTAL GROUP RIGHTS

Progressive jurisprudence has been instrumental in propounding the right to clean environment both as a fundamental right available to an individual as well as a group right available to the entire citizenry whose right is being violated. For instance, in the case of *Vellore Citizens Welfare Forum v. Union of India*,¹⁵⁶ the Court recognised the threat and damage posed by tanneries in the country and as a result it imposed a fine on the tanneries for their actions.

Another similar case is that of *Indian Council for Enviro-Legal Action v. Union of India*¹⁵⁷ where the court was concerned with a matter relating to pollution and long-lasting damage to the sub-soil and water sources. In this case too, the court not only ordered the closure of these factories but also ordered them to pay fines for reversal of ecology in the area.

Moving forward, another landmark case is that of *Fatehsang Gimba Vasava v. State of Gujarat*¹⁵⁸ where the petition had been brought forward by the poor adivasis in the State of Gujarat as they were being deprived of the forest rights conferred upon them by the State Government. The Court in this case observed that the sole purpose of granting certain special privileges to the residents of forest villages is to give them a source of livelihood and directed the State officials to restore the rights of the Adivasis and allow them, with the bamboo, to earn their livelihood.

A very significant case to discuss here is the *Niyamgiri Cave Case*, that is, the case of *Orissa Mining Corporation Ltd v. Ministry of Environment & Forest*,¹⁵⁹

¹⁵⁴ INDIA CONST. art. 29.

¹⁵⁵ INDIA CONST. art. 30.

¹⁵⁶ *Vellore Citizens Welfare Forum v. Union of India*, (1996) 5 SCC 647.

¹⁵⁷ *Indian Council for Enviro-Legal Action v. Union of India*, (1996) 3 SCC 212.

¹⁵⁸ *Fatesang Gimba Vasava v. State of Gujarat*, AIR 1987 Guj 9 (India).

¹⁵⁹ *Orissa Mining Corpn. Ltd. v. Ministry of Environment & Forests*, (2013) 6 SCC 476.

where Dongoria Kondhs, a PVTG from Odisha, won a historic legal battle against Vedanta's claim for bauxite mining on the Niyamgiri Hill, which was a religious and divine symbol for the Dongoria Kondhs. In this particular case, to enforce the need for free and informed consent of the tribes, the Apex Court ordered for a referendum to be held for the approval of the mining among the members of the PVTG. Since all votes in the referendum were against mining, the court set aside Vedanta's claim to hold that certain areas were to be kept beyond the reach of exploitation.

There are also several other cases like the *Taj Trapezium Case*,¹⁶⁰ the *Kanpur Tanneries Case*,¹⁶¹ the *Calcutta Tanneries Case*,¹⁶² the *Oleum Gas Leak case*¹⁶³ and the *Sterlite Industries case*,¹⁶⁴ almost all of which, like the above-mentioned cases, do not just look at the right to a clean environment from an individualistic perspective, but from a group's perspective.

Most recently, on April 5, 2024, a three-judge bench led by the Chief Justice of India, in the case of *MK Ranjitsinh and Ors. v. Union of India*,¹⁶⁵ held that right against the adverse impact of climate change is entwined and embedded in the rights to life and equality guaranteed by the Indian Constitution. The Court once again reiterated that the State cannot shirk its obligations under Articles 48A and 51A(g) as these provisions may be non-justiciable but they highlight the importance of the environment and natural world, which are parts of the right to life under Article 21.

Be it the pollution of rivers, the pollution of air, the damage to soil and subsequent damage to agriculture or the point of indigenous people's rights, the rulings given by the Apex Court show how it has taken a group rights stance in these cases, recognising that each of these damages is not just violating the right of one person at one time but rather that of a larger group that is relying on these natural resources for its livelihood and survival.

¹⁶⁰ M. C. Mehta v. Union of India, (1997) 2 SCC 353.

¹⁶¹ M. C. Mehta v. Union of India, (1987) 4 SCC 463.

¹⁶² M. C. Mehta v. Union of India, (1997) 2 SCC 411.

¹⁶³ M. C. Mehta v. Union of India, (1997) 1 SCC 395.

¹⁶⁴ Sterlite Industries (India) Ltd. v. Union of India, (2013) 4 SCC 575.

¹⁶⁵ M.K. Ranjitsinh v. Union of India, Writ Petition (Civil) No. 838/2019.

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The aforementioned cases have been included in this section, to illustrate how despite the traditional interpretation of right to a clean and healthy environment as an individual right, the Supreme Court has on occasion, has enforced the same as a group right for people or communities living in a specific city/area or state. This judicial creation of a group right can, thereby, be read along with the Supreme Court's approach in *M.K. Ranjitsinh and Ors. v. Union of India* to hold that just as vulnerable parts of the population are entitled to a group right to clean and healthy environment, they are also contenders for a fundamental right to protection against climate change and its adverse impacts as a group.

C. POSSIBLE SOLUTIONS AND AVAILABLE CONSTITUTIONAL REMEDIES FOR TRIBAL COMMUNITIES

It is not only *via* relying on Court precedents that we can solve the problems that are lying before the indigenous communities in India. The solutions and remedies possible for tribal communities in India cannot just be seen in the route of litigation before the courts. Litigation too is a difficult to attain remedy for the tribal people for not all of them have access to the same level of education, resources and financial means to successfully present themselves as litigants before a court of law against the state or big corporations.

Both the government and forest dwellers, including tribes, share a common goal of preserving forests and natural resources. However, lawmakers often develop laws without adequately considering the welfare of tribes. When these laws are enforced, unexpected and complex issues arise. There are suggestions aimed at ensuring the preservation of tribal rights when framing environmental conservation laws.

First, a greater role needs to be constitutionally accorded to the tribal communities in their own administration via providing them with a larger say in the decision-making by the local governments. For this particular purpose adequate amendments can be made to Part IX, PESA, and the FRA to make the JFM system more sustainable for the tribal people while making it a more holistic process instead of a top-to-bottom model. It is

only by including tribal people in the law-making process and by integrating the JFM model in the tribal management, that we can be cognisant of the day-to-day challenges and the ground realities of tribal communities' lives.

Second, measures like renewable energy training, education on clean energy resources, introduction of gender sensitive policies, greater representation in decision-making roles, or capacity building initiatives for tribal women that focus on gender equality and women's empowerment are crucial. These would enable women in tribal communities to effectively address the impacts of climate change, as gender stereotypes continue to contribute to heightened challenges. Specifically for rural and tribal women, targeted policies are needed to support their efforts in responding to climate change. Without these policies, actions, and approaches, progress in social and economic development would be limited. Tribal women play a significant role in fostering positive environmental change and should be recognised as environmental champions. Thus, sufficient measures should also be taken to raise awareness about climate change amongst the tribal women.

Third, the NAPCC by the Government of India should be revamped so as to make the plan more cognisant of the needs of the multi-dimensionally poor and vulnerable groups of population in India, specifically tribal groups and PVTGs.

The current NAPCC and the Mission LiFE¹⁶⁶ constructed by NITI Aayog are more citizen-oriented than State-oriented in the sense that they expect the citizens and the corporations to act first to curb pollution and environmental damage at their own level before the State would come into the picture.¹⁶⁷ In the face of the grave impending damage that climate

¹⁶⁶ NITI Aayog, Mission LiFE: Lifestyle for Environment, Ministry of Environment, Forests and Climate Change (2022) available at https://www.niti.gov.in/sites/default/files/2022-11/Mission_LiFE_Brochure.pdf,

¹⁶⁷ *Id.*, at 5. Mission LiFE focuses on the ecological conservation and changes that individuals and communities can bring via alteration in resource consumption and utilization patterns.

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change would inevitably cause in India, unless immediate action is taken, the State cannot wait for other actors to curb the damage while it waits.

Especially for a welfare state like India, which has constitutionally clarified itself to be obligated to endeavour to commit to welfare of the citizens and whose courts have often accorded a somewhat paternalistic role to the State towards its citizens.

CONCLUSION

In the sections above, we have looked at how tribal populations have been perceived, defined, represented and administered in India, from the pre-constitutional era to the present day. Tribal regions have, starting from the colonial era, been treated as special areas requiring dedicated administration. However, the forced assimilation by encouraging non-tribal immigration into the tribal areas opened doors for fresh exploitation of tribal resources, which led to a continuing conundrum that remains unsolved, even after the passage of the FRA.

The aim of this paper has been to look into the possible constitutional resources that the tribal communities can exercise against an impending climate crisis. These remedies are sought in a bid to secure state assistance for tribal groups in preventing the violation of their socio-economic rights.

To establish the same, we have looked at the representation that the tribal groups have had in the constitutional and legislative decision-making, to establish how the current provisions and forest laws have failed to adequately involve them in the administration and industrial utilisation of their own habitats.

Tribal groups in India are especially vulnerable to climate crisis and ecological imbalances because nature and natural resources are not merely means of sustenance but also are an integral component of their identities—social, cultural and religious. The climate change crisis will affect the weakest sections of the society, first and the hardest. The impact that climate change and global warming will have on marginalised or

vulnerable groups will also not be uniform. Intersectional groups among the vulnerable groups, like women and children, will comparatively suffer more in such a case. In such a scenario, the constitutionally entrenched welfare state cannot be allowed to act as a mere spectator while vulnerable citizens face the consequences of global warming.

