KAUTILYA SOCIETY, NLUO

PUBLIC POLICY POST

2021 SEPTEMBER

KAUTILYA SOCIETY
AN INITIATIVE BY
VIDHI CENTRE FOR LEGAL POLICY

ABOUT KAUTILYA SOCIETY

The Kautilya Society chapter at NLUO was set up by Vidhi Centre for Legal Policy. The Chapter is aimed at widening access to legislative drafting and analysis and empowering young minds to explore public policy as a career path. Having conducted public talks and circulated weekly legal updates, the chapter is pleased to bring out its flagship newsletter to further contribute to public policy discourse.

ABOUT THE NEWSLETTER

The Kautilya Society chapter at NLUO is pleased to publish its flagship newsletter **Public Policy Post**. The Post aims to provide a glimpse of the latest happenings in the public policy arena and to create a platform for further discourse for policy enthusiasts. Given the impact of public policy issues on general populace, this newsletter is an attempt to provide the legal fraternity with an avenue to keep abreast with policy discussions in an accessible and easy-to-understand format. This edition of the newsletter intends to include articles, quick legal updates, and interviews with legal professionals practicing in the field of public policy.

FOREWORD

We are pleased to release for you the first edition of the Public Policy Post Newsletter, Kautilya Society, NLUO.

The citizens of this democracy often engage with policy-making in everyday life—from worrying about power shortages to the nation's scarcity of jobs, from criticizing shoddily sanctioned lockdowns to crowded trains—each of these occurrences is the result of systematic policy decisions. Public policy, therefore, remains one of the most significant and impactful areas of law.

With the fast-paced lifestyle in the age of digital information coupled with the easy access to humongous amounts of data, the citizenry engages much better with the prevailing socio-political challenges. However, there is a lack of awareness on a variety of issues with which we are constantly confronted. Understandably, everyone has a job to do, a life to live, and other interests to consider. Thus, the daily hurdles involved in trying to fulfill these needs, remain unnoticed. One way to get around these realities is to showcase information in a format and framework that is prevalent with the readers in a way that is simple to read and engage with.

The Public Policy Post is a thoughtful attempt to meet this requirement. I hope the newsletter satisfies the need and desire that a thriving democracy has, to express, discuss, and discover opinions, and eventually be well-informed citizens of the communities in which we all live. The newsletter will also, through its coverage of diverse range of issues, engage the youth in India seeking to make a vocation in policy. It would provide them with an opportunity to understand existing issues surrounding public policy whilst empowering even more people to continue to thrive as experts in this space.

The newsletter in my considered view will widen the horizons of legal discourse with respect to the dynamic diaspora of public policy. I congratulate the team for successfully bringing out its maiden issue.

PROF. (DR.) YOGESH PRATAP SINGH

A TRIBUTE TO DR. OWAIS HASAN KHAN

We, at Kautilya Society NLUO, dedicate our very first newsletter to our beloved faculty advisor and teacher – Dr. Owais Hasan Khan. We were truly privileged to have had the opportunity to steer this society under his mentorship. He guided us in before every step of the way. He was the best mentor we could have asked for. His passion and dedication towards his work, even in the toughest of days, shall always remain a source of inspiration for each and every one of us. This newsletter – a fruit of our labour at Kautilya - is a small way to show our heartfelt gratitude for his constant guidance and unwavering support.

WHAT'S INSIDE

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LEGAL UPDATES

JANUARY 2021

THE ANTI-CONVERSION LAWS

The Madhya Pradesh (MP) government followed Uttar Pradesh (UP) and Himachal Pradesh (HP) to pass the Prohibition on Unlawful Conversion of Religion or the anti-conversion laws which outlaw religious conversion 'solely' for the purpose of marriage. All the laws have the feature of declaring such marriages "null and void". They also have penal provisions for doing such conversions without prior approval from the state. The three laws differ in their punishments and in the burden of proof to determine whether the conversion is lawful or not. The MP and UP laws prescribe a 60-days prior notice for declaration of intent to the District Magistrate. In addition to this, the UP law also requires the Magistrate to conduct an enquiry to find out the intention behind the conversion. The HP law requires 30 days prior notice. Furthermore, the MP and HP law put the burden of proof on the person converted to show that it was done with consent. The UP law puts the burden on the person or people who have "caused" or "facilitated" the conversion and not on the person getting converted. If the Magistrate does not feel satisfied by the police inquiry, a criminal action can be initiated against the people who "caused" the said conversion. If a marriage is declared null and void, the MP law protects the wife and children who will have the right to maintenance under the said legislation. However, there are no provisions for protecting the marriage subsequently. The UP and HP law do not have such provisions. As per a research paper, during the colonial period, anti-conversion laws were enacted in the princely states headed by Hindu royal families. They were enacted to "preserve Hindu religious identity in the face of British missionaries".

There are other states that also have anti-conversion laws but the ones recently passed in UP, MP and HP criminalize conversion specifically for the purpose of marriage.

Relevant readings:

1.3 states, 3 anti-conversion laws: what's similar, what's different- https://indianexpress.com/article/explained/religion-conversion-bill-bjp-7129285/

2. India's Defiance of Religious Freedom: A Briefing on 'AntiConversion' Laws (IIRF Report) - https://www.iirf.eu/site/assets/files/92149/iirf_reports_2012_02.pdf

DRAFT NATIONAL POLICY ON MIGRANT WORKERS

The migrant workers faced the most damaging effects of COVID-19. In order to mitigate the risk of such a situation arising again, NITI Aayog formulated a draft national policy on migrant workers. Its main aim is to create an institutional mechanism to coordinate between central ministries, state government and local departments. This policy provides two approaches for the benefit of migrant workers. Firstly, it talks about providing monetary benefits and special quotas to them and secondly, it talks about providing opportunities to enhance their skills. This policy does not seek to provide temporary or permanent economic help to them because this approach is perceived as limited. The focus is on making them self-dependent. It suggests that government policies should not hinder internal migration as it is an "integral part of development". It also urges the government to remove restrictions on true agency and potential of the migrant workers. This draft calls for a central database to help employers fill the gap between demand and supply and ensure maximum benefit of social welfare schemes. It should be noted that the current Inter-State Migrant Workers Act, 1979 does not cover labourers who migrate independently. This is an issue of concern as India has a lot of unorganized sector migrants who may fall into the trap of middlemen. This draft suggests an amendment to The Inter-State Migrant Workers Act, 1979 for its effective utilisation to protect migrants. The nodal ministry according to this draft will be the Ministry of Labour and Employment and it will create teams with the help of other ministries to accomplish tasks given. One of the most effective approaches the draft suggests is the creation of a migrant corridor which will be identified on the basis of migration between states. The draft suggests regulating these high migration zones and to create Migration Resource Centres in these corridors to regulate migration. As the third covid-19 wave is expected later this year, it would be compelling to see how this policy would act to resolve the migrant crisis in India.

Relevant readings:

1.Union Health Minister approves National Policy for Rare Diseases, 2021 (PIB release) - https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1709369

2.National Policy for Rare Diseases, 2021 - https://main.mohfw.gov.in/sites/default/files/Final%20NPRD%2C%202021.pdf

3.Understanding Circular Migration in India: Its Nature and Dimensions, the Crisis under Lockdown and the Response of the State - http://www.ihdindia.org/Working%20Ppaers/2020/IHD-CES_WP_04_2020.pdf

FARMERS' PROTESTS

Several farmers from mainly Punjab, Haryana and Uttar Pradesh have been camping on the Delhi border to protest against the three controversial agricultural laws that they consider 'pro-corporate'. The farmers' protests have been ongoing since November, 2020 with no clear end in sight. The farmers have been demanding a complete repeal of the farm laws namely the Farmers Produce Trade and Commerce (Promotion and Facilitation) Act, 2020; the Farmers Empowerment and Protection Agreement on Price Assurance and Farm Services Act, 2020 and the Essential Commodities (Amendment) Act, 2020. According to the government, these laws will benefit the farmers by deregulating the mandi system, eliminating the middle men, promoting the farmers freedom to sell their crops and boosting private investments in the agricultural sector. However, the protesting farmers believe that these laws will inevitably dismantle the Minimum Support Price (MSP) system. They fear that in the absence of an assured price for their crops, the big corporates will exploit them leading to lower earnings. Thus, the farmers are also demanding a legal guarantee for continuation of the MSP system through an amendment. On 11 January 2021, the Supreme Court stayed the implementation of these laws until further notice and constituted a 4-member Committee to review them. On 26 January 2021, the protests which had remained peaceful took a violent turn. The tractor parade organized by the farm unions on India's 72nd Republic Day as a peaceful demonstration turned violent after several farmers on tractors clashed with the police, destroyed barricades and stormed the Red Fort. The government on its part has offered to suspend implementation of the farm laws for 18 months and amend them after undertaking a proper consultation process with the concerned stakeholders. However, the farmers are not satisfied with the government's solution and seek a full repeal. As of writing, the impasse between the government and the farm unions continues and the issue remains unresolved.

Relevant readings:

1.Ending the deadlock: On farmers, reforms and stakeholders - https://www.thehindu.com/opinion/editorial/ending-the-deadlock-the-hindu-editorial-on-farmers-reforms-and-stakeholders/article33466144.ece

2.The Farmers (Empowerment and Protection) Agreement on Price Assurance and Farm Services Bill, 2020 - https://prsindia.org/billtrack/the-farmers-empowerment-and-protection-agreement-on-price-assurance-and-farm-services-bill-2020

NATIONAL URBAN DIGITAL MISSION

The Ministry of Housing and Urban Affairs (MoHUA) along with the Ministry of Electronics and Information Technology (MEITY) launched the National Urban Digital Mission (NUDM) on 23 February 2021. The Centre for Digital Governance (CDG) at the National Institute of Urban Affairs (NIUA) will be supporting NUDM. NIUA is a premier national think tank on urban planning and development. NUDM aims at creating the shared digital infrastructure for urban India, working across the three pillars of people, processes, and platforms. This national urban digital ecosystem will enhance the ease of living in all 44,000 cities and towns of the country leveraging IT & associated technologies and provide holistic support.

NUDM has a citizen-centric, ecosystem-driven and principles-based design and thereby its implementation will deliver benefits being mindful of the needs and local challenges of cities and towns across India. MoHUA targets harnessing technology in order to streamline projects and efforts of urban India. The approach of NUDM is to improve the standards and frameworks of governance for collaboration and impact, allow the stakeholders under NUDM to be empowered across the urban ecosystem and to utilise technology in improving the quality of life of urban Indians.

Under NUDM, besides creating a shared digital infrastructure, the Ministry aims at catalysing an urban national open digital ecosystem (u-NODE). It leverages NUDM to build new platforms, solutions and innovations. NUDM envisages creating open standards and enforces the adoption of open standards by all stakeholders. Registries will be created at suitable levels in order to establish a sole channel of correct information with respect to urban assets, service delivery, urban data and actors. Additionally, developing nationally scalable application systems, adopting the best principles of cooperative federalism, enhancing the efficiency and effectiveness of governance at all levels and strengthening existing urban systems and applications are amongst the objectives of NUDM.

Website: https://nudm.mohua.gov.in/
Press release: https://pib.gov.in/PressReleseDetailm.aspx?PRID=1700246

Relevant readings:
1.NIUA - CDG Citizen-Centric Smart Governance (CCSG) Program Implementation Guidelines for the National Urban Governance Platform (NUGP)- https://nudm.mohua.gov.in/wp-content/uploads/2021/02/Implementation-Guidelines-for-NUIS-CCSG-v3.pdf
2. India Urban Data Exchange - https://nudm.mohua.gov.in/wp-content/uploads/2021/02/IUDX-Booklet-FINAL.pdf
3. DataSmart Cities: Empowering cities through data - https://smartnet.niua.org/dsc/pdf/DataSmart_Cities_Strategy.pdf

SOCIAL MEDIA INTERMEDIARY RULES 2021

The Ministries of Electronics and Information Technology and Ministry of Information and Broadcasting after significant contemplation on having a harmonious "soft touch oversight" mechanism for various social media platforms as well as OTT platforms, have formed the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021. This step was taken after several cases of social media abuse were witnessed like spreading fake news, pornographic material and morphed pictures of women. These Rules have introduced the concept of "social media intermediary (SMI)" and "significant social media intermediary (SSMI)". An SMI has been defined as:

"*An intermediary which primarily or solely enables online interaction between two or more users and allows them to create, upload, share, disseminate, modify or access information using its services.*"

Rule 4(1) states that an SSMI having more than 5 million registered users in India within 3 months from the date of the threshold has to comply with the three-tier grievance system. The intermediaries are therefore required to appoint a chief compliance officer to ensure compliance with the IT Act and the Rules within the date of notification along with a nodal officer and Resident Grievance Officer. They also need to conduct due diligence by informing users of their rights, privacy policy and user agreement for access to a computer resource. According to Rule 4(2), it is also compulsory for social media platforms to identify the originator of any unlawful messages that offer messaging as a primary service. They are mandatorily required to remove any unlawful information within 36 hours of receiving an order, form a three-tier grievance redressal mechanism and support the government in their investigation. They also prescribed a code of ethics for digital media publishers. In conclusion, publication of compliance reports, providing Privacy Policy, User Agreement, and annually informing the users regarding its policies would ensure transparency and increase efficiency and accountability.