The rights to a clean environment, to a healthy natural world and to protection against the adverse impacts of climate change are all intertwined and embedded in the right to life of every citizen of the nation. To apply these entwined rights effectively and on a large scale, it is imperative that the state and the judiciary shift to a transformative re-reading of them—from a group rights perspective. Further, proactive steps like capacity building, promotion of clean energy, inclusion in decision-making forums, targeted research and data collection are the need of the hour, to not only protect the tribal groups against climate change damage, but also to ensure protection of their identities, socio-economic rights, and continued sustenance.

**DEMOCRACY ON TRIAL: A CASE OF TEMPORARY
DISQUALIFICATION OF PEOPLE'S REPRESENTATIVES
UNDER SECTION 8B OF THE REPRESENTATION OF THE
PEOPLE ACT**

GARGI BINDAL¹

A recent report by the Association of Democratic Reforms, dated 6th June, 2024, reveals that 46% of the newly elected members of the Lok Sabha have criminal cases registered against them, with 27 already convicted. This report underscores the recommendation made by the 244th Law Commission of India advocating for the enactment of Section 8B of the Representation of the People Act, 1951. The proposed section suggests the disqualification of such representatives from contesting elections once the charges are framed for serious offences. The proposed amendment was never enacted, but it highlights society's deep concern about the growing trend of criminalisation in politics, which threatens constitutional democracy.

The Supreme Court, in Public Interest Foundation v. Union of India, held that a person cannot be disqualified from membership in a legislative body merely on the framing of criminal charges, and hence missed an opportunity to enable much needed reforms. This issue resonates with the recent case of Ashvini Kumar Upadhyay v. Union of India, which raises the question of whether candidates facing serious criminal charges should be barred from contesting elections.

In light of these developments, this paper evaluates the constitutionality and effectiveness of Section 8B. Part I examines the current legislative and judicial landscape for electoral disqualifications. Part II dissects the substance and intent of Section 8B while also addressing the arguments made against the temporary disqualification of candidates. It further addresses safeguards under Section 8B. It underscores the ineffectiveness of judicial intervention in curbing the cancer of the criminalisation of politics. Part III

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undertakes a comparative analysis of political decriminalisation with other countries, followed by an exploration of the practical implications, concluding with recommendations for enhancing electoral and legislative integrity.

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INTRODUCTION

A recent report released in June 2024 by the Association for Democratic Reforms reveals that, of the 543 newly elected Lok Sabha members in 2024, i.e., 251 members (46%) have pending criminal proceedings against them, and 27 of them have been convicted.² Among these 251 members, i.e., 170 members (31%) are accused of serious crimes such as rape, murder, terrorism, attempted murder, kidnapping, and crimes against women.³ This marks the highest percentage of elected officials ever charged with crimes in the Lok Sabha's history. The percentage in previous Lok Sabhas was 34% in 2014 (20% had serious criminal cases) and

² ASSOCIATION FOR DEMOCRATIC REFORMS, List of constituencies (District Wise): Lok Sabha 2024 Election Candidate Information (myneta.info).

³ *Id.* at 6.

escalated to 44% in 2019 (30% had serious criminal cases).⁴ This shows a rampant increase in the criminalisation of politics in the largest democracy of the world (**Fig. A**). This unrestrained amplification of criminal elements in governance continues despite various rulings of the Supreme Court, which mandated the disclosure of politicians' criminal antecedents.⁵

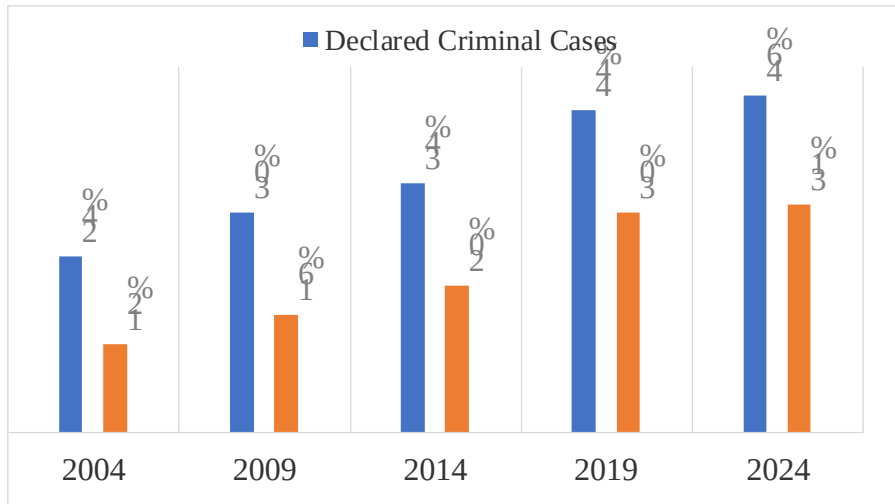


FIG. A: REPORT OF ASSOCIATION FOR DEMOCRATIC REFORMS

From the Economic Times to the New York Times, headlines such as “Ridding politics of crime, criminals”,⁶ “Vote against jail”,⁷ and “Electoral

⁴ ASSOCIATION FOR DEMOCRATIC REFORMS, MyNeta, Candidate Affidavits for Elections in India, Criminal, Financial, Educational, Income, Profession Details of candidates MPs & MLAs, Information from ADR and National Election Watch <https://myneta.info>.

⁵ ELECTION COMMISSION OF INDIA, GOV'T OF INDIA, UPDATED GUIDELINES ON PUBLICITY OF CRIMINAL ANTECEDENTS BY POLITICAL PARTIES AND CANDIDATES, IN LIGHT OF THE HON'BLE SUPREME COURT'S JUDGEMENT DATED 10TH AUGUST, 2021 (2022), <https://old.eci.gov.in/files/file/13949-updated-guidelines-on-publicity-of-criminal-antecedents-by-political-parties-and-candidates-in-light-of-the-honble-supreme-courts-judgment-dated-10th-august-2021-reg/>.

⁶ The ET Bureau, *Ridding Politics of Crime, Criminals*, THE ECONOMIC TIMES (Aug. 11, 2021), <https://economictimes.indiatimes.com/opinion/et-editorial/ridding-politics-of-crime-criminals/articleshow/85250511.cms>.

⁷ Rifat Fareed and Arbab Ali, ‘Vote against jail’: How two Modi critics won India election from prison, ALJAZEERA (Jun. 14, 2024), <https://www.aljazeera.com/news/2024/6/14/vote-against-jail-how-two-modi-critics-won-india-election-from-prison>.

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Autocracy”⁸ have become commonplace in India. Stating the number of politicians with criminal antecedents has become a commonplace remark when discussing modern India; it flows as effortlessly as saying that the nation shares borders with Pakistan and Bangladesh.⁹

The criminalisation of politics through muscle power and coercive methods is not unfamiliar to India.¹⁰ The Constituent Assembly members had argued that a constitution's effectiveness ultimately depends on the integrity and actions of the people and political parties within it.¹¹ This was illustrated after the 1993 Mumbai bomb blast, wherein a thread of connection was revealed between the criminal gangs, politicians, police officers, and customs officials.¹² This attack shook the entire nation, prompting the establishment of a commission to investigate the issue of political criminalisation and the nexus between criminals, politicians, and bureaucrats in India.¹³

However, the trend of criminalisation in politics has evolved. In the past, politicians relied on criminal gangs, using their money and power to secure victories through vote rigging, intimidating candidates, inciting violence,

⁸ Soutik Biswas, *Electoral Autocracy: The downgrading of India's democracy*, BBC (Mar. 16, 2021), <https://www.bbc.com/news/world-asia-india-56393944>.

⁹ MILAN VAISHNAV, *THE MARKET FOR CRIMINALITY: MONEY, MUSCLES AND ELECTIONS IN INDIA* 29 (Yale University Press 2010).

¹⁰ Trilochan Sastry, *Towards Decriminalisation of Elections and Politics*, 49 EPW 1 (2014).

¹¹ Words of Dr. B.R. Ambedkar in the Constituent Assembly on 25.11.1949 and the sentiments echoed by Dr. Rajendra Prasad on 26.11.1949.

¹² PTI, *Criminalisation of politics felt in strongest form in 1993 Mumbai serial blasts: Supreme Court*, THE ECONOMIC TIMES (Sep. 25, 2018), <https://economictimes.indiatimes.com/news/politics-and-nation/criminalisation-of-politics-felt-in-strongest-form-in-1993-mumbai-serial-blasts-supreme-court/articleshow/65949574.cms>.

¹³ MINISTRY OF HOME AFFAIRS, GOV'T OF IND., VOHRA COMMITTEE REPORT ON CRIMINALISATION OF POLITICS, (1993), https://adrindia.org/sites/default/files/VOHRA%20COMMITTEE%20REPORT_0.pdf.

and booth capturing.¹⁴ In return for this support, politicians often protected the criminals from state machinery.¹⁵ In contemporary times, this trend has changed with many criminals entering the electoral fray and securing their place in the administrative set-up, thus becoming their custodians legally.¹⁶ Through this rampant process, criminals who are law-breakers are slowly turning into the lawmakers of the country.¹⁷ This trend is remarkably prevalent and is becoming a salient feature of our democracy. Legislative bodies are yet to take action despite the Election Commission¹⁸ and the Supreme Court urging Parliament to amend electoral laws to disqualify candidates facing serious criminal charges (as proposed in Section 8B of the Representation of the People Act, 1951).¹⁹

This paper critically analyses the effectiveness of judicial and legislative efforts taken to maintain probity in public life, arguing that these measures have been insufficient in Part I. It advocates for the implementation of stronger provisions, specifically the proposed Section 8B of the Representation of the People Act, 1951 (“**RPA**”), as a means to prevent individuals with criminal backgrounds from entering public office. The paper further explores the necessity and constitutionality of Section 8B, addressing and countering the concerns raised during legislative debates. It argues that Section 8B contains adequate safeguards and is essential for achieving the broader objective of cleansing the political landscape in Part II. Additionally, it draws comparisons with other countries and offers recommendations to achieve this goal in Part III.