Relevant readings:

1.Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021 (PIB Release) - https://pib.gov.in/PressReleseDetailm.aspx?PRID=1700749

2.Why India's new rules for social media, news sites are anti-democratic, unconstitutional - https://scroll.in/article/988105/explainer-how-indias-new-digital-media-rules-are-anti-democratic-and-unconstitutional

INSURANCE OMBUDSMAN (AMENDMENT) RULES, 2021

The Insurance Ombudsman Rules, 2017 have been amended in order to facilitate the process of complaint resolution and ensure promptness, effectiveness and impartiality as notified on 2 March 2021. The amendment targets extending the scope of complaints to Ombudsmen to include deficiencies in service on the part of insurers, agents, brokers and other intermediaries in addition to disputes. Currently, seventeen Insurance Ombudsmen are present across the country.

The Rules now provide for policyholders to file their complaints to Ombudsmen electronically. Furthermore, a complaints management system will also be created to provide for online tracking of complaints. Video-conferencing has been added as a method for hearings. Insurance brokers have been included under the Ombudsman mechanism with this amendment. Ombudsmen can now also pass awards against insurance brokers. Additionally, to ensure impartiality and integrity during the selection of Ombudsmen as well as during their tenure, certain amendments have been introduced. A person with a history of working for the cause of consumer protection in the insurance sector will now be included in the selection committee. When any vacancy exists in the office of any Ombudsman, an additional charge will be given to another Ombudsman.

The Executive Council of Insurers has been retitled as the Council for Insurance Ombudsmen.

Insurance Ombudsman (Amendment) Rules, 2021:
https://financialservices.gov.in/sites/default/files/insurance%20ombudsman%20rules%20amendement%202021.pdf

Press release: https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1702099

Relevant readings:

1.The Gazette of India - https://financialservices.gov.in/sites/default/files/Ins.%20Ombudsman%20Rules%2C%202017.pdf

2.Fourth report on The insurance ombudsman rules, 2017- https://eparlib.nic.in/bitstream/123456789/796076/1/17_Subordinate_Legislation_4.pdf

IMPACT OF ELECTIONS ON THE SECOND WAVE OF COVID-19 IN INDIA

The Election Commission announced State and Panchayat elections in six states in India namely, Assam, Kerala, Puducherry, Tamil Nadu, West Bengal and Uttar Pradesh in March. By mid-March, election campaigning started in these states in full swing. The politicians hosted large gatherings, posted about it continuously on social media and conducted rallies without social distancing or masks in sight. After the campaigning, there was a rapid rise in average daily cases. It was not just the public that was not taking proper precautions, it was also the leaders who were campaigning. When these leaders were questioned about this, they gave very vague answers or simply shifted the blame on the Election Commission. Some even dismissed the link between the rise in cases and the election rallies.

The Election Commission had also issued a warning about large gatherings in West Bengal but they were not heeded to. Later in April, they limited the gathering to 500 people and rallies were permitted only with proper adherence to guidelines. But all this came way too late. The Madras High Court even put all the blame on the Election Commission for the second wave of COVID-19. After the election rallies ended, West Bengal registered a single-day spike of 17, 411 cases with 96 deaths. This is a huge number in contrast to 812 cases per day with the death of two people on the first day of election rallies in the state. The second wave has shown the importance of winning elections for the ruling government over the lives of millions of Indians. The experts have found that the risk of transmission of the virus in outdoor gatherings is low but when people are in a crowded place in close proximity for a long period of time, there are high chances of infection. It has further highlighted the cracks in the healthcare system such as the shortage of beds, oxygen cylinders and vaccines when the Government decreased the age of vaccination to 18.

Relevant readings:

1. Did Political Rallies Contribute to an Increase in COVID-19 Cases in India?
https://thewire.in/politics/election-rally-covid-19-case-spike
2. India's Second Wave: A Man-Made Disaster?
https://www.institutmontaigne.org/en/blog/indias-second-wave-man-made-disaster

THE GOVERNMENT OF NATIONAL CAPITAL TERRITORY OF DELHI (AMENDMENT)BILL

The Government of National Capital Territory of Delhi (Amendment) (GNCTD) Bill was introduced in the Lok Sabha in March, 2021. According to the central government, the aim of this bill is to reduce ambiguities in the legislative provisions of the GNCTD Act, 1991 and clearly demarcate the responsibilities of the Delhi government and the Lieutenant Governor of Delhi. However, the Delhi government contends that this bill reduces the elected government to a mere vestigial organ by undermining their powers and elevates the position of the centrally appointed Lieutenant Governor to that of the now defunct post of "Viceroy". Further, the Delhi government has contended that this bill is contrary to the decision rendered by the Supreme Court in the *Government of NCT of Delhi v. Union of India* (2018) wherein it was held that the Lt. Governor has no independent decision-making power and is to act on the "aid and advice" of the Council of Ministers which shall be binding on him. The bill seeks to interpret the term "Government" as meaning "Lt. Governor of Delhi" and justifies this interpretation on the basis that it is consistent with Delhi's status as a Union Territory. To this extent, it is now mandatory for the elected Delhi government to send files to/ seek the Lt. Governor's opinion before taking any administrative decision. This entails that the elected Delhi government can do nothing if the Lt. Governor does not permit it to do so. In addition to being contrary to the Supreme Court's decision, this is viewed as violating the mandate of the people of Delhi as the Lt. Governor (who represents the interests of the central government) has the final say in decision-making over the elected government of Delhi. As the Lt. Governor is an appointed post and can be changed only when the party at the Centre changes, there lies no recourse for the people of Delhi to hold an unelected, centrally appointed government functionary accountable.

Relevant readings:

1.Delhi's administration as the tail wagging the dog - https://www.thehindu.com/opinion/lead/delhis-administration-as-the-tail-wagging-the-dog/article34135140.ece

2.National Policy for Rare Diseases, 2021 -https://prsindia.org/files/bill_track/2021-03-15/Summary_The%20Govt%20of%20NCT%20(A)%20Bill,%202021.pdf

NATIONAL RARE DISEASE POLICY 2021

Recently, the Health Ministry approved the National Rare Disease Policy 2021 which aims to lower the cost of treatment of rare diseases and focuses on research and development to produce medicines for such diseases. The ministry notified that financial support of Rs. 20 lakhs will be provided to those who are suffering from such rare diseases. It should be noted that this policy will not work under Ayushman Bharat Scheme (PMJAY) but under the umbrella scheme of Rashtriya Arogya Nidhi (RAN), which is a scheme to provide financial assistance to people Below Poverty Line (BPL) and those who are suffering from life-threatening diseases. It is interesting to note that the RAN is not only restricted to BPL people but to all the people who are eligible as per norms of Pradhan Mantri Jan Arogya Yojana which constitutes approximately 40% of the population. This policy will also set up a digital platform for voluntary crowdfunding and for corporates to donate voluntarily. There are about 7000-8000 rare diseases but the most challenging part is that around 95% of them do not have approved treatment, thus making it difficult for the patients to get proper treatment for such diseases. Another problem with such diseases is that as they are often non-treatable, most of them require continuous medical support which is very expensive and makes it difficult for the poor people to seek treatment. Thus, it will be a challenging task for the government to implement it in such a way that poorer sections of the society can avail its benefits easily.

This policy was first framed in 2017 by the central government but it was not implemented because states were not certain about fund-allocation and there was no information about the diseases to be covered. The Centre framed a policy regarding rare diseases after the Delhi High Court's Order of 23 March 2021. The Government implemented this policy on 1 April 2021.

Relevant readings:

1. Union Health Minister approves National Policy for Rare Diseases, 2021 - https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1709369
2. National Policy for Rare Diseases, 2021 - https://main.mohfw.gov.in/sites/default/files/Final%20NPRD%2C%202021.pdf
3. Understanding Circular Migration in India: Its Nature and Dimensions, the Crisis under Lockdown and the Response of the State - http://www.ihdindia.org/Working%20Ppaers/2020/IHD-CES_WP_04_2020.pdf

INDIA'S VACCINE POLICY

India was hit by a catastrophic second wave of COVID-19. One of the major reasons for the same was considered to be a slow vaccine rollout. The government had initially allowed vaccination of only frontline workers and citizens above the age of 45 years. The guidelines released on 1st May initiated the vaccination process for people between the age group of 18 to 44 years. However, the Supreme Court termed that the vaccination drive for 18-44 age group to be "arbitrary and irrational".

The Government on 21st June initiated centralised procurement of vaccines. It stated that 75% of the doses manufactured will be procured by the Government and distributed for free among states while the remaining 25% will be accessed by the private clinics and hospitals. Only vaccination doses administered from the private hospitals to be payable at pre-determined cost. The criteria for allocation of vaccines to states is on the basis of population, disease burden, the progress of vaccination and wastage of vaccines. The states can assess their priority groups. They are now given more independence. The government also assured onsite registration for those unable to register through COWIN.

The Centre will now be spending almost Rs. 45,000 crores in comparison to Rs. 35,000 crores as stated in the budget. The government is targeting to ensure availability of 187.2 crore shots by December 31. The new guidelines have provided a lot more clarity on the intention of the government.

Relevant readings:

1.How Centre's U-turn in Covid-19 vaccine policy creates a clear roadmap - https://www.indiatoday.in/coronavirus-outbreak/vaccine-updates/story/pm-modi-centre-u-turn-covid-19-vaccine-policy-roadmap-1812216-2021-06-08

2.Supreme Court queries on equity, pricing nudge change in vaccine policy - https://www.thehindu.com/news/national/supreme-court-queries-on-equity-pricing-nudge-change-in-vaccine-policy/article34755905.ece

THE INSOLVENCY AND BANKRUPTCY CODE (AMENDMENT) BILL, 2021

Lok Sabha passed The Insolvency and Bankruptcy Code (Amendment) Bill, 2021 on 28th July 2021. The Bill will replace the IBC Amendment Ordinance 2021 promulgated in April which introduced pre-packs as an insolvency resolution mechanism for micro, small and medium enterprises (MSMEs), with default amount up to Rs 1 crore. The Bill introduces an alternate insolvency resolution process for MSMEs called the Pre-Packaged Insolvency Resolution Process (PIRP). Under PRIP, the resolution will be negotiated between debtor and creditor before going ahead with the formal proceeding. The minimum threshold for initiation of PRIP is 10 lakhs. It is a flexible resolution mechanism that will focus on speed and cost-effectiveness with the binding effect of a formal process. It should be noted that to initiate the resolution process the consent of 66 percent of unrelated financial creditors and the special majority of shareholders. After moving the bill for consideration, Finance Minister Nirmala Sitharaman said, “It is less costly, it is hybrid in nature, the debtor will still be in control and the creditors will be working together and, therefore, it is going to cut the cost and speed up the process because the whole thing will be over in 120 days”. It is well known that the resolution process can be lengthy and very costly. This amendment thus opens the way for small businesses to easily get justice they are entitled to.

Amendment:
https://prsindia.org/files/bills_acts/acts_parliament/2021/The%20Insolvency%20and%20Bankruptcy%20Code%20(Amendment)%20Act,%202021.pdf

Relevant readings:
1.Standing Committee Report Summary Implementation of Insolvency and Bankruptcy Code: Pitfalls and solutions -
https://prsindia.org/files/policy/policy_committee_reports/Report%20summary_IBC.pdf
2.Challenges in Implementation of Pre-packaged Insolvency Resolution Process - Way Forward -
https://rbsa.in/archives_of_research_reports/RBSA-Presents-Challenges-in-Implementation-of-Pre-packaged-Insolvency-Resolution-Process-Way%20Forward-May2021.pdf

THE KIGALI AMENDMENT TO THE MONTREAL PROTOCOL

Recently, India agreed to ratify the Kigali Amendment to the Montreal Protocol, an important step towards global climate action. The Amendment is named after the Rwandan capital where it was negotiated in 2016. The amendment includes the Hydrofluorocarbons (HFCs) a set of chemicals known for their capacity to warm the planet to the Montreal Protocol. It enables the phase-out of these HFCs. If the HFCs are phased out by 2050 we can prevent about a 0.5-degree Celsius rise in the global temperature by the end of this century. Under the Amendment, the ratifying countries are required to reduce their HFCs use by 80% by 2050. These terms are slightly different for developing countries. For example, India is expected to reduce the HFCs use from 2028 by 85% of the figure for 2024-2046 by the year 2047. As of July, 122 countries had ratified the Agreement and India's decision follows that of the US and China that fall in a different category for reducing the emissions. India has said it will draw up its strategy in "consultation with all industry stakeholders" and the existing laws that govern the implementation of the Montreal Protocol shall be amended by 2024. This development is important considering the Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) which has pointed out that the Planet's temperature has already risen by 1.1-degree Celsius.

Relevant readings:

1.India Ratifies Kigali Amendment to Montreal Protocol, to Phase Out HFCs - https://science.thewire.in/environment/india-ratifies-kigali-amendment-to-montreal-protocol-to-phase-out-hfcs/

2.India decides to ratify Kigali Amendment to Montreal Protocol - https://indianexpress.com/article/india/india-decides-to-ratify-kigali-amendment-to-montreal-protocol-7460521/

GUEST ARTICLE

PANDEMIC, DIGITAL EXCLUSION & REASONABLE RESTRICTION

- Ashit Kumar Srivastava[1]

The pandemic has brought along with-it revelations of unparallel level, knowing that most human activities have been limited to a laptop screen. In this natural confinement, the internet and social media platforms have become a source of freedom. Through social media platforms, fundamental rights today are finding expressions, be it freedom of speech, right to information & freedom to form an association[2], carrying on profession (in my case taking lectures). All these rights are being exercised through virtual platforms; therefore, by default, virtual platforms are becoming an important predicament for exercising fundamental rights in times of pandemics. And this is the democratic and inclusive power of the internet for which it was originally brought into existence.

But this new way of lifestyle also tags along with itself new form of threats; in a non-virtual world, the threat to individual freedom was from the '*State-actor*.' Thus, resistance against the State excesses was seen as the prime motive of a constitution: what we primordially called as Constitutionalism. A written constitution was a eulogy to the higher principle of Constitutionalism; interestingly, the new virtual world brings itself a new form of excesses flowing not only from the State-Actor, but rather from the non-State actor well. Thus, leading to the growth of a hybrid form of Constitutionalism, typically called Digital Constitutionalism.

Coming back to the exercise of fundamental rights through the means of digital platforms, any form of exclusion or inaccessibility to the digital platform could have severe repercussions on the exercise of the fundamental rights. Now, in this pandemic, we by default are imitating fundamental rights with digital platforms, and quite understandably. Social media exclusion will also lead to social exclusion & will also create impediment in right to information. However, this does not mean that the social media platforms would not be subject to any reasonable restrictions. The recent inculcation of IT Rules 2021 [Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules 2021] in this mix has led to several questions being raised as to the freedom of speech and other digital rights, however, the objective of the IT rules 2021 needs to be understood. The core objective of the IT Rules 2021 is to ensure there is reasonable restriction being imposed on the content being posted on social media platform or any other platform utilized for sharing of content.

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1. Ashit Kumar Srivastava is an Assistant Professor of Law at Dharmashastra National Law University.
2. Dr. Edoardo Celeste, 'Digital Punishment: social media exclusion and the constitutionalizing role of national courts' (2021) Int.R.L, Comp. &Tech. < https://www.tandfonline.com/doi/full/10.1080/13600869.2021.1885106 > accessed 28 August 2021.

Therefore, the IT rules 2021 can be seen as an e-reasonable restriction. However, many of the scholars find IT rules capable of impeding free speech, which again is an idea of exclusion. However, rule 12 of the IT Rules, 2021 does provide for Self-Regulating Mechanism, which shall be headed by a retired Supreme Court or High Court judge or an independent eminent person from the field of media, broadcasting, entertainment, child rights, human rights or such other relevant filed. Definitely, there is a possibility that this provision will lead to the constitutionalization of the tenets of the IT Rules. If the retired judge of the Supreme Court or the High Court would be sitting at the position, there are chances that the provisions of the IT rules would be read under the light of the constitution, and thus there would be jurisprudential borrowing from the Constitution.

MINIMAL STANDARDS OF CONSTITUTIONS

After comprehending the essential role of digital platforms as an extension of expression of fundamental rights, it becomes important to set responsibility onto their actions, there have to be certain minimal standards of constitution which need to be maintained by the social media platforms. Knowing that a lot many platforms are the U.S. based MNCs with billions of turnovers and with its own set of policies. A foreign corporation finds itself in a tangle to adhere to the local laws. A U.S. based social media website would reflect the free speech values of its native country.

Yet, while delivering services within the Indian context, it becomes important to ensure that the platforms playing an important role of expression adhere to certain minimal standards of the constitution. Knowing that the 'Free Speech' in India is not an identical free Speech of the U.S. jurisprudence, these platforms need to ensure certain reasonable restrictions are put onto their users. Mimic(ing) cultural underpinning of certain rights of a non-native country will have different consequences.

DATA LOCALIZATION & POSSIBLE EXCLUSION

Another aspect that needs to be emphasized upon from the perspective of 'Digital Exclusion' is data-localization. In recent times, the debate about data-localization has turned more heated and frequent, especially after the first draft of Personal Data Protection had come in 2018 (the first draft). The first draft had called for a blanket data-localization, meaning all the data about Indian consumers would be required to be stored within India. However, after much furor upon this issue in the second draft of the Personal Data Protection, 2019 (second draft), the data-localization has been limited to critical & sensitive personal data, however, there are situations in which sensitive and critical personal data could also transferred outside India. However, as per the second draft, there is no clear definition of 'Critical Personal Data', it has to be notified by the Central Government (refer to section 33 explanation). What does it implicate? Transfer of huge volume of data from the U.S. based premises to the trans-Atlantic sub-continent, now many of the corporations are still under the process for embracing data-localization. Further a lot many minor corporations won't be able to sustain such huge transfers or even sustain a data-centre in India, meaning that a lot many foreign-based website services would come to a halt.

If India pushes for a hard-data localization, there is a possibility that corporations who were not preparing for it, might have to make a make-shift mechanism for continuing their services. This could mean renting of data-centers in India, which again brings a question who will be owning these data-centres? Will it be native corporations, or will the government back it. Therefore, a sudden push for data-localization surely can bring data-fragmentation: meaning some data would be in India, while some in the U.S. while transitioning is happening, which will lead to disruption of services.

However, if seen from the perspective of accountability & national security, since 2018 the Government has hinted towards its stand for data-localization. However, several corporations have been found lax in this, to ensure that there is no disruption of services, it is necessary that a smooth transition happens, especially in cases of Search Engines websites, knowing that search-engines websites require accessibility of huge volume of data in every micro-second, it is hard to image to them to function with data-fragmentation.

In today's A.I. driven era, data is everything, if accessibility to data-centres in India is limited to few big corporations, there would by default would be exclusions of certain services which minor corporations provided. Therefore, to ensure there is equal space for companies coming to India certain criteria are kept in mind. Such as the kind of service provided by the corporation, the essentiality of that service, the company's economic viability coming to India, and whether there is a healthy alternative to that service within India.

Coming to the conclusion, it is imperative to understand that growth of digital Constitutionalism is India is happening at a rapid speed, and as a young nation we need to respond to the challenges being presented to us promptly. As pandemic takes different forms, a digital life is something to which we need to embrace upon for current times.

GUEST ARTICLE

WHAT DOES APPROVAL OF A RESOLUTION PLAN MEAN FOR GUARANTORS?

- Akash Chandra Jauhari & Aishwarya Singh[1]

CONTEXT

It has been five years since the enactment of the Insolvency and Bankruptcy Code, 2016 (**IBC or Code**) which overhauled the decades old mechanisms for insolvency resolution in India. The earlier regime was replaced with a consolidated legal regime which seeks to provide a time-bound and value maximising framework for resolving insolvency of the body corporates[2] as well as individuals[3]. It made a fundamental shift in the normative and analytical understanding of the insolvency law in the country. Despite being a private law governing inter alia the rights of creditors against its insolvent debtors, the provisions of the Code have public law ramifications which has resulted in several debates around its interaction with other private and public laws.[4] One such set of interactions has been between the Code and the law of guarantees, as codified under the Indian Contract Act, 1872 (**ICA, 1872**), specially where the principal debtor is undergoing a corporate insolvency resolution process (**CIRP**) under Chapter II of Part II of the Code.

Generally, a contract of guarantee is a tripartite transaction which is intended to be completed in two stages[5]. First, where the principal debtor defaults, the guarantor is required to discharge the principal debtor's liability towards the creditor,[6] and second, the guarantor has the right to seek compensation from the principal debtor or its assets[7]. The primary obligation is ultimately required to be performed by the principal debtor. Commencement of the CIRP in relation to the principal debtor or corporate debtor (**CD**) obstructs the completion of this arrangement, as the CD undergoes a collective claims resolution process. This results in impasses between the insolvency law and the law of guarantees, and in certain cases requires intervention of the courts and tribunals. On a fundamental level, these impasses are on account of two sets of schools of thought. The proponents of the law of guarantee seek to argue that the steps involved in a CIRP will have a bearing upon the obligations of the guarantor under the contract of guarantee or the ICA, 1872. While the insolvency law proponents proceed on the premise that the CIRP under the Code is designed for resolving insolvency of a single entity which has no direct bearing upon obligations of the guarantor.

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1. Mr. Akash Chandra Jauhari is a Senior Resident Fellow at Vidhi Centre for Legal Policy and Ms. Aishwarya Singh is an Associate at AP & Partners. These are the authors' personal views.
2. Insolvency and Bankruptcy Code 2016, Part II.
3. Insolvency and Bankruptcy Code 2016, Part III.
4. For instance, section 238 of the Insolvency and Bankruptcy Code 2016 stipulates that provisions of the Code will override other laws.
5. Indian Contract Act 1872, s 126; P.C. Markanda, *The Law of Contract*., vol. 2 (3rd Edition, 2013) 1394.
6. Indian Contract Act 1872, ss 126 and 128.
7. Indian Contract Act 1872, ss 140, 141 and 145.

The recent decisions of the Supreme Court in *Lalit Kumar Jain*[8] and *Ghanashyam Mishra*[9] try to settle this impasse and side with the proponents of insolvency law in relation to the status of a guarantor during the CIRP. In *Lalit Kumar Jain*, the Supreme Court observed that the approval of a resolution plan does not *ipso facto* discharge a personal guarantor of its liabilities under the contract of guarantee.[10] The release or discharge of a principal debtor by an involuntary process or operational of law does not absolve the guarantor of its liabilities which arises out of an independent contract.[11] Significantly, the Supreme Court categorised the approval of a resolution plan equivalent to 'operation of law' and an 'involuntary process'.