¹⁴ VIKASA KUMARA JHA, *BIHAR, CRIMINALISATION OF POLITICS*, 71 (Srishti Prakashan, 1st ed., 1996).

¹⁵ SUSHEELA BHAN, *CRIMINALIZATION OF POLITICS*, 25 (Shipra Publications, 1995).

¹⁶ JOSE J. NEDUMPARA, *POLITICAL ECONOMY AND CLASS CONTRADICTIONS: A STUDY* (Anmol Publications, 2004); See Ramashankar, *Flying like A Phoenix*, THE TELEGRAPH (Nov. 11, 2010), <https://www.telegraphindia.com/bihar/flying-like-a-phoenix/cid/459775>.

¹⁷ K Prabhakaran v. P Jayarajan, (2005) 1 SCC 754, 780 ¶ 54.

¹⁸ DEVESH KAPUR & PRATAP BHANU MEHTA, *PUBLIC INSTITUTIONS IN INDIA: PERFORMANCE AND DESIGN* (Oxford University Press, 2005).

¹⁹ The Representation of People Act, 1951, § 8B, No. 43, Acts of Parliament, 1951 (India).

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**CONTEMPORARY LEGAL AND JUDICIAL LANDSCAPE FOR
DISQUALIFICATION LAW**

**A. LAW COMMISSION REPORTS AND PROPOSED ELECTORAL
REFORMS**

The Constitution outlines the specific grounds for disqualifying an individual from running for a legislative election, and permits additional grounds of disqualification to be added under other legislations.²⁰ The RPA outlines the various criteria for disqualification.²¹ The law does not prevent individuals with pending criminal cases from contesting elections. However, an individual sentenced to over two years is disqualified from contesting elections and holding a seat in legislative bodies.²² An individual convicted by a District Court cannot contest the election unless the higher Court passes an order for their acquittal; merely filing an appeal is insufficient after the judgment of *Lily Thomas v. Union of India*.²³ In this 2013 judgment, the Supreme Court ruled that a sitting MP or MLA convicted and sentenced for two years or more must vacate their seat immediately.²⁴ The judgment resulted in Lalu Prasad Yadav losing his Lok Sabha membership that same year.²⁵

Despite the existence of these legal safeguards, criminalisation of politics still prevails in the society. The persistence of criminalisation in politics can

²⁰ INDIA CONST. art. 84, art. 102, art. 173, art. 191.

²¹ *Id.*

²² The Representation of People Act, 1951, § 8, No. 43, Acts of Parliament, 1951 (India).

²³ *Lily Thomas v. Union of India*, (2000) 6 SCC 224.

²⁴ SUJIT CHOUDHRY, MADHAV KHOSLA, AND PRATAP BHANU MEHTA, OXFORD HANDBOOK OF THE INDIAN CONSTITUTION 270-289 (Oxford University Press, 2016); Prianka Rao, *The Representation of the People (Second Amendment and Validation) Bill, 2013*, PRS LEGISLATIVE RESEARCH BRIEF, (Aug. 25, 2024), <https://prsindia.org/billtrack/the-representation-of-the-people-second-amendment-and-validation-bill-2013>.

²⁵ Deepu Sebastian Edmond, *Lalu Prasad gets 5-year jail term in fodder scam case, loses Lok Sabha seat*, THE INDIAN EXPRESS (Oct. 4, 2013), <https://indianexpress.com/article/india/crime/lalu-prasad-gets-5year-jail-term-in-fodder-scam-case-loses-lok-sabha-seat/>.

be attributed to two primary factors. *First*, the slow pace of the judicial system contributes to this issue, as delayed court proceedings allow those facing serious charges to remain in office while their cases are pending. *Second*, the low conviction rate allows politicians in power to exploit the state machinery, manipulating law enforcement and judicial processes to protect their interests and evade accountability.²⁶ This combination of factors undermines the Rule of Law and encourages individuals to engage in criminal activities, knowing that immediate consequences are unlikely.

Therefore, to cleanse politics, the 244th Law Commission Report 2014 suggested electoral disqualifications.²⁷ The report deliberated on whether the disqualification of politicians from contesting elections should be based on convictions or when the Court is framing charges for serious crimes. The proposed Section 8B of RPA, 1951 suggests disqualification upon the framing of charges by a competent Court against a person for an offence that carries a minimum punishment of five years imprisonment. The person will be disqualified for six years from the date of framing the charge or until the charge is quashed or acquitted, whichever occurs earlier.²⁸ However, exceptions were proposed to this rule to prevent misuse. The exemptions are as follows:

Disqualification exemption period: the commission recommended that charges filed up to one year before scrutinising nominations should not result in disqualification. This measure would help reduce the likelihood of politically motivated cases being brought against individuals ahead of an upcoming election.²⁹

Expedited Trials: the commission suggested that the trial for charges brought against MPs and MLAs should be conducted daily and completed within a year.³⁰

²⁶ Maj. Gen. Anil Verma Retd., *Criminality in politics: A point of no return?*, TRIBUNE INDIA (Mar. 01, 2025), <https://www.tribuneindia.com/news/comment/criminality-in-politics-a-point-of-no-return/>.

²⁷ LAW COMMISSION OF INDIA, GOV'T OF IND., ELECTORAL DISQUALIFICATIONS, REPORT NO. 244 (2014), <http://www.lawcommissionofindia.nic.in/>.

²⁸ *Id.* at 52.

²⁹ *Id.* at 43.

³⁰ *Id.* at 46-47.

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Severity of Offences: Only criminal offences with a maximum punishment of five years or more are to be included in this provision.³¹

Additional Safeguards: In addition to Section 8B, Section 8C and amendments to Section 8, Section 125A, and Section 123 of the RPA were also proposed to safeguard the Section from misuse.³²

However, the proposed Section 8B never saw the light of the day as it was rejected by the Eighteenth Report on Electoral Reforms (Disqualification of Persons from contesting elections on framing of charges against them for certain offences).³³ The rationale given by the committee was, *first*, that there are high chances that false and malafide charges will be framed against the political opponents due to the influence on the prosecution by the political parties in power, and due to the failure of state machinery.³⁴ *Second*, that the Court can arbitrarily frame charges against the accused.³⁵ This would lead to the accused being deprived of his statutory right to contest an election which would benefit his opponents. These concerns of the Rajya Sabha are addressed in Part II. of the paper, where it is argued that they can be effectively mitigated with a robust approach.

B. JUDICIAL PERSPECTIVE ON THE CRIMINALISATION OF POLITICS

The Supreme Court, on various instances, has sought to curb the menace of criminalisation of politics by giving directions to the government and the Election Commission. Essentially, the orders of the Supreme Court to

³¹ *Id.* at 42-43.

³² *Id.* at 56-59.

³³ PARLIAMENTARY STANDING COMMITTEE, 18TH REPORT ON ELECTORAL REFORMS (DISQUALIFICATION OF PERSONS FROM CONTESTING ELECTIONS ON FRAMING OF CHARGES AGAINST THEM FOR CERTAIN OFFENCES) (2007) https://docslib.org/doc/9405179/electoral-reforms-disqualification-of-persons-from-contesting-elections-on-framing-of-charges-against-them-for-certain-offences#google_vignette.

³⁴ *Id.* at 21.

³⁵ *Id.* at 20.1.

clean Indian politics can be tabulated into three types: *first*, the decision to increase the accountability of individuals holding public office; *second*, the decision to bring transparency into the electoral process and emphasise the voters' right to know; and *third*, judgments to remove corruption from public offices. This section examines how these judgments, while generally sound, exhibit certain flaws. It reveals a discrepancy between the theoretical principles of the Constitution and their actual implementation, potentially creating tensions between the moral imperatives of governance and the realities of political pragmatism.

Public Interest Foundation v. Union of India

In 2018, the five Judge Bench of the Supreme Court in the case of *PIF v. UOI*, analysed Section 8B.³⁶ It held that the time has come for Parliament to enact legislation that prevents individuals facing serious criminal charges from entering the political arena.³⁷ It further stated that while it is essential to uphold the principle of presumption of innocence, it is equally crucial that those who engage in public life and participate in lawmaking are free from serious criminal allegations.³⁸ Voters demand systematic preservation of constitutionalism, and the country suffers when money and muscle power dominate.³⁹ The nation eagerly awaits such legislation, as society has a legitimate expectation of governance rooted in constitutional principles.⁴⁰ In the case of *Rambabu Singh Thakur v. Sunil Arora*, a two-judge bench upheld the judgment passed in *PIF v. UOI*.⁴¹ The Court missed an opportunity to proactively address the criminalisation of politics by not issuing explicit instructions or guidelines for enacting relevant legislation. The Court could have set a precedent to safeguard the integrity of elections. The Court overlooked the likelihood that such legislation would be against the interests of legislators, leading to legislative apathy. Consequently, the legal implication of this judgment is that no legislation has been enacted to prevent criminals from entering legislative bodies,

³⁶ *Public Interest Foundation v. Union of India*, (2019) 3 SCC 224.