A similar categorisation seems to be at the background of the decision in *Ghanashyam Mishra*, wherein it was held that upon approval of the resolution plan, all claims which are not part of the plan stand extinguished. During the CIRP, the resolution plan is not binding due to collective participation of all the stakeholders in the decision-making process.[12] Alternatively, to ensure value maximisation, the Code trusts the Committee of Creditors (**CoC**) with the decision-making process during the CIRP.[13] It is composed of unrelated financial creditors who are required to assess the financial status of the CD and viability and feasibility of a resolution plan. Thereafter, the Adjudicating Authority by order approves a resolution plan. Therefore, the approved resolution plan[14] is binding upon all the creditors of the CD, due to a provision of law i.e. section 31 of the Code, whether or not they have submitted their claims during the CIRP. A guarantor's claim pursuant to her right of subrogation[15] or indemnity[16] under the ICA, 1872, is contingent upon performance of her obligations under the contract of guarantee. Where a guarantor performs her obligations post-approval of a resolution plan in respect of the CD, she will be unable to exercise these rights as they are not part of the resolution plan, and therefore, extinguished.[17]

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8. *Lalit Kumar Jain v. Union of India*, (2021) SCC OnLine SC 396.
9. *Ghanashyam Mishra and Sons Pvt. Ltd. v. Edelweiss Asset Reconstruction Company Ltd.*, (2021) SCC Online SC 313.
10. ibid 8, para 136.
11. ibid.
12. A similar rationale was adopted by the court in Calcutta High Court in *Gouri Shankar Jain v. PNB*, (2019) SCC OnLine Cal 7288 wherein it was observed that "34. ... *Post the bankruptcy and insolvency proceeding of the debtor, the pre bankruptcy and insolvency right of the creditor does not undergo any metamorphosis on the principle that, such proceedings emanate out of a statutory right and are involuntary in nature. ... 35. ... when, a financial creditor approaches the NCLT under the provisions of the Code, it does so, in exercise of statutory rights. Contractual obligations between the financial creditors and the surety are not obliterated or modified or suspended by the eventual outcome of such proceeding.*"
13. The CoC's power to approve a resolution is subject to the provisions of the Code which ensures balance of equities amongst the stakeholders of the CD. For instance, under section 30(2) of the Code in order to balance the interests of certain key stakeholders i.e., operational creditors and dissenting financial creditors, the Code imposes conditions on the exercise of CoC's powers.
14. The constitution of the CoC was upheld by the Supreme Court in *Swiss Ribbons Pvt. Ltd. v. UoI* (2019) 4 SCC 17 wherein it was *inter alia* noted that since the financial creditors are in the business of moneylending, banks and financial institutions are best equipped to assess viability and feasibility of the business of the corporate debtor; see also the Report of the Bankruptcy Law Reforms Committee @ para 4.
15. Indian Contract Act 1872, s 140.
16. Indian Contract Act 1872, s 145.
17. In certain cases, the resolution plans explicitly provide for extinguishment of any subrogation or indemnity rights against the CD. For example, *CoC of Essar Steel India Ltd. v. Satish Kumar*, (2020) 8 SCC 531 and *SBI v. Calyx Chemicals & Pharmaceuticals Ltd.*, (2019) SCC OnLine 3854.

Therefore, unless otherwise provided in a resolution plan, post-approval of a resolution plan the tripartite transaction in a contract of guarantee is limited to a bilateral transaction between the creditor and the guarantor. What critics of these decisions are most concerned about is that they will continue the guarantors liability towards the creditors despite having no rights promised under the ICA, 1872.[18] This may be a problem for the proponents of laws of guarantee, but a creditor's bargain in a contract of guarantee needs to be appreciated. Particularly, when the creditor has performed the guarantor's consideration by lending money to the CD.[19] One of the primary reasons why a creditor will wish to take a guarantee as security is that she can look to the guarantor for payment particularly in a situation when the CD is in some financial difficulty.[20] It is the guarantor, rather than the creditor, who bears the risk of the CD's insolvency including the legal consequence of successful completion of the CIRP.[21]

CONCEPTUALISATION OF 'GUARANTORS' UNDER PART II OF THE CODE

These decisions also shed some light on the conceptualisation of guarantors in the insolvency of the CD under Part II of the Code. Raising debt is an essential part of any business for an enterprise, and guarantees are ubiquitous in such commercial transactions. It is a commercial practice for banks and financial institutions to seek a guarantee as a security while disbursing loans for mitigating risk associated with the default. In many cases, where the debtor is a company, these guarantees are provided by the promoters or a person in control or associated with the debtor.[22] In addition to risk mitigation, taking guarantee from such persons ensures that they will monitor the performance of the principal obligations by the debtor This practice of Indian banks taking a personal guarantee from the promoters was noted by the Bankruptcy Law. Reforms Committee (**BLRC**) which observed that a common code for individuals and enterprises will ensure that the resolution can be synchronous, less costly and help more efficient recovery.[23]

Post-enactment, Part II and Part III of the Code dealt with insolvency resolution of the corporate persons and of the individuals (including personal guarantors) and the partnerships, respectively. The contextual commonality between these two parts, as noted by the BLRC, is reflected through the legal design of the Code by a common set of definitions[24] and administrative support.[25]

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18. Indian Contract Act 1872, ss 133 and 141.

19.As per section 127 of the ICA, 1872 – *Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.*

20.Andrews, Law of Guarantees (6th edn, 2011) para 6-002.

21. ibid.

22. It reduces the monitoring costs for the lenders which is shared with such guarantors. Being related to companies, they have a comparative monitoring advantage over the creditors which reduces the risks related to the non-performance by the debtor. *See Avery Wiener Katz*, An Economic Analysis of the Guarantee Contract, Vol. 66: Issue 1, Article 2 (1999) Available at: https://chicagounbound.uchicago.edu/uclrev/vol66/iss1/2.

23. *The Report of the Bankruptcy Law Reforms Committee* (BLRC 2015, 31-I) para 3.4.3.

24. Insolvency and Bankruptcy Code 2016, s 3.

25. IBBI has the power to make regulations under Part II and Part III of the Code.

The synchronisation between the resolution of claims owed by the CD and its guarantors is intended to be achieved by procedural coordination pursuant to section 60 of the Code and making the resolution plan binding upon the guarantors under section 31 of the Code.

- *Procedural Coordination between the insolvency procedures of CD and its guarantors*

Unlike group insolvency procedures, the processes under the Part II and Part III of the Code are designed for resolving insolvency of a single entity or an individual. A guarantee relationship possesses a special challenge for such singular insolvency processes as: a common debt is jointly and severally owed to more than one debtor; and the insolvency resolution process is directed towards only one of them. Though there are no substantive interlinkages amongst the processes for different enterprises, or between an enterprise or an individual, section 60 addresses this challenge by providing a common adjudicating authority for the CD and its guarantors (personal or corporate) being the National Company Law Tribunal (**NCLT**).[26] Where required, a common adjudicating body may ensure procedural coordination between the conduct of the insolvency resolution processes of the CD and its guarantors.

The decisions in the *Lalit Kumar Jain* and *Ghanashyam Mishra* dissociates the resolution of a debt owed by the CD from the rights and liability of its guarantors. Unless otherwise provided in the resolution plan, the liability of the guarantor is unaffected by the approval of resolution plan in respect of the CD. Also, post-approval, the guarantor will not have any right to proceed against the CD or its assets, even if she makes good the guaranteed debt. Since the creditors' rights vis-à-vis the guarantors are not affected, the CoC may not be incentivised to seek a combined resolution through procedural coordination, unless such coordination fetches better value as compared to dissociated insolvency proceedings. On the other hand, the guarantors may seek a holistic resolution of the guaranteed debt in order to avoid or minimise her liability post-approval of the resolution plan.

In practise, the procedural coordination may be seen between the insolvency resolution processes of a CD and its corporate guarantor as both are subjected to a similar procedure. The commencement of the CIRP delinks the CD from its erstwhile management and offers an asset like treatment by the CoC, who may restructure or reorganise it in accordance with the resolution plan. Where the CD and its corporate guarantors form part of the same group of companies, an attempt may be made before the common NCLT for consolidation of their CIRPs[27] Such procedural coordination will be driven by the CoCs of both the entities and it will result in a successful resolution if creditors forming part of the CoCs are not non-aligned. Further, as implementation of Part III is at its nascent stage, it is difficult to assess the probability of similar procedural coordination between insolvency resolution processes for the CD and its personal guarantors. Dissimilarity of procedures and its timelines may be one of the reasons which may hinder the jurisprudential evolution in this direction. However, creditors-driven attempt may compel the NCLT to issue orders in favour of procedural coordination.

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26. Insolvency and Bankruptcy Code 2016, ss 60 (2) and (3).
27. *State Bank of India v. Videocon Industries Limited,* MA 1306/2018 in CP No. 02/2018 dated 08.08.2019 (NCLT-Mumbai).

- *Binding nature of the resolution plan vis-à-vis the guarantors*

As per section 31 of the Code, where the NCLT by order approves the resolution plan, *it* ***shall be binding on the … guarantors*** *and other stakeholders* ***involved in the resolution plan.*** The approved resolution plan is binding upon the guarantor and other stakeholders due to operation of law. Use of the word 'involved' may imply that a stakeholder needs to actively participate in the CIRP of the CD, thereby making her bound by the resolution plan by her own volition. However, the involvement is required in the resolution plan and not during the resolution process. Therefore, the stakeholders are bound by the terms of the resolution plan and its implementation, whether or not they approved the resolution plan. Similarly, the notes on clauses to this provision states that – "*… it is important to note that the plan is binding on all the relevant stakeholders. Therefore,* ***if a plan requires stakeholders to do or not do certain actions for the successful implementation of a plan, it shall be binding on all the affected parties who shall be bound to undertake the actions set out in the plan.*** *…*" [28]

Further, according to the Supreme Court in *V. Ramakrishnan* [29] reference to 'guarantor' in section 31(1) is included as otherwise the guarantor would be relieved of its liabilities pursuant to section 133 of the ICA, 1872.[30] Section 31(1) makes it clear that the guarantor[31] cannot escape payment as the resolution plan, which has been approved, may well include provisions as to payments to be made by such guarantor. This decision was relied in *Essar Steel* [32] wherein the resolution plan explicitly provided that a financial creditor's rights against the guarantors are not discharged, while the guarantor's right of subrogation against the CD is extinguished. The court rejected the argument that part of the resolution plan which extinguishes subrogation rights cannot be applied to guarantees furnished by the erstwhile directors, and also laid down the clean or fresh slate principle.[33] Further, in *Vijay Kumar Jain* [34] the apex court noted that one of the rationale for providing a resolution plan to the board of directors is that the members of the board, who are often guarantors, are vitally interested in the plan as it binds them. Also, it noted that the scaling down of the debt of the principal debtor will have an effect upon the debt of the guarantor.[35]

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28. Notes on clauses of the Insolvency and Bankruptcy Code, 2015, Bill No. 349 of 2015.
29. *State Bank of India v. V. Ramakrishnan*, (2018) 17 SCC 394 , p 25.
30. Section 133 of the ICA, 1872 provides for the discharge of surety by variance in terms of contract.
31. ibid.
32. *CoC of Essar Steel India Ltd. v. Satish Kumar*, (2020) 8 SCC 531.
33. The Supreme Court in *Essar Steel* observed that – "*107. … A successful resolution applicant cannot suddenly be faced with "undecided" claims after the resolution plan submitted by him has been accepted as this would amount to a hydra head popping up which would throw into uncertainty amounts payable by a prospective resolution applicant who would successfully take over the business of the corporate debtor. All claims must be submitted to and decided by the resolution professional so that a prospective resolution applicant knows exactly what has to be paid in order that it may then take over and run the business of the corporate debtor. This the successful resolution applicant does on a fresh slate, as has been pointed out by us hereinabove. …*".
34. *Vijay Kumar Jain v. Standard Chartered Bank*, (2019) 20 SCC 455.
35. ibid, para 19.3. The decision in *Vijay Kumar Jain* was referred in *IDBI Bank Ltd. v. EPC Constructions India Ltd.*, 2019 SCC OnLine NCLT 583 wherein NCLT *inter alia* observed that until and unless the resolution plan expressly provides that guarantees would survive even after the approval/implementation of plan, it cannot be said that the guarantors would be liable to pay the debt of the CD. If the creditors are allowed to claim their remaining dues from the guarantors after the approval of plan, and the guarantors pay off the remaining debt of the CD, the guarantors would step into the shoes of the creditor of the CD. Thereafter, they would be entitled to exercise their right of subrogation against the CD which is then under the control and management of the resolution applicant (**RA**). Hence, the RA will then pay the debt of the guarantor under its right of subrogation. Hence, in effect, the RA would pay the full amount of creditors, therefore, there was no idea left for filing the plan and taking over the debtor company by settling the dues of the creditors. This vicious circle is a never ending process and it was definitely not intended by the legislators while framing the IBC.

Interestingly, the observations made in the notes on clauses and these decisions determine the rights and liabilities of the guarantors as a *legal effect of the contents* of the approved resolution plan. On the other hand, findings in the *Lalit Kumar Jain* relies only on the fact of approval of the resolution plan, as the court discussed the interplay between the provisions of the Code and the ICA, 1872. As per Lalit Kumar Jain, the liabilities of a personal guarantors are not ipso facto discharged upon approval of a resolution plan. Similarly, pursuant to Ghanashyam Mishra, unless otherwise provided in the resolution plan, as a legal effect of approval, the guarantors will be unable to proceed against the CD or its assets in respect of their subrogation or indemnity rights.

In case any alterations are required to rights and liabilities of the guarantor, the same can be provided within the resolution plan. While negotiating the resolution plan for the CD, the CoC may negotiate with the guarantors (personal or corporate) in respect of their rights and liabilities under the contract of guarantee. If such negotiations form part of the approved resolution plan, parties to the contract of guarantee will be bound by the same. However, the extent of alterations and unnegotiated changes to the contract of guarantee or the rights and liabilities of the guarantor through the approved resolution plan may require another round of intervention by the courts and tribunals.[36]

THE ROAD AHEAD

Ever since the enactment of the Code in 2016, there has been uncertainty regarding the status of guarantors during CIRP of the CD. The observations of the BLRC indicates that the conceptualisation of the 'personal guarantors' during the CIRP was made due to the prevailing practise of guarantees provided by the erstwhile promoters or management of the CD.[37] This conceptualisation was made at the inception of the Code, when section 29A was not inserted, and the defaulting promoters or management were permitted to participate in the resolution process. In a non-section 29A regime, the interpretations adopted by the *Lalit Kumar Jain* and *Ghanashyam Mishra*, could have acted as a negative reinforcement for the promoters (or personal guarantors) to seek procedural coordination of insolvency processes or offer a better value in the resolution plan for a holistic resolution of guaranteed debt.

During the course of its enforcement, the amendments to the Code, its phased implementation[38] and judicial intervention to address constitutional challenges[39] and interpretation related issues, has continued the uncertainty regarding a stable implication of the approval of resolution plan upon the guarantors.

36. For instance, in *IDBI Bank Ltd. v. EPC Constructions India Ltd.*, (2019) SCC OnLine NCLT 583 a dissenting financial creditor sought directions to amend the resolution plan to remove the restrictions on it to enforce its rights against the guarantors of the CD as such rights ought to be protected while approving or implementing the resolution plan. NCLT noted that this issue was placed before the CoC and it approved the resolution plan, therefore, NCLT was not inclined to interfere with the commercial wisdom of the CoC.
37. The concept of 'corporate guarantor' was introduced later in 2018 vide IBC (Second Amendment) Act, 2018 based on the recommendations of the Insolvency Law Committee, March 2018.
38. The provisions for insolvency resolution for personal guarantors were notified after three years of implementation of the CIRP in respect of the CDs. Chapter II of Part II of the Code was notified vide Notification No. S.O. 3594(E) dated 30.11.2016 w.e.f. 01.12.2016; and Part III of the Code in so far as it relates to personal guarantors to CDs was notified *vide* Notification No. S.O. 4126(E) dated 15.11.2019 w.e.f. 01.12.2019.
39. *Lalit Kumar Jain* upheld the Notification No. S.O. 4126(E) dated 15.11.2019 which notified provisions related to insolvency resolution of personal guarantors.

Even though the proponents of the two schools of thought are still discussing the merits of these findings, the decisions in *Lalit Kumar Jain* and *Ghanashyam Mishra* provide predictability and legal certainty to the relationship between the CD, its creditors and its guarantors. Going forward this may facilitate development of creative commercial solutions for a holistic resolution of guaranteed claims by the creditors and the guarantors of the CD for ensuring value maximisation.

GUEST INTERVIEW

IN CONVERSATION WITH MR. AMEEN JAUHAR

1.What was your academic pursuit in your earlier days? How did you end up choosing public policy for a professional career?

I am from the 2007-2012 batch of National University of Juridical Sciences, Kolkata. My law school journey was pretty conventional that included participating in moot courts, research paper writings, attending conferences, etc. Through participation in various activities, I discovered that my interest lies in research work. Back in my days, the scope for making a career in public policy was narrow, and the only way to become a part of it was either by writing civil services examinations or joining political parties, if one was resourceful. Due to these reasons, my internships were fairly limited to litigation practices. It was during my time in law school when the corporate culture was booming especially in cities like Mumbai and Delhi. After graduation, I ended up joining the Dispute Resolution Team of one of the biggest law firms in India today, J. Sagar Associates. Eventually, I moved to their Regulatory Practice Team where I had my first exposure to some policy-related work. However, my work was mostly litigation oriented and was quite different from what I currently do.

Addressing the second part of your question now, how I ventured into the policy sphere of working was after conversations with people, especially a friend of mine who had interned with a think tank based in Washington, while she was in her fourth year of law school. It was these conversations, and my work in regulatory policy that made me think if such roles existed in India. After having spent three years at JSA, I was thinking of going abroad for a Master's degree, and it was during this time that VIDHI had formally set up its work. Coincidentally, that VIDHI had put out a call for applications as well during that time, I decided to give it a shot, and that is what marked my transition from a litigation lawyer to a policy researcher.

2. What law subjects are fundamental in shaping one's understanding of public policy?

Having a clarity in Administrative Law and Constitutional Law are definitely crucial for someone who wants to understand the nuances of public policy. Unlike how much importance Part III of the Constitution is given in law schools, it is very much important to have an understanding of the federal structure of India, functioning of the legislature and various other elements of the Constitution that are usually not touched upon. One also needs to have knowledge in areas beyond what one works in. For instance, I am currently working on tech-policy issues, so having, so having an understanding of the Information Technology Act in India, Data Protection Bill, etc. is pivotal to my research.

IN CONVERSATION WITH MR. AMEEN JAUHAR

My own research focus has been on AI ethics and governance of AI, which currently has no legislation regulating it, and this is where one needs to read up, and engage with other domain experts working on these issues.

Law schools don't usually provide a practical understanding of how policy-related issues work and this is mostly due to the lack of empirical study initiatives being taken by them. If one wants to have a working knowledge of public policy, then understanding subjects beyond law is also crucial. This means rudimentary knowledge of sociology and economics that is provided at law schools are not enough. You need to develop some good grounding in social science research methods, especially empirical research (including quantitative, qualitative, or mixed methods).In addition to this, it is important to develop interpretational skills which will help in understanding the nuances of legislative functioning, such as the legislative bills, Acts, rules, etc.

As a researcher, one needs to have clear articulation of complex policy challenges and recommendations, which are neither reductionist, but succinctly capture the core issues. So, for building a career in public policy, one's thoughts need to be structured along-with the identification of skills which need polishing. Career options might seem obscure when deciding which program to choose right after your law school, but often not-so-popular programs might turn out to be better suited for your career in public policy. Also, the initial years of one's career needs to be introspective prudently and judiciously.

3. What skills are the most important for a career in public policy?

Familiarisation with social science research papers is integral to understand what social science research really is. The more you engage with this literature, the more you understand their methods, research questions, objectives, and how it feeds into the policy narratives as research evidence. During a conversation, one should be in a space to understand what is going on instead of feeling left out. Some may disregard these practices, but these would develop a holistic understanding of how to look at all the literature from different perspectives.

GUEST INTERVIEW

IN CONVERSATION WITH MR. AMEEN JAUHAR

4. For someone considering a specialization in the field of public policy, what difference can a Master's Degree in Public Policy from India and abroad make? In your opinion, when is the right time to pursue a Master's Degree in public policy?

From my personal experience, having a few years of work experience enriched my understanding of what I really wanted to do. There was a tectonic shift from my initial interest to do a Masters degree right after graduating college, to wanting to be involved in public policy research. Also, if considered logistically, prior work ex for allows one to be financially secure and that can help you pursue a master degree abroad.
Now, between India and abroad, it is very difficult to compare since there are not many established public policy programmes in India, and the ones which are being offered by a few universities are at a nascent stage. Hence, it is very difficult to assess the quality of such programs.

Thus, I am more inclined towards non-Indian universities for pursuing public policy courses as a part of a Master's degree.

5. In your experience, what in a CV can help build a career in public policy for law students?

When I shifted from J. Sagar Associates to VIDHI, the reason I was able to convince them that I was a good fit for them was because I had some working knowledge in the field I was applying for (judicial reforms and access to justice). My litigation experience aided me understanding of policy-related research issues in the judicial reforms and access to justice discourse. Hence, having some domain knowledge always helps.
Having all kinds of perspectives towards an issue helps one not to align your thoughts with one perspective and objective. It is pretty similar to how a lawyer would work neutrally when giving advice on an issue backed by research and evidence, and not just blindly supporting any agenda or through anecdotal evidence alone.

For the purpose of your CV, conventional methods such as publishing research papers in the subject area you like will work. However, one needs to be versatile with the understanding of a particular issue. Also, developing requisite skill sets and understanding of the ecosystem is imperative. After all, while recruiting, we do recognize that people are just graduating from law schools, and currently, law schools are not imparting substantial knowledge on public policy; hence, we do not test anyone unnecessarily.

GUEST INTERVIEW

IN CONVERSATION WITH MR. AMEEN JAUHAR

6. What places/organizations would you suggest to a law student for internships who wishes to get a comprehensive experience of public policy?

There are a number of organizations where one could intern like VIDHI, DAKSH, CIS, and CLPR. There are also international organizations like Brookings, Carnegie, Oxford Policy Center and Observer Research Foundation. But before choosing, one should know one's area of interest and then choose an organization for an internship.

7. What is the nature of work at a Think Tank?

At a Think Tank, work is not confined to desk jobs but also requires field work. Field work depends on the subject of research. Research in a think tank is not purely academic as it has to be actionable and needs to be negotiated with different stakeholders like bureaucrats and politicians. One should be able to balance between robust research and practicality. Now, since many organizations are coming up in the field of public policy, one needs to build one's own ecosystem, network and collaborations.

8. What should be the desired course of action for a student whose CV is inclined towards Corporate Law but in the last year of law school he/she decides to go for public policy?

One can opt for financial policy and corporate regulation, if they change their mind in the final year of law school. One's Statement of Purpose should be more appealing than the resume. The SOP should reflect your transferable skill set, versatile research background and basic understanding of law subjects. One should also be good at research and thereafter articulating it.

9. Any advice or tips that you would like to impart to aspiring law students and policy enthusiasts?

Policy research generally takes time to show evidence. It might also culminate quickly due to conducive political momentum. So, the people working in this field need to be self-motivated and must keep oneself in a space where one's work is appreciated. One must recognise the incremental nature of the policy process, and not be frustrated when research and advocacy efforts do not immediately bear fruit. This, arguably, is a big challenge for newcomers into this space.

STUDENT SUBMISSION

REGULATING SOCIAL MEDIA: A RESTRICTION ON FREEDOM OF INTERMEDIARY

- Dipti Jain and Aksshay Sharma

INTRODUCTION

> *"Privacy is not an option, and it shouldn't be the price we accept for just getting on the Internet."*
>
> - Gary Kovacs

The present pandemic has catalysed a plethora of changes and one of them is the increased use of social media platforms and Over-the-Top Platforms (OTT platforms) due to which there is a 60% rise in paid OTT subscribers.[1] In this High-tech era where the whole world is dependent upon social media to express themselves and India, having the highest number of users has come up with the guidelines to put restrictions on the freedom of expression. Recently, the Ministry of Electronics and Information Technology has introduced the Information and Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 ("Rules, 2021" and "Intermediary Guidelines, 2021") which put restrictions on the social media platforms regarding their content. Before deliberating on the guidelines, it is pertinent to understand the meaning of intermediary.

MEANING OF THE WORD "INTERMEDIARY"

The Information Technology Act, 2000 ("IT Act") under Section 2(1)(w) has defined an intermediary as a person who on behalf of another person receives, stores or transmits any electronic record or provides any service relating to such electronic record. It then gives a list of entities who constitute an intermediary that includes: telecom service providers, network service providers, internet service providers, web-hosting service providers, search engines, online payment sites, online-auction sites, online-marketplaces and Cyber cafes.