³⁷ *Id.* at ¶ 107.

³⁸ *Id.* at ¶ 118.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Rambabu Singh Thakur v. Sunil Arora*, (2020) 3 SCC 733.

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despite the Supreme Court's strong stance against allowing criminals into these institutions.

Manoj Narula v. Union of India

At the same time in *Manoj Narula v. UOI*, the issue of whether people with criminal histories or those charged with serious offences should be appointed as ministers was being considered by a five-judge panel of the Supreme Court.⁴² The Supreme Court again used the argument of separation of power and acknowledged that the Court does not have the authority to comment on the designation of Ministers. It was decided that the Court was not permitted to interpret a disqualification not included in the statute. Thereby leaving the minister's appointment with a criminal past to the discretion of the Prime Minister. Nonetheless, it stated that it is always reasonable to anticipate that the Prime Minister will consider the criminal history of the Council of Ministers and decline the appointment of an individual with a criminal history, all while upholding the expectations outlined in the Constitution. This ruling had no effect on legislative or procedural amendments that would have addressed the issue of people with criminal histories holding ministerial positions. Because of the Prime Minister's discretion, the nomination of such individuals is still determined more by political factors than by stringent legislative requirements. As a result, the ruling exposes a gap between the principles of the Constitution and their practical implications.

Lily Thomas v. Union of India

The Supreme Court, in the judgment of *Lily Thomas v. UOI*, in which Section 8(4) of the RPA 1951 was held unconstitutional, advocated for accountability of people holding public offices.⁴³ Section 8(4) allowed convicted MPs and MLAs to continue in office until an appeal against such conviction is disposed of. This was held unconstitutional for two significant reasons. *First*, it is not within the competence of Parliament to

⁴² *Manoj Narula v. Union of India*, (2014) 9 SCC 1.

⁴³ *Lily Thomas v. Union of India*, (2013) 7 SCC 653.

stipulate distinct criteria for disqualifying prospective members and current members; *second*, the presence of criminals undermines the integrity of the public office. Although this judgment was a positive step, its impact was limited by prolonged judicial delays and a low conviction rate, which did not effectively prevent the entry of criminals into politics.

K. Prabhakaran v. P. Jayarajan

At the same time, in the judgment of *K. Prabhakaran v. P. Jayarajan*, the Court clarified Section 8(3) of RPA, 1951, laying forth the disqualification requirements.⁴⁴ It was noted that the object of Section 8(3) is to prohibit the criminalisation of politics. Laws shouldn't be made by people who break them. The goal of laws that disqualify people upon conviction for specific offences is to keep those with criminal records out of politics and government. Consequently, it was held that the goal of Section 8 was to advance electoral justice and freedom. However, its impact was limited due to challenges in enforcement. Additionally, the verdict fell short of strengthening the practical execution of the law and successfully discouraging the criminalisation of politics since it failed to address the issues of political corruption or propose new reforms.

Association for Democratic Reforms v. Union of India

In *ADR v. UOI*, the Supreme Court directed the Election Commission to call for information regarding criminal antecedents of the individual contesting the election on an affidavit.⁴⁵ Such information would pertain to whether the candidate has been convicted, acquitted, or discharged. It would also include the length of any sentence if found guilty, and whether, within the six months before the nomination was filed, the candidate was accused of any crimes that were still pending and for which a Court had issued a charge or taken cognisance. This step was taken to ensure voters' fundamental right to be informed about the backgrounds of candidates running for public office. The Court concluded that this right to know is a crucial component and the basis for the meaningful exercise of the freedom of speech and expression that all people are entitled to under

⁴⁴ *K. Prabhakaran v. P. Jayarajan*, (2005) 1 SCC 754, 780.

⁴⁵ *Union of India v. Association for Democratic Reforms*, (2002) 5 SCC 294.

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Article 19(1)(a) of the Constitution. Despite this ruling, the voters were unaffected by the candidates' criminal histories, as they felt that the criminality factor of candidates had no direct bearing on them.

Ashwini Upadhyay v. UOI

In September 2020, a writ petition in *Ashwini Upadhyay v. Union of India* was filed to disqualify individuals from contesting elections against whom charges have been framed for serious crimes. Alternatively, the petition requests that the Court order the ECI to modify the 1968 Symbols Order so that political parties are required to forbid such individuals if they wish to be recognised as a national or state party.⁴⁶ In 2023, the Union Government opposed the petition using a two-fold argument. *First*, a politician cannot be disqualified at the stage of framing charges because of the principle of innocence until proven guilty. *Second*, they argued that the meaning of “serious offence” is unclear as any prosecution agency would argue that charges framed against the accused are serious. The said petition is still pending before the Court.⁴⁷

Through its interpretation of fundamental rights and statutory provisions, the Supreme Court has taken several steps to ensure cleaner politics. It has created substantial barriers for criminal elements seeking to enter public office and has provided mechanisms to remove those already in power.

However, due to the complexities of Indian democracy and procedural loopholes, the criminalisation of politics continues to rise at an alarming rate. This ongoing trend highlights the need to strengthen disqualification criteria, not only at the stage of conviction but also when charges have been formally framed for serious offences.

⁴⁶ Ashwini Kumar Upadhyay v. Union of India, (2021) 20 SCC 599.

⁴⁷ Abraham Thomas, *Centre opposes plea in SC to debar candidates charged with 'serious' offences*, HINDUSTAN TIMES (Apr. 10, 2023), <https://www.hindustantimes.com/india-news/centre-opposes-petition-to-debar-candidates-with-framed-charges-from-elections-defining-serious-offences-a-challenge-says-asg-sanjay-jain-101681145552018.html>.

DISSECTING THE SUBSTANCE AND INTENT OF SECTION 8B

The primary question that needs to be considered is whether the disqualifications under Section 8 of RPA, 1951 are sufficient, or whether more stringent temporary disqualifications are needed under Section 8B of RPA, 1951 to curb the cancer of criminalisation of politics. There are four compelling reasons for the essential need of Section 8B: *first*, the lack of free and fair elections; *second*, the integrity of the institution; and *third*, the influence of Political Parties in nominating candidates with criminal backgrounds. *Fourth*, voters' indifference towards criminal antecedents.

A. THE LACK OF FREE AND FAIR ELECTIONS

A fundamental aspect of a representative government is its commitment to conduct regular, free, and fair elections.⁴⁸ The involvement of candidates with criminal backgrounds undermines the core democratic principle of free and fair elections by fostering a climate of fear, coercion, and manipulation.⁴⁹ Tactics such as voter intimidation, ballot-stuffing, and violence distort electoral outcomes⁵⁰ and violate citizens' freedom of expression under Article 19(1)(a).⁵¹ This not only erodes public trust in democratic institutions but also threatens the legitimacy of representative governance.⁵²

B. MAINTAINING THE INTEGRITY OF THE INSTITUTION

It is well-established that MPs and MLAs accused of violating the very laws they are entrusted to uphold fundamentally contradict the vision of the framers of the Constitution. The Supreme Court recognised this in the case of *K Prabhakaran v. P Jayarajan*, stating that the involvement of individuals against whom serious crimes are framed is incompatible with the ideals of

⁴⁸ Mohinder Singh Gill v. Chief Election Commissioner, (1978) 1 SCC 405, 424, at ¶ 23.

⁴⁹ ATUL KOHLI, DEMOCRACY AND DISCONTENT: INDIA'S GROWING CRISIS OF GOVERNABILITY 214 (Cambridge University Press, 1990).

⁵⁰ D. N. Dhanagare, *Violence in the Fourth General Elections: A Study in Political Conflict*, no. 1/2 E&PW 3, 151–156, (1968).

⁵¹ Resurgence India v. Election Commission of India, (2014) 14 SCC 189.

⁵² *Id.*

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a just and lawful society.⁵³ Individuals who violate the law should not be involved in creating it. Individuals with criminal histories may violate the electoral process, as they are willing to disregard ethical boundaries and engage in unlawful activities to achieve electoral success.⁵⁴

C. INFLUENCE OF POLITICAL PARTIES IN NOMINATING CANDIDATES WITH CRIMINAL BACKGROUND

There is an absence of restriction on political parties from giving tickets to politicians despite having charges framed against them.⁵⁵ Many analysts explain why political parties may select candidates with criminal backgrounds.⁵⁶ Moreover, Milan Vaishnav, in his work, explains that candidates with criminal records have performed better in elections and appear to have an electoral advantage. This suggests that parties prioritise candidates' perceived "winnability" factor over their ethical standing when making nomination decisions.⁵⁷ Therefore, there is no motivation for political parties to ensure that the candidates they nominate do not have criminal charges.

D. VOTERS' INDIFFERENCE TOWARDS THE CRIMINAL ANTECEDENTS

Strangely enough, voters truly support criminal candidates in elections. Candidates with criminal histories often receive more votes and get elected more easily than anticipated. According to data from the 2004, 2009, and

⁵³ K Prabhakaran v. P Jayarajan, (2005) 1 SCC 754, 780, ¶ 54.

⁵⁴ Dhananjay Singh v. State of U.P., (2024) SCC OnLine All 5329.