The perusal of the above definition indicates that an Intermediary simply refers to a platform or forum or service provider which hosts or publishes third party content and does not have any role in the creation, modification etc. of such content. It does not exercise any editorial control over the content posted on it. However, this does not mean that content posted on its platform cannot be restricted for violating the platform's guidelines.

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1. Lata Jha 'India registers 60% growth in paid OTT subscribers during pandemic' *Livemint* (16 Dec 2020), <https://www.livemint.com/industry/media/india-registers-60-growth-in-paid-ott-subscribers-during-pandemic-11608108011235.html> accessed 15 May 2021.

There are many platforms which are intermediary but still exercise some power regarding the type or nature of content posted on them, e.g. Twitter, Facebook, etc. who have their own set of guidelines such as 'community guidelines,' which specify that certain type of content (like content that incites communal hatred or violates privacy) will be taken down if it is found to be violating its terms and conditions or guidelines. This is done so that a safe online environment is made available where the bare minimum level of decency is maintained as no privilege can be enjoyed absolutely.

OVERVIEW OF THE INTERMEDIARY GUIDELINES

On 25th February, 2021 the Ministry of Electronics and Information Technology notified the Intermediary Guidelines, 2021 under the Section 87(2) of the IT Act. Through these guidelines the government not only regulated the digital news and OTT platforms but also set out the provisions for the due diligence to be adopted by the intermediaries. Under these Rules 2021, the intermediaries have been distinguished into two categories viz. Social Media Intermediaries and Significant Social Media Intermediaries which need to comply with some special set of rules.

According to Part II of the new guidelines, the intermediaries need to establish a Grievance Redressal Mechanism wherein an Indian Resident as Chief Compliance Officer, a Nodal Contact Person and a Resident Grievance Officer shall be appointed to ensure the compliance of these rules. Additionally, it provides for due diligence which the intermediaries need to comply with. However, non-compliance with the same would have severe consequences of depriving the social media intermediary of the immunity of "safe harbour" provided under the Section 79 of the IT Act (Rule 3(1)). The rules also provide that when asked by the Court or the government agencies, the Significant Social Media Intermediaries shall disclose the identity of the "first originator of the mischief" to the authorities (Rule 4(2)).

Part III of the Guidelines is applicable on the digital news and current affair platforms and entities engaged in online curated content under which these platforms are required to have a three-tiered grievance redressal mechanism, which is as follows: Level I - Self-regulation by the publishers with the help of Grievance Officer; Level II- Self-regulation by the self-regulating bodies of the publishers; Level III- Oversight mechanism by the Central Government.

The Code of Ethics is also provided by the rules that mention the classification of the online curated content on the basis of the nature and type of the content. It provides for the content rating system like U (Universal), U/A 7+, U/A 13+, U/A 16+ and A (Adult) and for which the basis should be "themes and messages; violence; nudity; sex; language; drug and substance abuse and horror."

Through these rules the Central government has got a sweeping right over the social media intermediaries to keep them under control. Now, intermediaries are not puppets who would comply with every action of the Government.

Due to this arbitrariness, few of the digital news platforms have approached various High Courts by filing a petition to seek remedy for the violation of their fundamental rights. Those platforms are:

1. "The Wire" (*Foundation For Independent Journalism and Ors. vs. Union of India and Ors.*) (Delhi High Court)[2]
2. "Live Law" Legal News Portal (*Live Law Media Private Limited and Ors. vs. Union of India and Ors.*) (Kerala High Court)[3]
3. "The Quint" (*Quint Digital Media Ltd. and Anr. vs. Union of India and Anr.*) (Delhi High Court)[4]
4. "Pratidhvani" (*Truth Pro Foundation India vs. Union of India*) (Karnataka High Court)[5]

SCANNING THE INTERMEDIARY GUIDELINES

- Beyond the Scope of IT Act, 2000

The Intermediary guidelines is the delegated legislation under the IT Act, 2000 and they cannot overreach the limitations of the parent legislation. However, the Central Government has exercised its power under the IT Act, 2000 beyond the limits prescribed thereunder to frame these rules. The Act, 2000 only provides recognition, authentication and facilitation of electronic data and electronic communication and their receipt as the evidence. It regulates the online content on the basis of the offences like cyber terrorism, obscene material, child pornography, sexually explicit material, etc. The Rules, 2021 has gone beyond the scope of the parent Act and seeks to regulate the online news platforms and the online curated content by imposing a 'Code of Ethics' violating freedom to express and free press. These two entities have been introduced by the Central Government through the guidelines, which have no mention in the parent Act. The impugned Rules have brought in some of the elements of Section 66-A which was struck down by the Supreme Court.

Thus, the Rules not only remit the parent Act but also contravene the ruling of *Shreya Singhal vs. Union of India*.[6] However, the IT Act, 2000 neither intends nor provides any provision for the programme code or regulating the online news content, yet this has been done by the impugned rules, a subordinate legislation. The Rules have increased the scope as to when the intermediaries can be deprived of the "safe-harbour" protection under section 79 of the Act which is also subject to legal prosecution. As decided by the Supreme Court in *Ajoy Kumar Banerjee vs. Union of India*[7] "there is no unlimited right of delegation and subordinate legislation cannot go beyond the object and the scope of the parent Act. If such Rule or Regulation goes beyond what the parent Act contemplates, then it becomes ultra vires the parent Act," similarly the impugned intermediary guidelines are also ultra vires to the IT Act, 2000.

2. W.P.(C) 3125 / 2021.
3. W.P. (Civil) No. 6272 of 2021.
4. *Quint Digital Media Limited & Anr. v. Union of India* W.P.(Civil) of 2021 <https://www.livelaw.in/pdf_upload/the-quint-delhi-hc-petition-it-rules-390804.pdf>
5. *Truth Pro Foundation India v. Union of India* W.P.(Civil) of 202 https://www.medianama.com/wp-content/uploads/2021/04/TRUTH-PRO-FOUNDDATION-INDIA-VS-UNION-OF-INDIA-AND-OTHERS.pdf.
6. *Shreya Singhal vs. Union of India* (2015) 5 SCC 1.
7. *Ajoy Kumar Banerjee vs. Union of India* (1984) 3 SCC 127.

- Vague and Manifestly Arbitrary, According to Article 14

The provisions therein are excessive, vague, arbitrary and disproportionate. Rule 8(3) of Rules, 2021 provides for a 3-tiered structure to ensure adherence to code of ethics and grievance redressal. This structure could lead to filtering of content based on subjective interpretation of "discrimination, psychotropic substances, liquor, smoking and tobacco, imitable behaviour, language, nudity, sex and violence."

These same words were used in the Section 66A of the IT Act which the Supreme Court of India held unconstitutional in the *Shreya Singhal vs. Union of India*[8]. The Court held "The terminologies used in Section 66A of the IT Act are deemed to be very ambiguous and loose in nature. It is so vague that it is very hard to put up a charge on an accused under this section distinctly. For this reason, it is tended to be argued that what might be obnoxious to one individual might not be to the other and this makes the provision constitutionally vague in its entirety."

The same question arises here as well that every person thinks differently and what might be offensive to one person might not be offensive to another which makes it redundant in light of Shreya Singhal's case. So, this implies that the government has tried to bring the elements of Section 66A which contravenes the decision of Shreya Singhal's case. The three-tiered structure for the grievance redressal makes the executive both the complainant and the judge for all the vital free speech matters involving the removal of the content and the Central government has failed to provide judicial oversight for the redressal mechanism over the censorship. The Central government failed to consult with the stockholders when it came to the digital news platforms making this Act of government manifestly arbitrary.

Furthermore, there is no provision for appeal for the aggrieved publishers against the inter-departmental committee which again makes the provisions of the Guidelines arbitrary. Also, they violate the rule of law and separation of power. Moreover, the Code of Ethics given by the impugned rules are vague and overbroad in themselves and also seeks to proscribe the right to free speech and expression under Article 19 of the Constitution.

- Violates Freedom of Speech and Press under Article 19

Part II of Rules puts an obligation on the social media intermediaries that they need to do private censorship at the cost of severe penalties. This part also violates Article 19(1) (a) of the Constitution in cases of OTT platforms or online curated content, and right to freedom of press for online news and current affair platforms. It impermissibly deprives the social media platforms of their safe harbour protections under the Section 79 of the IT Act, 2000. The redressal mechanism under Part III of the rules puts restrictions on the Digital media platforms regarding the content which is directly affecting their Right to Speech and Expression under Article 19(1) (a) of the Constitution of India.

8. Shreya Singhal (n. 2).

Also Part III of the Guidelines classifies the content on the basis of nudity, sex, expletive language, substance abuse, etc. which are overreaching the purview of the Section 69-A of the IT Act. The said provision does not mention restricting the online content on the basis of "decency and morality," although this is a ground under Article 19(2) of the Indian Constitution but it finds no mention under Section 69-A of the Act, 2000. The net effect of Part II and Part III is that it causes a chilling effect upon the social media entities in exercising their Right under Article 19(1) (a) and disproportionately violates Article 19(1)(g) and 21 of the Constitution of India.

- Traceability is Unconstitutional and Violative of Article 21

The Rule 4(2) of the impugned rules provides that the intermediaries who primarily work in the nature of messaging should furnish the information of the first originator of the mischief whenever asked by the Judicial or Government authorities. This identification of the "first originator" requires tracing of a message to its original sender, which breaks the end-to-end encryption, laying the private conversations of individuals for the perusal of government instrumentalities. This rule violates the privacy of the user of that particular platform as one's information is being encrypted without informing them which also undermines the ruling of the Supreme Court in the case of *K.S. Puttaswamy vs. Union of India*[9] which held that the right to privacy is a part of the right to life under Article 21 of the Indian Constitution.

As Justice Srikrishna explained that "*the data could be misused by the government in several ways — which book do you read, how much money do you have in the bank, where are you getting the money from, where do you go for a walk, which restaurants do you visit... All this information and much more can be accessed without your consent. It will lead to framing people and implicating them. That is exactly what I meant when I said Orwellian, it is the Big Brother looking at you.*"[10]

Also, the Rule 17 of the Guidelines does not provide the Right of being heard to the users of the social media intermediaries which consequently violates the principles of audi alteram partem and Natural Justice.

Therefore, these guidelines violate the "Golden Triangle" of the Constitution of India envisaged in Article 14, 19 and 21 as laid down by the Supreme Court of India in the case of *Maneka Gandhi vs. Union of India*.[11] Furthermore, it also violates the principles laid by the Supreme Court in *Kartar Singh v. State of Punjab*[12] wherein the Court observed that "a penalizing provision should give a person of ordinary intelligence a reasonable opportunity to know what is prohibited."

9. *K.S. Puttaswamy vs. Union of India* (2017) 10 SCC 1.
10. Sonam Saigal, Data Protection Bill not in line with draft: Justice Srikrishna, *The Hindu* (14 Dec 2019) <https://www.thehindu.com/news/national/data-protection-bill-not-in-line-with-draft/article30307560.ece> accessed 15 May 2021.
11. *Maneka Gandhi vs. Union of India* 1978 AIR 597 SC.
12. *Kartar Singh v. State of Punjab* (1994) SCC (3) 569.

For instance, under Section 67 of IT Act, 2000 which punishes publishing obscene material in electronic form, the determination of obscene material and the content that "tends to deprave and corrupt" the persons who are likely to see such material depends on the discretion of the executives. However, it nowhere defines what amounts to obscene material and as mentioned above in Kartar Singh's case a person of sound mind should know what content is being prohibited, which has not been specified under Section 67 of IT Act, 2000.

CONCLUSION

Therefore, there was no need to introduce a new legislation and that too by putting at stake the privacy of the users of social media platforms. If the government wanted to regulate the digital news and OTT platforms then it could have done the same under the other laws like Press Council Act, 1978 which regulates newspapers, without its intervention.

Another regulation called the Cable Television Network (Regulation) Act, 1995 sets out the provisions for the programme code and cable television to be regulated by the Central Government. But, it came as a delegated legislation under the IT Act, 2000 where this category of intermediaries is not even mentioned in the parent legislation. Also, these guidelines have been framed beyond the scope of IT Act, 2000 which is impermissible under the Indian Laws. These guidelines also provided for the disclosure of the information of the first originator of the mischief which translates to government's trying to intrude into the privacy of the users of these platforms which again violates the basic fundamental right to personal liberty.