⁵⁵ SURINDER SINGH GILL, *PATHOLOGY OF CORRUPTION* 203 (Harper Collin Publishers India, 1999).

⁵⁶ RUDOLPH AND RUDOLPH, *IN PURSUIT OF LAKSHMI: THE POLITICAL ECONOMY OF INDIAN STATES* 85 (University of Chicago Press, 1987); Many analysts believe that Sanjay Gandhi was mainly responsible for giving Congress Party tickets to unruly or undesirable people. However, after his death, the party did not completely stop this practice, and other parties also continued to do the same.

⁵⁷ MILAN VAISHNAV, *THE MARKET FOR CRIMINALITY: MONEY, MUSCLES AND ELECTIONS IN INDIA* 96 (Yale University Press, 2010).

2014 general elections, a candidate with criminal antecedents was, on average, over three times more likely to win an election than a candidate with no cases. Furthermore, candidates facing serious accusations have a greater “win rate” than those facing only minor charges.⁵⁸ This may initially appear to be a typical tale of logically uninformed voters unaware of a candidate's criminal history, but Vaishnav's book sheds light on this topic.⁵⁹

Milan Vaishnav discovered that voters support these politicians because of their criminal histories. Milan Vaishnav contends that there are situations in which voters, especially well-informed voters, vote for individuals with a history of criminal cases framed against them.⁶⁰ The voter behaviour is influenced by various extraneous factors such as caste, religion, and regional political bargains. Voters may overlook criminal charges against candidates because these charges do not have an immediate impact on their own lives.

Furthermore, this kind of support for public officials with criminal histories does not always indicate a breakdown in democratic accountability. Such support occurs within a system beset by a deficiency in state capacity and feeble government institutions incapable of delivering even the most basic public goods and services.⁶¹ Voters with higher levels of education are marginally more inclined to support these candidates than their counterparts with lower levels of education.⁶² Therefore, even if they are aware of a candidate's caste or criminal history, Indian voters may still be intellectually uninformed. As a result, when voters support candidates with criminal charges, political parties do not hesitate to nominate such candidates.

⁵⁸ *Id.* at 25. MILAN VAISHNAV, *THE MARKET FOR CRIMINALITY: MONEY, MUSCLES AND ELECTIONS IN INDIA* 25 (Yale University Press, 2010).

⁵⁹ *Id.* at 24-31.

⁶⁰ *Id.* at 173-177. *See also* MILAN VAISHNAV, *THE MARKET FOR CRIMINALITY: MONEY, MUSCLES AND ELECTIONS IN INDIA* 25 (Yale University Press, 2010).

⁶¹ Shivani Nayak and Anirban Mitra, *Criminal Politicians, Electoral Competition and Public Good Provision: Evidence from India*, 61 EUR. J. POL. ECON. 102470 (2024).

⁶² V.S. RAMA DESAI & S. K. MENDIRATTA, *HOW INDIA VOTES ELECTION LAWS, PRACTICE AND PROCEDURE* 233 (LexisNexis, 3rd ed., 2014).

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**CHALLENGING THE ARGUMENTS PROPOSED AGAINST
THE TEMPORARY DISQUALIFICATION OF CANDIDATES**

The debate over temporary disqualification has been prominent since 1999 when the 170th Law Commission Report recommended measures to address criminalisation in politics.⁶³ The report argued that including temporary disqualification as a criterion would help ensure that candidates with serious criminal charges are excluded from holding public office, aiming to reduce the influence of criminal elements in politics.⁶⁴ However, in various instances, the Parliament has argued its misuse, lack of remedy for the accused and the hindrance of the sanctity of criminal jurisprudence. This section analyses the multiple concerns of the 18th Report on Electoral Reforms by the Rajya Sabha, which raised problems with Section 8B.⁶⁵ The concerns raised regarding Section 8B were *first*, disqualifying individuals at the stage of framing of charges is considered premature and unjust; *second*, it contradicts the principle of innocent until proven guilty; third, the potential for misuse by political parties, which may file false cases against opponents, and *finally* that accused would be left without any remedy or recourse.

A. PREMATURE DISQUALIFICATION

It was asserted that disqualification at the stage of framing of charges under Section 228 Code of Criminal Procedure (“CrPC”) or Section 251 of the Bharatiya Nagarik Suraksha Sanhita (“BNSS”)⁶⁶ is premature, given the Court only has the charge sheet filed by the Police and the statements under Section 161 CrPC or Section 180 of the BNSS at this stage.⁶⁷ The

⁶³ LAW COMMISSION OF INDIA, REFORM OF THE ELECTORAL LAWS, REPORT NO. 170, (1999) https://lawcommissionofindia.nic.in/cat_ELECTORAL_REFORMS/.

⁶⁴ *Id.* at ¶ 5.2.6- 5.4.

⁶⁵ *Supra* note 33.

⁶⁶ CODE CRIM. PROC. § 228; The Bharatiya Nagarik Suraksha Sanhita Act, 2023, No. 45, Acts of Parliament, 2023 (India) § 251.

⁶⁷ CODE CRIM. PROC. § 161; The Bharatiya Nagarik Suraksha Sanhita Act, 2023, No. 45, Acts of Parliament, 2023 (India) § 180.

fact that the Court has framed charges is not enough protection because the Court does not yet consider the accused's side of the story at this stage. Further, it was contended that if Police want to frame frivolous charges against an individual, they only need two witness statements, and the validity of those testimonies will be decided later in the trial. Thereby, legislators believed that there could be highly unjust outcomes of Section 8B.

However, this concern is addressed by the case of *State of Maharashtra v. Som Nath Thapa*,⁶⁸ which clarifies that at the stage of framing charges, the burden is on the prosecution to prove a case against the accused, and charges could be framed only if there is 'grave suspicion' against the accused.⁶⁹ The stage of framing of charge goes through judicial scrutiny, and frivolous charges cannot stand at such a stage. It is imperative to check whether a grave suspicion exists against the accused, not an ordinary suspicion.⁷⁰ The accused would be entirely within his right to discharge if the judge believes the evidence produced only gives rise to some suspicion, not grave suspicion.

Referring to the above mentioned case, framing a charge is appropriate for disqualifying candidates from contesting elections. Not doing so would lead to adverse consequences in the law-making process.⁷¹ In the case of *Manoj Narula v. Union of India*, it was held that the criminalization of politics runs against the sacredness of democracy.⁷² Accordingly, to maintain the purity of democracy, the impugned Section disqualifies the person from contesting the election if charges are framed for serious crimes.⁷³

⁶⁸ *State of Maharashtra v. Som Nath Thapa*, (1996) 4 SCC 659.

⁶⁹ *Dilawar Balu Kurane v. State of Maharashtra*, (2002) 2 SCC 135; *Sajjan Kumar v. Central Bureau of Investigation*, (2010) 9 SCC 368.

⁷⁰ *Union of India v. Prafulla Kumar Samal*, (1979) 3 SCC 4.

⁷¹ Election Commission of India, Proposed Electoral Reforms, Handbook (2016) http://eci.nic.in/eci_main/ElectoralLaws/HandBooks/proposed_electoral_reforms_01052017.pdf.

⁷² *Manoj Narula v. Union of India*, (2014) 9 SCC 1.

⁷³ *Supra* note 63.

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B. PRINCIPLE OF INNOCENT UNTIL PROVEN GUILTY

It was contended that in Indian jurisprudence, the 'principle of innocent until proven guilty' is on a high pedestal, and implementation of Section 8B would go against that principle. The rationale behind this contention was that an individual can be disqualified from contesting elections even before the Courts convict him.

However, such contention can be negated as the disqualification imposed on an accused is temporary, affecting only statutory rights and not a fundamental right. In the case of *A. Pari v. The Election Commission of India*,⁷⁴ it was held that the principle of 'presumption of innocence' is restricted to criminal law and not civil law. Therefore, the proceedings before reaching the final verdict of conviction can attract civil liability for the penalty. Thus, disqualifying a person from contesting an election against whom charges of a serious nature have been framed is merely a restriction of a civil nature.

Although the law assumes a person is innocent until proven guilty, the principle does not imply that an individual accused of serious charges like terrorism, rape, murder etc, has an absolute right to run for public office. Rather, it is a mere decision about suitability for public office and does not relate to their guilt or innocence, which will only be determined through a criminal trial. The rationale behind implementing temporary disqualification is the ongoing rise of individuals with criminal backgrounds in Parliament and State Assemblies. If such criminalization remains unchecked, it would undermine democratic institutions, even if these candidates have public support. Current laws on disqualification focus solely on convictions, which has proven ineffective in addressing this issue.⁷⁵

Therefore, there is a need to disqualify the accused against whom a competent court has framed criminal charges and prevent them from running for elections. The legislation aims to decriminalise politics so that

⁷⁴ *A. Pari v. The Election Commission of India*, (2019) SCC OnLine Mad 27267.

⁷⁵ *Indira Nehru Gandhi v. Raj Narain*, (1975) Supp SCC 1.

the candidates do not abuse their power to extend the duration of the trial, which in turn helps them to hold their seats for a more extended period by not getting convicted. Therefore, the classification created between an accused and an accused contesting elections has a rational nexus with the objective sought to be achieved, i.e., the decriminalisation of politics.

C. MISUSE BY POLITICAL PARTIES

The Committee thought that malafide and false charges could be framed against the accused by political opponents as, *first*, the prosecution is substantially influenced by the party in power and, *second*, failure of state machinery which will allow political actors to influence the legal process for their gains. Once the prosecution files these charges, the individual loses their statutory right to contest elections, ultimately benefiting their opponents.

However, to prevent such misuse of Section 8B, it has been proposed that charges filed up to one year before the scrutiny of nominations should not result in disqualification. This measure would help reduce the likelihood of politically motivated cases being brought against individuals ahead of an upcoming election.⁷⁶ The period is sufficient to ensure that any false accusations made with the intent to disqualify candidates won't result in that disqualification. As a result, each contender is given at least a year to be discharged. Further, the Supreme Court has consistently stated that the potential for abuse of the authority granted by statute does not negate the need not to make laws.⁷⁷ Thus, it achieves a suitable balance between expanding the extent of disqualification and attempting to discourage the filing of fraudulent cases only to manipulate disqualification.

D. LACK OF REMEDY FOR THE ACCUSED

The committee also considered that at the stage of framing of charges, the accused's defence is unavailable to the Court, and the accused cannot provide proof that the statements under Section 161 CrPC or Section 180

⁷⁶ *Supra* note 26 at 43.

⁷⁷ *Id.* at ¶ 237.

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of BNSS are frivolous.⁷⁸ However, apart from the protective measures incorporated during the charge-filing phase, there is an additional remedy available under Section 311 of the CrPC or Section 348 of the BNSS.⁷⁹ At any point during the trial, the Court may summon or question any witness whose testimony is crucial to a fair verdict under Section 311. This clause gives the Court broad discretion, which may even be employed suo-moto, even though it is not frequently used, and the Supreme Court has warned against the arbitrary exercise of this power.⁸⁰ The Court may utilise this Section to look into more evidence before filing charges in cases when doing so could result in the candidate's disqualification. Therefore, all the concerns raised by the Parliament for not enacting Section 8B lack rational basis.

Furthermore, expanding the range of disqualifications violates no fundamental or constitutional rights. The Supreme Court has consistently emphasised that the right to vote and contest elections is neither a fundamental nor a common law right.⁸¹ It is a unique privilege established by statute that is only exercisable under the restrictions outlined in the act.⁸² As a result, it is exempt from the Constitution's Fundamental Rights chapter.⁸³ Therefore, to achieve the democratic goal of clean politics, stringent steps need to be taken.⁸⁴ If such a percentage of criminals in legislative bodies prevail, it would erode confidence in democratic institutions. Thereby, it is high time for Parliament to curb the entry of individuals accused of serious crimes into law-making bodies and pollute them.

⁷⁸ *Supra* note 59.

⁷⁹ CODE CRIM. PROC. § 311; NAG. SURAK. SANHITA § 348.

⁸⁰ *Natasha Singh v. CBI*, (2013) 5 SCC 741.

⁸¹ *N.P. Ponnuswami v. Returning Officer, Namakkal Constituency*, (1952) 1 SCC 94; *Jagan Nath v. Jaswant Singh*, (1954) 1 SCC 57; *Dr. N. B. Khare v. Election Commission of India*, AIR 1958 SC 139.

⁸² *Jumuna Prasad Mukhariya v. Lachhi Ram*, (1954) 2 SCC 306.

⁸³ *Jagdev Singh Sidhanti v. Pratap Singh Daulta*, AIR 1965 SC 183; *Ebrahim Suleiman Sait v. M.C. Mohammed*, (1980) 1 SCC 398.

⁸⁴ *Public Interest Foundation v. Union of India*, (2019) 3 SCC 224, ¶ 118.

SAFEGUARDS IN RELATION TO DISQUALIFICATIONS UNDER SECTION 8B

To ensure that the practice of misuse of Section 8B does not prevail, it is essential to limit its scope and balance it with safeguards such as *first*, the disqualification would apply only to a few cases, *second*, the period of applicability of disqualification would not be arbitrary and *third*, a cut-off date would be provided to avoid any frivolous cases.

A. LIMITATIONS ON THE OFFENCES TO WHICH DISQUALIFICATION APPLIES

Under Section 8B, it is proposed that only those crimes which have the punishment of imprisonment of more than five years should be disqualified from contesting elections. The said Section limits the ambit of Section 8B to very few serious crimes, like waging or attempting to wage war or abetting waging of war against the Government of India,⁸⁵ murder,⁸⁶ dowry death,⁸⁷ thug,⁸⁸ voluntarily causing grievous hurt by use of acid,⁸⁹ exploitation of a trafficked person,⁹⁰ rape,⁹¹ etc. Thus, Section 8B of RPA, 1951 is reasonable as it disqualifies a candidate only for very serious offences. The underlying rationale behind this rule is that individuals facing charges for serious crimes are not deemed suitable to serve in Parliament or State Legislatures.

This principle is consistently applied across various high-level positions, such as members of the Public Service Commission, the Chief Vigilance Commissioner, and the Chief Secretary, who are disqualified when charges are framed against them. The rationale for disqualifying individuals with criminal charges from these crucial posts underscores the broader intent

⁸⁵ PEN. CODE § 121; NYA. SANHITA § 147.

⁸⁶ PEN. CODE § 300; NYA. SANHITA § 101.

⁸⁷ PEN. CODE § 304(b); NYA. SANHITA § 80.

⁸⁸ PEN. CODE § 304(b); omitted in Bharatiya Nyaya Sanhita 2023.

⁸⁹ PEN. CODE § 326A; NYA. SANHITA § 124.

⁹⁰ PEN. CODE § 370A; NYA. SANHITA § 144.

⁹¹ PEN. CODE § 375A; NYA. SANHITA § 63.

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to maintain integrity and trustworthiness. Therefore, it is reasonable to extend this principle to legislative positions as well, in order to curb the criminalization of politics.

B. PERIOD OF APPLICABILITY

It is suggested that Section 8B disqualifies the individual for five years from the date of framing of charge or acquittal, whichever is earlier. The reasoning behind the five-year disqualification period was to ensure that an individual facing charges would be barred from participating in at least one cycle of election. However, this would work to the advantage of an innocent individual if a one-year cutoff period is also established. For instance, if charges are framed against someone six months before an election, they would not be disqualified from that election due to the protection provided by the one-year timeframe. Additionally, even if the next election occurs five years later, they would still be eligible to participate, as the five years since the charges were framed would have already lapsed. The six-month period will prevent the filing of frivolous cases. Generally, candidates' names are announced 3-4 months before the elections. This buffer period ensures that charges filed with malafide intent by the ruling party cannot influence the election process. This approach ensures that individuals are not unfairly barred from participating in elections for extended periods, promoting a more balanced and just system.

C. CUT-OFF DATE

It has been proposed that charges filed up to one year before the scrutiny of nominations should not result in disqualification. This measure would help reduce the likelihood of politically motivated cases being brought against individuals ahead of an upcoming election.⁹² The period is quite

⁹² India: Crackdown on the opposition, divisive rhetoric and targeting of activists and critics persists around the elections, Civicus Monitor, <https://monitor.civicus.org/explore/india-crackdown-on-the-opposition-divisive-rhetoric-and-targeting-of-activists-and-critics-persists-around-the-elections/>; B.S. Satish Kumar, *The fact that only 40 of 5297 PMLA cases have resulted in conviction shows they are politically*

lengthy to ensure that any false accusations made with the intent to disqualify candidates won't result in that disqualification. As a result, each contender is given at least a year to be discharged. Furthermore, authorities must exercise due diligence when evaluating candidates against whom charges have been framed within the cut-off period. Without such scrutiny, candidates could exploit this period to commit crimes with impunity, circumventing any restrictions. Additionally, the Supreme Court has consistently stated that the potential for abuse of the authority granted by statute does not negate the need not to make such laws.⁹³ Thus, it achieves a suitable balance between expanding the extent of disqualification and attempting to discourage the filing of fraudulent cases only to manipulate disqualification.

COMPARATIVE ANALYSIS OF POLITICAL DECRIMINALISATION

A comparative analysis has been conducted to understand how different countries deal with the issue of criminalisation of politics. A comparative study was conducted across a mix of civil and common law jurisdictions including the United Kingdom, Egypt, Philippines, Germany and Thailand. These countries were selected due to diverse legal frameworks and different approaches to electoral disqualification to reduce people with criminal histories in politics.

A. UNITED KINGDOM

The principles for political party systems in the UK and India are distinct when it comes to upholding moral principles and accountability. A comprehensive code of conduct has been established by the leading political parties in the United Kingdom, such as the Conservative Party, Labour Party, and Liberal Democrats. The code of conduct prioritises honesty, responsibility, and mutual respect among their constituents.⁹⁴

motivated, says Priyank Kharge, THE HINDU, (Jun. 1, 2024), <https://www.thehindu.com/news/national/karnataka/the-fact-that-only-40-of-5297-pmla-cases-have-resulted-in-conviction-shows-they-are-politically-motivated-says-priyank-kharge/article68710076.ece>.

⁹³ *Supra* note 30.