Even if law and order is retained on this particular point, then also proper grounds must be established for initiation of such a process which has not been prescribed in the present guidelines. The guidance for such grounds can be taken from the "*imminent danger test*" laid in *Brandenburg vs Ohio*[13] rather than considering disturbance of law and public order. Whereas in the present guidelines nowhere it is provided that the users must be informed of the reasons for the actions that will be taken against them. These intermediary guidelines are vague and arbitrary, giving sweeping powers to the central government to regulate the digital platforms. Thus, these Social Media Intermediary Rules, 2021 should be repealed.

13. Brandenburg vs Ohio, (395 U.S. 444 (1969)).

STUDENT SUBMISSION

SUNSHINE AND RAINBOWS

- Aneesh Rajesh Khare

Human society may accredit itself with many achievements but sadly giving equal treatment to all of its members is not something human society has achieved in a millennium. Despite landing people on the moon and making valiant efforts to find life on Mars, we as a civilized society have failed to hear the pleas of the various communities in our society and grant them their most basic rights. One of these communities is the LGBTQIA+ community. The plethora of issues faced by the LGBTQIA+ community is quite large and diverse across the world. Needless to say that despite the use a rainbow coloured flag to identify themselves, it hasn't been all sunshine and rainbows for them. One of the issues is that of same-sex marriage laws. While a few countries have recognized same-sex marriage, some countries continue to resist introducing such changes to their domestic laws. When it comes to India, the LGBTQIA+ community has just started getting legal recognition but still continues to face an absence of adequate laws to address their needs. India needs to address the demands of this community as we cannot simply ignore the changing needs of our society. The lack of social recognition and acceptance coupled with the reluctance shown by the Government to deal with this particular issue through public policy have become serious issues for the LGBTQIA+ community in India.

The LGBTQIA+ community has been existent all over the world since as early as 2494 B.C.E.[1] Over the years, archaeologists and historians have found that homosexuality existed and was accepted across ancient civilizations like Egypt, India, etc.[2] Law is expected to be a vehicle of change in society. However in India the change in the law is the reason behind the LGBT community becoming a marginalized community in a country where it had always been accepted throughout millennia. While the Indian Penal Code's (hereinafter referred to as 'IPC') introduction was considered as a great leap in the field of criminal justice in India, it also turned the time back for the LGBTQIA+ community. Section 377 of the IPC criminalized any consensual sexual intercourse between adults of the same gender and held it to be "*against the order of nature.*"[3]

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1. Brian Braiker, 'Oldest known gay man?' (*ABC News,* 7 April 2011) <https://abcnews-go-com.cdn.ampproject.org/v/s/abcnews.go.com/amp/US/oldest-gay man/story?amp_js_v=a6&amp_gsa=1&id=13320808&usqp=mq331AQHKAFQArABIA%3D%3D#aoh=16234687824338&csi=1&referrer=https%3A%2F%2Fwww.google.com&amp_tf=From%20%251%24s&ampshare=https%3A%2F%2Fabcnews.go.com%2FUS%2Foldest-gay-man%2Fstory%3Fid%3D13320808> accessed 28 March 2021.
2. Sanjana Ray, 'Indian Culture Does Recognise Homosexuality, Let us Count the Ways' *The Quint* (11 September 2018) <https://www.thequint.com/voices/opinion/homosexuality-rss-ancient-indian-culture-section-377#read-more#read-more> accessed 28 March 2021.
3. Indian Penal Code 1860, s 377.

This was accompanied by the British propagating hatred and homophobia throughout the country and even declaring the 'hijara' community to be a criminal tribe.[4] Such acts promoted the notion that homosexuality is unnatural and was never a part of the Indian society. Over time, Indian society has come to believe that homosexuality is nothing more than an unnatural notion that was adopted by the younger generations from the West. It is troubling to note that homophobia has become so ingrained in our society that it has come to be viewed as a social evil. While the Indian Parliament declared that homosexuality is not a mental illness by the passing of the Mental Health Act, 2017,[5] it didn't make any further laws to protect the other rights and interests of that community that might be endangered.

Law, however, cannot be stagnant and sooner or later it must change according to the changing needs of the society, or be the catalyst that brings about the change in the society. In the landmark case of *Navtej Singh Johar and Othrs. v. Union of India*[6], the Supreme Court finally struck down those parts of Section 377 of the IPC that criminalized homosexual intercourse. In this case, the Court held that, the Section was inconsistent with Articles 14, 15, 19 and 21 of the Constitution of India. It overruled its earlier judgment in the case of *Suresh Kumar Koushal v. Naz Foundation*[7] wherein the Supreme Court used the minority status of the LGBTQIA+ community to hold the parts of Section 377 criminalizing homosexual activity to be constitutionally valid and not ultra vires to the Constitution of India. This went against what was held by the Delhi High Court in the case of *Naz Foundation v. the Govt. (NCT Delhi)*.[8] The Supreme Court criticized this point and held that regardless of the minority status of the LGBTQIA+ community, it cannot be used to deny them their constitutional and fundamental rights.[9]

In the case of *Navtej Singh Johar*, the Supreme Court also observed upon the role of the State in this regard and was of the opinion that, "Sexual orientation is to be treated as reflective of consensual choice- It implicates positive and negative obligations of State by requiring the State not only to not discriminate but requiring State to recognise rights which bring true fulfilment of every kind of consensual sexual relationship." The interpretation of the wordings "true fulfilment of every kind of consensual sexual relationship" should include the right to same sex marriages. The State by denying them the right to marry is in clear violation of the LGBTQIA+ community's right to equality under Article 14 as well as their right to life under Article 21.

As such, the State shouldn't have the right to decide whether live-in relationships are enough for the LGBTQIA+ community.

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4. Jessica Hinchy, 'The Long History of Criminalising Hijras' *Himal SouthAsian* (2 July 2019) <https://www.himalmag.com/long-history-criminalising-hijras-india-jessica-hinchy-2019/> accessed 28 March 2021.
5. The Mental Healthcare Act 2017.
6. *Navtej Singh Johar v Union of India* (2018) 10 SCC 1.
7. *Suresh Kumar Koushal v Naz Foundation* (2014) 1 SCC 1.
8. *Naz Foundation v The Govt. (NCT Delhi)* (2009) SCC OnLine Del 1762.
9. The Constitution of India 1950, arts. 14, 15, 19 and 21.
10. Richa Banka, 'Centre opposes petitions for Same sex marriage' *Hindustan Times (*26 Feb 2021) <https://www.hindustantimes.com/india-news/centre-opposes-petitions-for-same-sex-marriage-101614301498359.html> accessed 29 March 2021.

By depriving the community of their right to marry, the State is making a clear distinction in the way heterosexuals are treated as against the LGBTQIA+ community which is in clear violation of their right to equality and equal protection of the law under Article 14. Furthermore, Article 21 of the Constitution of India includes the principles of natural justice meaning laws should be fair, just, and reasonable and of good conscience as held by the Supreme Court in the case of *Maneka Gandhi v. Union of India*.[11]

The act of not allowing same-sex marriages violates all these principles. It doesn't allow an individual of the LGBTQIA+ community to lead a dignified life as enshrined under Article 21. While writ petitions have been filed in the High Courts of Delhi and Kerala to grant the right of same-sex marriage, the State has opposed such petitions which are a clear violation of its own obligation towards the protection of the rights of every citizen regardless of their age, gender, caste, creed and sexual orientation. The Government of India responding to writ petitions filed for recognition of same-sex marriages under the Special Marriages Act, 1954 and the Foreign Marriage Act, 1969 before the Delhi High Court, stated that "there exists a legitimate state interest in limiting the legal recognition of marriage to persons of opposite sexes only."

This statement certainly comes as a shock as it's evident that the State is still not inclined towards uplifting the LGBTQIA+ community and helping them in getting legal as well as social recognition. There should be no 'legitimate state interest' that violates a community's basic fundamental rights under Articles 14, 15 and 21. They have the right to be afforded the same rights of marriage that are accorded to the heterosexual citizens of this country.

The State must realize that it cannot uplift the LGBTQIA+ community by simply acting oblivious to their predicaments and hoping that issues will get resolved on their own. It is saddening to note that despite the Supreme Court making it clear that homosexuality is natural and neither against the order of nature nor abusive of public morality, the State continues to use those very same arguments to explain their non-inclination towards granting the LGBTQIA+ community their equal rights.

The State has to play a proactive role in not just giving the LGBTQIA+ community their equal rights but to also normalize these concepts in societies where they may not be openly accepted. If one were to study the curriculums of schools in the United Kingdom and other European nations, one will see that they include concepts that normalize the concept of same sex marriages and families raised by homosexual couples.[12] This reduces the stigma and prejudice from an early age and these concepts need to be implemented by the Government of India as well. While the Government of India is still ignorant of this issue, all hope is not lost.

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11. *Maneka Gandhi v The Union of India* AIR 1978 SC 597.
12. Stonewall Organisation, 'LGBT Education: Everything you need to know.' *Stonewall Organisation* (15 July 2019) < https://www.stonewall.org.uk/lgbt-inclusive-education-everything-you-need-know> accessed 29 March 2021.
13 *S. Sushma v Commissioner of Police* (2021) SCC Online Mad 2096.

The Madras High Court showed the true spirit of judicial activism in the case of *S. Sushma v. Commissioner of Police*[13] by not only accepting the issue of social stigma in the Indian society but by also passing several binding guidelines on both the Centre as well as State authorities to address this pressing issue. The single judge bench of the Madras High Court in a rare move underwent counselling to sensitise himself with the concept and issues of the LGBTQIA+ community and attached his counselling report in the judgement as well. The High Court underlined the seriousness of the social stigma faced by the LGBTQIA+ community and passed the binding guidelines which included organising mental awareness programs to sensitise people as well as State authorities like the Police with LGBTQIA+ issues. The High Court also asked for school and educational institutions' curriculums to include subjects to normalise the concept of LGBTQIA+ among the younger generations. Furthermore the High Court declared it to be a *continuing mandamus* until the legislature makes a law enforcing these guidelines. This judgement of the Madras High Court should be hailed as a true example of law being the catalyst for change.

In light of these guidelines, it is time that the Government and other State institutions also finally open their eyes and realise that "*We the People of India*" in the Preamble of the Constitution includes all people of this country regardless of their sexual preferences and deserve the same rights and respect.

STUDENT SUBMISSION

CHALLENGES OF BIOMEDICAL WASTE MANAGEMENT IN INDIA

- RONITA BISWAS

With the outbreak of Covid-19, we have identified that the essential services provided by the waste management sector to reduce the amounts of biomedical waste. Most of the waste generated during the pandemic poses a threat to human health and escalates the chance of spreading of the virus. Even before the pandemic, India's waste management sector had been suffering from serious drawbacks. Though India is the largest producer[1] of municipal solid waste, it has the most inadequate infrastructure to deal with it. And now with the increase in bio-medical waste, India continues to grapple with its insufficient waste treatment and disposal mechanisms. Sustainable management of waste requires proper policies and guidelines on sorting, segregating, transportation, and storage of hazardous waste. Lack of compliance with the existing waste management policies has a drastic consequence of exposing thousands of healthcare workers, and waste managers to the deadly virus.

There is a fear among the sanitation workers of contracting the virus.[2] Most of these waste workers are not provided with adequate personal protective equipment nor is sufficient training given to them about the handling of biomedical waste. There are about 2 to 4 million people employed in this informal sector and most of them lack awareness about the requisite precautions to be taken during the pandemic. Consequently, the pandemic has recorded the death of thousands of sanitation workers and the numbers will keep on increasing unless the government takes proactive steps to protect the health of these people.[3] It is advised that testing of sanitation workers must take priority over any other matter.