⁹⁴ Committee on Standards in Public Life, *Ethics in Practice: Promoting Ethical Conduct in Public Life*, U.K. GOVERNMENT (Aug. 26, 2024),

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Members are expected to respect the party's reputation in all interactions and to maintain discipline such as following the norms of the party, and demonstrating the party's strong commitment to moral conduct and democratic values, etc.⁹⁵

India, on the other hand, does not have a comprehensive internal code of conduct for political parties. Within Indian parties, disciplinary measures are less codified and differ greatly across parties.⁹⁶ This implies that although procedures exist to deal with misbehaviour, they might not be applied with the same rigour as they would in the UK. As a result, consistent ethical and moral standards as followed in the UK are largely absent in the Indian political system. Therefore, there is a need for a written code of conduct within political parties in India.

B. EGYPT

In comparing the electoral disqualification of India and Egypt, we can draw several insights. In Egypt, the rules governing the exercise of political rights are set down in the Egyptian election law.⁹⁷ Article 52 pertains directly to disqualification grounds; it states that a candidate may be excluded without a formal conviction if there are suspicions of legal irregularities, including criminal charges. The statute clarifies that disqualification procedures may start once criminal charges have been framed and proceedings are pending before the Court. Ahmed “Al-Tantawy”, the former leader of Egypt's Dignity Party, and several of his party members were barred from running for office in November 2023 because of allegations of terrorism and fraud against them that were

<https://www.gov.uk/government/publications/ethics-in-practice-promoting-ethical-standards-in-public-life>.

⁹⁵ Robert Williams, *Conduct Unbecoming: The Regulation of Legislative Ethics in Britain and the United States*, 55 PARLIAMENTARY AFFAIRS 611, 612-615 (2002).

⁹⁶ ELECTION COMMISSION OF INDIA, MODEL CODE OF CONDUCT <https://www.eci.gov.in/mcc/>.

⁹⁷ Egyptian Electoral Law on Regulation of Exercise of Political Rights, Act No. 45/2014, 2014.

forwarded to trial.⁹⁸

In India, we only disqualify people if they are convicted following the “innocent until proven guilty” principle. However, it ignores those situations where an individual may have serious allegations against them and the immediate possibility of a conclusion of trial is not possible due to the flaws in the justice delivery system. Therefore, taking inspiration from Egypt, they are disqualified even if they have serious allegations against them as well, even if they are not convicted. This shall be implemented in India: if a serious allegation is pending, they should still be disqualified.

India could prevent the criminalisation of politics and ensure higher election integrity by permitting disqualification based on grave suspicions. This would also help keep those with possible criminal history out of politics.

C. PHILIPPINES

Both India and the Philippines have election disqualification laws that are designed to preserve the integrity of their democratic systems. The primary law governing elections in the Philippines is the Omnibus Election Code, which reflects the guidelines for holding elections and several associated issues.⁹⁹ Sections 12 and 68 of the Code define the circumstances under which someone may be unable to hold office, and these Sections are comparable to Section 8 of the RPA, 1951. They both set disqualification standards based on criminal convictions. However, the scope of the Omnibus Election Code is broader, and it permits disqualification even without a sentence for accusations of moral turpitude.

On the other hand, Section 8B of the RPA, 1951 in India, is particularly focused on disqualifying candidates only following a conviction for significant offences rather than based on charges or moral accusations.

⁹⁸ CIHRS, Egypt: Al-Tantawy prevented from running for presidency and referred to trial, underscoring illegitimacy of upcoming elections, Cairo Institute for Human Rights Studies (CIHRS), <https://cihrs.org/egypt-al-tantawy-prevented-from-running-for-presidency-and-referred-to-trial-underscoring-illegitimacy-of-upcoming-elections/?lang=en>.

⁹⁹ Omnibus Election Code, 2007 Batas Pambansa Blg. 881, 2007 (Philippines).

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India could adopt the Philippines model which can broaden disqualification criteria to include pending accusations of moral turpitude, thereby improving candidate vetting and reducing the influence of unethical actors in elections.

D. GERMANY

Significant differences emerge in comparing the approaches to political party discipline between Germany and India. Germany, one of the most robust democracies, has introduced policies to ensure intra-party discipline. This ensures that action will be taken against the parties that align with non-democratic ways. According to Article 21 of Germany's Basic Law (Constitution), political parties are unlawful if their goals or the actions of their supporters intend to destroy the free democratic basic order or jeopardize the survival of Germany.¹⁰⁰ Determining whether a party is unconstitutional rests solely with the Federal Constitutional Court.¹⁰¹ A party's assets may be taken away, and it would be prohibited from running for office if found unlawful. This Article ensures that parties align with constitutional and legal methods to achieve their goals.¹⁰²

In contrast, RPA 1951, which governs elections in India, political parties do not take any actions if a candidate is willing to go against democratic principles. Although India has procedures to regulate party-related concerns, they are not as strict as Germany's proactive strategy. Therefore, India should consider adopting a legal system which empowers the court to ban political parties whose activities threaten democratic values. More stringent regulations akin to those in Germany would improve India's capacity to confront and thwart non-democratic actions in political parties, guaranteeing that all parties adhere to democratic and constitutional norms.

¹⁰⁰ GERMANY CONST. § 21, The Federal Statute of 23, 1990.

¹⁰¹ THE FEDERAL RETURNING OFFICER, Party ban - The Federal Returning Officer.

¹⁰² BUNDESVERFASSUNGSGERICHT, Bundesverfassungsgericht - Proceedings for the prohibition of a political party (last visited May 24 2025).

E. THAILAND

Thailand and India differ significantly when it comes to electoral disqualification. The Organic Act on Election of Members of the House of Representatives (2018) in Thailand lays down precise standards for disqualification, preventing those who are incarcerated or have been found guilty of a crime from seeking public office.¹⁰³

The RPA, 1951 in India, in contrast, largely disqualifies candidates only upon a conviction; it does not consider ongoing charges or incarceration. Adopting Thailand's method, India could also introduce a provision that disqualifies imprisoned individuals from contesting elections. This would simplify the voting procedure, stop the exploitation of legal loopholes, and support the upholding of better standards of election integrity in India.

PRACTICAL IMPLICATIONS

This section takes into account how the discussed legal, political, and institutional issues translate into real-world consequences and challenges. It also entails moral dilemmas, logistical challenges, and systematic obstacles that arise when individuals with criminal antecedents occupy public office.

A. MORAL AND LOGISTICAL CHALLENGES OF JAILED CANDIDATES

In the eighteenth Lok Sabha elections, two candidates who are presently jailed and are under trial were elected as MP- Amritpal Singh from Khadoor Sahib, Punjab and Engineer Sheikh Abdul Rashid from Baramulla, Kashmir.¹⁰⁴ The Constitution of India and RPA 1951 do not forbid such candidates from running for office unless found guilty of a crime that carries a minimum two-year sentence. However, the presence of such candidates poses two difficulties: *first*, moral questions are raised

¹⁰³ Organic Act on Election of Members of the House of Representatives, Act. No. 2 of B.E. 2566, 2023.

¹⁰⁴ Utkarsh Anand, *Jailed but elected: decoding Rashid, Amritpal Singh's Lok Sabha Victories*, HINDUSTAN TIMES (Aug. 25, 2024), <https://www.hindustantimes.com/india-news/jailed-but-elected-decoding-rashid-amritpal-singh-s-lok-sabha-victories-101717730654397.html>.

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because there could be embarrassing situations if these individuals are later convicted while serving in office, and *second*, logistical difficulties to ensure the presence of such members in the parliament for the normal working of the house.

Moral questions arise when such candidates are allowed to hold office as they may abuse power for personal gain, eroding public confidence in the political system. This has led to a hypocritical situation because an individual deemed unfit for bail because of involvement in acts prejudicial to national security or moral turpitude is now acting as an MP or MLA of the legislative body. Further complicating this issue are the logistical challenges posed by Article 101(4), that enables the Speaker to vacate the seat of any member who has been continuously absent for sixty days.¹⁰⁵

This leads to an issue for a jailed MP or MLA where their presence can only be ascertained through bail, which the courts rarely grant to any accused charged with offences like terrorism or corruption. For instance, both Amritpal Singh and Engineer Rashid are accused of serious crimes; Amritpal Singh, arrested in 2023 under the National Security Act of 1980, has been in jail since absconding amid a crackdown against his secessionist militants. Similarly, Engineer Rashid, a former two-time MLA, was arrested in 2019 under the Unlawful Activities Prevention Act, 1967, on allegations of money laundering linked to terror-funding activities and has been in jail ever since.¹⁰⁶

B. LEGISLATIVE APATHY AND SELF-INTEREST IN LAW-MAKING

In 2012, the Supreme Court in its decision in *Chief Election Commissioner. v. Jan Chaukidar*¹⁰⁷ stated that since a jailed person is not an elector, that

¹⁰⁵ INDIA CONST. art. 101, cl. 4.

¹⁰⁶ Aaratrika Bhaumik, *Can jailed leader Amritpal Singh and Engineer Rashid function as MPs after Lok Sabha victories*, THE HINDU (Jun. 10, 2024), <https://www.thehindu.com/news/national/can-jailed-leaders-amritpal-singh-and-engineer-rashid-function-as-mps-after-lok-sabha-victories-explained/article68258062.ece>.

¹⁰⁷ *Chief Election Commissioner. v. Jan Chaukidar*, (2013) 7 SCC 507.

individual cannot contest the election. It was ruled that the right to contest elections would be extinguished even if the person was not convicted. The rationale behind the judgment was that though Section 8 of RPA, 1951 only provides for disqualification at the stage of conviction however, according to Section 2(1) of RPA, to contest the election, an individual needs to be an “elector”.

Section 16 of RPA provides for disqualification for registration in an electoral roll, and one of the disqualifications is that if the individual is disqualified from voting under the provisions of any law relating to corrupt practices and other offences in connection with elections, the individual is disqualified. Interestingly, Section 62(5) of RPA also provides an additional ground for disqualification from voting and states that no person shall vote in any election if he is confined in prison or the lawful custody of the police, ergo a “jailed person”. This, in the opinion of the Court, meant that, since a jailed person by Section 62(5) ceases to be an “elector” under the RPA, they are no longer qualified to contest elections.¹⁰⁸ However, responding to this interpretation, the legislators enacted an amendment within four months of this judgment, in which any jailed person was deemed to be still eligible to contest elections.¹⁰⁹ Through the amendment, the ambit of disqualification from contesting elections or holding any assembly seat on account of criminal antecedents was effectively narrowed back to the condition of “conviction” in Section 8 of the RPA.

This instance reflects the legislative apathy towards the criminalisation of politics. It is expected that legislators will mould the nation's political system and be in charge of enacting the laws and policies that govern it. However, they might not always act in the country's best interests. There could be two reasons for this apathy of legislators: *first*, they might have a personal stake in preserving the status quo in politics, even if it involves engaging in illegal activities; *second*, succumbing to pressure from powerful lobbies or groups who benefit from such loopholes in the current system.

Another practical implication is that a legislator with vested interests may prioritise their personal gain over effective lawmaking. For instance, a

¹⁰⁸ Chief Election Commissioner. v. Jan Chaukidar, (2013) 7 SCC 507, at ¶ 7.

¹⁰⁹ The Representation of the People (Amendment and Validation) Act, No. 29 of 2013, Acts of Parliament, 2013 (India).

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person charged under the Unlawful Activities (Prevention) Act might be more focused on using their position to protect themselves rather than enacting reforms. This situation creates significant challenges, as it leads to legislative apathy and potential conflicts of interest. This phenomenon is evident in instances where the monthly pension of MLAs of Tamil Nadu was increased,¹¹⁰ or the amendments to the Companies Act increased the ceiling for political funding from companies.¹¹¹

Both measures saw broad support and minimal opposition, highlighting how legislative decisions can be influenced by the self-interests of the lawmakers. One of the most significant barriers to the growth of a more accountable and transparent political system may be the lack of political will to legalise politics. Consequently, it is unrealistic to expect political parties to pass laws that might undermine their own advantages or those of their members.

RECOMMENDATIONS FOR ENHANCING ELECTORAL AND LEGISLATIVE INTEGRITY

A. GENERAL RECOMMENDATIONS

Screening Process by Political Parties

The Law Commission of India, in its 170th report referenced by Subhash Chandra Agarwal and the Central Information Commission, made several important observations regarding the role of political parties in our democracy.¹¹² It stated that political parties are responsible for forming the government, staffing Parliament, and managing the country's governance. Therefore, political parties must maintain discipline, transparency, and accountability. A political party that fails to adhere to democratic principles internally cannot be expected to uphold those principles in governing the

¹¹⁰ TNN, *Stalin: Pension For MLAs Increased To ₹ 30k*, TIMES OF INDIA (Apr. 20, 2023), <https://timesofindia.indiatimes.com/city/chennai/pension-for-mlas-increased-to-30k/articleshow/99627503.cms>.

¹¹¹ The Companies Act, 2013, § 182, No. 18, Acts of Parliament, 2013 (India).

¹¹² *Supra* note 63.

country.¹¹³ As a result of the lack of principles within political parties, there is a black market for political donations.¹¹⁴ It is hardly surprising that illegal money has become more prevalent in Indian politics for elections at all levels, given that both campaign financing and campaign spending are conducted behind closed doors.

Penalties for Political Parties

To maintain discipline between political parties, it is vital to sustain intra-party discipline, and such discipline can only become a reality if penalties are imposed. To achieve the larger picture of having Parliament without criminals, imposing penalties on political parties that nominate candidates with criminal records is quintessential. This could include financial fines or deregistration for repeat offenders, thereby incentivising parties to vet their candidates more rigorously.

Time-Bound Justice Delivery System

Another problem that Indian politics faces is that even though we disqualify a candidate if the individual is convicted, such a step does not make a massive difference because the working of the judiciary in India is prolonged. The accused can destroy evidence against them and manipulate the state machinery. Therefore, our goal should be fast-tracking trials and expediting the judicial process to weed out corrupt and criminal elements in politics. The goal should be to establish special courts that render decisions in six months. It would be the decision of these Special Courts to decide whether the charges are justified or not and whether they should result in disqualification. These Special Courts will be at the same level as High Courts, and appeal to their decision would only lie with the Supreme Court. This would ensure there is no delay on the part of the judiciary and cases are resolved within one year. Two problems would be solved through this: *first*, filtration in Legislative bodies would be more robust, ensuring that no criminal enters the politics, and *second*, an innocent person would

¹¹³ SUBHASH CHANDRA AGARWAL, *supra* note 63.

¹¹⁴ William Stevens, *India Politics: The Sun Sets on Old Ways*, NEW YORK TIMES (Aug. 26, 2024), <https://www.nytimes.com/1984/11/26/world/india-politics-the-sun-sets-on-old-ways.html>.

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not be suffocated in a case where malicious or frivolous charges are framed against them and can easily contest elections.

B. SPECIFIC RECOMMENDATIONS

Insertion of Section 8B of RPA

In *Brajesh Singh v. Sunil Arora*, it was observed that the requirement of “conviction” under Section 8 of the RPA has produced the undesirable outcome of undertrials abusing the system and running for office only because their cases have not been resolved.¹¹⁵ The underlying reason for including Section 8B is not that the individual is a branded criminal in the eyes of society but that such an individual is not suitable for the role of lawmaker. Under criminal law, fundamental rights like the right to liberty and freedom can be constrained at the stage of framing of charges; thereby, taking away a statutory right, the right to contest an election in order to cleanse politics, is not a premature step.¹¹⁶

Voter Sensitization

Voter sensitization is one of the most important actions that could be taken. In developed nations such as the United States, the United Kingdom, and Germany, voters perceive the importance of their vote and find it unacceptable when a candidate is a criminal. In contrast, in India, voters do not perceive a candidate's criminality to have an immediate impact on their voting behaviour. Therefore, it is necessary to educate the voters about their power to vote and make them understand that the criminality of the candidate might not have a tangible effect, but it has intangible effects such as erosion of public trust and normalising criminality in politics in the long run. If voters become aware and stop supporting candidates against whom charges are framed, the political parties will be compelled to stop nominating such candidates.

¹¹⁵ *Brajesh Singh v. Sunil Arora*, (2021) 10 SCC 241.

¹¹⁶ *Anukul Pradhan Chandan v. Union of India*, (1997) 6 SCC 1.

Cumulative Crime Analysis

Another important step to consider when determining whether a candidate should be disqualified is the number and nature of charges framed against them. The severity and frequency of these charges should play a crucial role in the decision-making process. For instance, in the present Lok Sabha, there are numerous candidates who have more than 20 charges framed against them, many of which involve serious crimes. Such candidates should not be allowed to hold public office as it raises moral and integral questions.

One possible solution to this problem is to introduce a disqualification based on the crime's cumulative nature. For example, a candidate should be instantly disqualified from contesting an election or holding public office if substantial charges of a serious nature are framed against them. By ensuring that those with lengthy criminal histories are kept out of positions of authority, this strategy would protect the integrity of the legislative process and rebuild public confidence in the democratic system.

CONCLUSION

The integrity of an individual's actions as an MP or MLA is crucial for democracy. Although the accused cannot be considered a criminal in a pending trial, it does not mean that the individual has the same rights as a person against whom no charges have been framed. Specific restrictions can be imposed to cleanse politics and have lawmakers with the highest sense of morality. However, these restrictions must be balanced with the right of the individual and the rational nexus of the object to be achieved. However, many countries regard disqualification at the stage of framing of charges as a premature step. These countries do not have the same level of political landscape criminalisation as India or the same level of lingering cases that cause lengthy trials.

Disqualification from elections upon the filing of criminal charges should not be viewed as a form of punishment, as the Supreme Court's observation above makes it clear that disqualification is merely an outcome of the criminal charges, similar to an arrest, and is meant to prevent individuals from contesting elections who are unfit to hold public office.

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UNDER SECTION 8B OF THE REPRESENTATION OF THE
PEOPLE ACT

Therefore, every legislation relating to disqualification must be interpreted from society's viewpoint and considered separately and independently from an individual's rights.

The solution to the problem of criminalisation of politics in India is multi-dimensional. It has four stakeholders: the government, the citizens, the judiciary and the political parties. To effectively combat the perpetual criminalisation of politics, all these stakeholders need to act in harmony with each other. For instance, the government should pass legislation that prevents criminals from entering politics. The citizens should ensure that they vote for candidates who are committed to implementing the law democratically. The judiciary needs to expedite the resolution of cases and ensure that the rights of the candidates are not harmed. Lastly, the political parties need to ensure that the candidates they nominate are free from any criminal charges. If these stakeholders do not work together, it will result in a weak democracy, and the largest threat to India's democratic consolidation is a weak democracy. Only radical electoral reforms can prevent political decay in our magnificent country. The future of India rests on the integrity and sanctity of the electoral process, which must be preserved at all costs.