The Cities that have recorded the highest number of Covid-related cases are now facing the problem of proper disposal of bio-medical waste that consists of used/infected PPE suits, surgical masks, gloves, shoe covers, etc.[4] These are primarily made of plastic which is a threat to the environment in the long run. Most of them are dumped in landfills, open fields, or water bodies in a reckless manner without proper segregation from general solid waste.[5]

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1. Tnn, 'In 30yrs, India Tipped to Double the Amount of Waste it Generates' *The Times of India* (4 March 2020) <https://timesofindia.indiatimes.com/india/in-30-years-india-tipped-to-double-the-amount-of-waste-it-generates/articleshow/74454382.cms>accessed 10 May 2021.
2. Akhileshwar Reddy, 'Sanitation workers were at forefront of Covid fight. But are missing from vaccination plan' *The Print (*28 December 2020) < https://theprint.in/opinion/sanitation-workers-were-at-forefront-of-covid-fight-but-are-missing-from-vaccination-plan/573382/>accessed 10 May 2021.
3. Sharad Chand and others, 'Updates on biomedical waste management during COVID-19:The Indian scenario' (2021) (11) C.E.G.H. <www.sciencedirect.com/science/article/pii/S2213398421000191>accessed 10 May 2021.
4. Shruti Ganapatye, 'The growing challenge of biomedical waste disposal' *Moneycontrol* (11 Feb 2021) <www.moneycontrol.com/news/opinion/covid-19-the-growing-challenge-of-biomedical-waste-disposal-6492401.html>accessed 10 May 2021.
5. PTI, 'COVID-19: Disposed Personal Protective Equipment Could Be Turned Into Biofuel, Say Indian Scientists' *NDTV* (5 August 2020) < https://swachhindia.ndtv.com/covid-19-disposed-personal-protective-equipment-could-be-turned-into-biofuel-say-indian-scientists-2-47976/>accessed 10 May 2021.

This increases the extent of environmental pollution in the country and leads to destruction of local biodiversity. An increase in generation of solid waste products also escalates the production of greenhouse gases in the environment.[6]

The growing usage of health-related single-use plastic items such as PPE kits has caused rampant plastic pollution in the country.[7] With the outbreak of the pandemic, India's goal to ban single-use plastics and curb plastic pollution has faced a severe setback.[8] There are also speculations among industry experts and academicians that post Covid-19, the Indian government might relax environmental regulations in a desperate attempt to save the economy.

Presently, India does not have proper sewage treatment plants. Most of the times, sewage containing the body fluids and discharges of infected patients directly flow into nearby water bodies such as rivers and seas. This increases the chances of transmission of the virus through water. Recently, a ghastly incident triggered paranoia among the common masses. According to several media outlets, more than hundred dead bodies have been recovered from the banks of river Ganga and Yamuna in the States of Bihar and Uttar Pradesh.[9]

It is suspected that most of these people died of Covid-19.[10] Although the impact of this is yet unknown, , experts have suggested that "*dumping of dead bodies will not have a significant effect on transmission. Dumping of bodies primarily leads to pollution of rivers.*"[11] Professor Tare of IIT-Kanpur has elaborated on this and stated that since the contaminated water will pass through the normal water supply systems, the water will get disinfected.

The Covid-19 pandemic has burdened India's already stressed and inefficient waste management industry. According to official data released by CPCB, India has generated more than 18,000 tonnes of Covid related biomedical waste from June to September 2020.[12] Experts have cited different reasons for the rise in bio-medical waste (hereinafter referred as BMW). Firstly, the increased BMW can be attributed to an increase in the number of patients suffering from Covid-19. Secondly, the increase in BMW can be due to an increase in routine healthcare-related work.[13]

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6. Tanvi Banerjee, 'A Waste-ful Enterprise: COVID-19 and India's Waste Management Story' *Degrees of change* (16 August 2020) < www.degreesofchange.in/articles/a-waste-ful-enterprise-covid-19-india-waste> accessed 10 May 2021.
7. Association of Cities and Regions for Sustainable Resource management, 'Municipal waste management and COVID-19' *ACR+* (18 November 2020) < www.acrplus.org/en/municipal-waste-management-covid-19>accessed 10 May 2021.
8. Dr. Girija K Bharat, Mr Hans Nicolai Adam and Ms Emmy Noklebye, 'A Sustainable Development Agenda: Plastic and Biomedical Waste Post COVID-19'(*Teri*, 24 February 2021) <www.teriin.org/article/sustainable-development-agenda-plastic-and-biomedical-waste-post-covid-19>accessed 10 May 2021.
9. ibid.
10.Srishti Ojha, 'Corpses Floating in Ganga: PIL In Supreme Court Seeks Judicial Intervention, SIT Probe' *LiveLaw (*13 May 2021) <www.livelaw.in/top-stories/corpses-floating-in-ganga-pil-in-supreme-court-seeks-judicial-intervention-sit-probe-174114?infinitescroll=1>accessed 14 May 2021.
11. Staff Writer, 'Covid transmission through water is not a concern, say experts after dead bodies found floating in Ganga' *Livemint* (12 May 2021) < www.livemint.com/news/india/coronavirus-transmission-through-water-is-not-a-concern-say-experts-after-dead-bodies-found-floating-in-ganga-11620831842922.html>accessed on 14 May 2021.
12. Prashasti Awasthi, 'India generates over 18,000 tonnes of Covid-19 biomedical waste in 4 months' *Business Line* (13 October, 2020) <https://www.thehindubusinessline.com/news/national/india-generates-over-18000-tonnes-of-covid-19-biomedical-waste-in-4-months/article32840651.ece> accessed 10 May 2021.
13. Aastha Ahuja, 'India Generated Over 18,000 Tonnes OF COVID-19 Related Bio-medical Waste In 4 Months, Experts Call To Reduce, Reuse And Segregate' *NDTV* (13 November 2020) <https://swachhindia.ndtv.com/india-generated-over-18000-tonnes-of-covid-19-related-bio-medical-waste-in-4-months-experts-call-to-reduce-reuse-and-segregate-52901/> accessed 10 May 2021.

Thirdly, an increase in quantities of BMW can be attributed to the non-segregation of waste at the source of generation. The CPCB has come out with new guidelines in 2019 stressing on "waste segregation". Segregation of waste at the source will increase the disposal capacity of incinerators a thereby helping in using the existing infrastructure to the fullest. When BMW gets separated from the general recyclable waste, the load on the incineration facilities reduces considerably, thereby enabling it to handle more waste at one time.[15]

The CPCB had also issued guidelines that can be implemented at the household or individual level to further the community-led movement towards eradication of unscientific disposal of BMW. This includes proper disposal of PPE suits and waste masks and gloves. The CPCB guidelines mention steps for safe disposal of waste generated in isolation wards, sample Collection Centres and Laboratories, and quarantine camps/home-care facilities.[16] However, the huge gap between the policy and its implementation on the ground has led to a crisis in the waste management industry.

A lack of sufficient information and accurate data on the BMW exacerbates the problem for the government bodies to formulate appropriate policies to deal with the unusual volume of BMW. In this context, the Punjab government's unique solution to implement a bar code system for the scientific management of BMW is appreciable.[17] To provide accurate data on waste management the CPCB has also released a mobile application known as 'COVID19BWM' for real-time tracking of Covid waste at the point of generation, collection, and disposal.[18]

PROSPECTIVE SOLUTIONS

The outbreak of Covid-19 has not only highlighted the poor healthcare infrastructure of the country but also called attention to India's inefficient waste collection and treatment facilities. The following part will look into some potential solutions to reduce the burden on our waste management sector.

Experts have time and again stressed public awareness about segregation of waste at the household level. States should try to adopt the Indore model on waste management which focused on educating the public through inclusion in the school curriculum and spreading awareness through various media channels.[19]

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15. Aastha Ahuja, 'Coronavirus Pandemic Exposes Broken System of Bio-medical Waste Management; Experts Discuss The Issue and Solutions' *NDTV* (18 September) <https://swachhindia.ndtv.com/coronavirus-pandemic-exposes-broken-system-of-bio-medical-waste-management-experts-discuss-the-issue-and-solutions-49427/>accessed 10 May 2021.
16. Malyaj Varmani, 'Bio-medical waste management during COVID-19' *Invest India* (22 June 2020) <www.investindia.gov.in/team-india-blogs/bio-medical-waste-management-during-covid-19>accessed 10 May 2021.
17. ANI, 'Bar Code System Used To Manage Bio-Medical Waste IN Punjab: Health Minister' *NDTV* (28 July 2020) <https://swachhindia.ndtv.com/bar-code-system-used-to-manage-bio-medical-waste-in-punjab-health-minister-47612/>accessed 10 May 2021.
18. PTI, 'India generated around 33,000 tonnes Covid-19 waste in 7 months: CPCB' *Business Standard* (10 January 2021) <www.business-standard.com/article/current-affairs/india-generated-around-33-000-tonnes-covid-19-waste-in-7-months-cpcb-121011000176_1.html>accessed 10 May 2021.
19. Shreya Khaitan, 'How Indore became India's cleanest city (and how others can follow)' *Scroll.in* (3 October 2019) <https://scroll.in/article/939210/how-indore-became-indias-cleanest-city-and-how-others-can-follow>accessed 14 May 2021.

Imparting proper technical knowledge and education among healthcare and non-healthcare workers can help to control the generation of enormous amounts of BMW. Mainstream concepts can be adopted to encourage a more zero waste lifestyle such as 'Rethink, Refuse, Reduce, Reuse and Recycle.' Environment-friendly alternatives such as reusable PPE material, masks, and gloves, etc. should be encouraged instead of using single-use plastic.

The government should invest in building proper infrastructure and focus on overall capacity building to establish a reliable and efficient waste management system in the country. Developing new waste processing plants and upgrading existing ones are viable options for the time being. Moreover, the government should adopt methods to engage the recycling industry to reduce environmental degradation caused due to the pandemic. Other stakeholders can be included to reduce the overall burden on the government and its limited infrastructural capacities. For instance, the BMC (Bhubaneswar Municipal Corporation) has deployed Jagruti Welfare Organisation for transportation of bio-medical waste to treatment centers.[20] Further, the government should allow more public-private partnership that encourages more innovation in the field of waste management. Collaborative efforts from the private sector, international organizations, and government agencies will bring the required change.

India must learn from this pandemic and attempt to build a much stronger waste management system. Suitable reforms can be brought in to implement better waste management solutions. As an immediate measure, the Kerala model can be adopted. In Kerala, the IMA had teamed up with the State government to directly handle a CBWTF for the treatment of highly contaminated BMW. The State is following a "no-profit no-loss" model and providing the lowest rate in terms of managing BMW in comparison to all other States in the country. For instance, the cost is as low as Rs. 3.6-4.5 per bed in government hospitals and Rs. 6.5 per bed in private hospitals as compared to rate other States which is as high as Rs. 23 per bed for both private and government hospitals.[21]

The best practices from all over the country should be identified and implemented on a national level to strengthen the bio-medical waste management in the country. Strict adherence to guidelines framed by authorities will make the management of bio-medical waste much easier and safer to handle. It is time the government adopts a long-term systemic solution towards mitigating the disaster caused due to inadequate waste management system.

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20. ANI, 'Bhubaneswar Civic Body Starts Collecting Bio-Medical Waste From COVID-19 Patients Under Home Isolation' *NDTV* (11 September 2020) <https://swachhindia.ndtv.com/bhubaneswar-civic-body-starts-collecting-bio-medical-waste-from-covid-19-patients-under-home-isolation-49817/>accessed 10 May 2021.

21. Shine Jacob, 'Recent positive crossover of 50-SMA with 200-SMA on hourly charts is a bullish sign for Nifty: Mehul Kothari of AnandRathi' *Moneycontrol* (13 May 2021) <www.moneycontrol.com/news/business/markets/recent-positive-crossover-of-50-sma-with-200-sma-on-hourly-charts-is-a-bullish-sign-for-nifty-mehul-kothari-of-anandrathi-6895631.html >accessed 14 May 2021.

THE SHAKEDOWN OF FEDERAL STRUCTURE DURING PANDEMIC

From the time of independence, India has been known for its unique take on federalism and has adopted the structure of having two subsystems working parallelly in a cooperative way. The importance of such cooperative federalism was realised with the advent of the pandemic as the centre and state tussle took a new shape. There were instances of failed cooperation and the centre's ideas dominated when it came to implementing public welfare schemes. Not only did it affect states but also the rural areas whose administration comes under the powers of state governments and Panchayati Raj systems. Furthermore, considering the repercussions of lockdown, the citizens suffered financial losses due to the poor implementation and lack of state-centre coordination. Not just in terms of schemes and policies, the implementation of existing laws also contributed to unitary bias for instance, changing the provisions affecting the fiscal affairs of the states. The authors shall explore how, contrary to the popular opinion, the constitutional structure of India's federalism is less important to the actual relationship between the national and state governments in India, particularly during a national emergency.

The unitary orientation of the Indian federal structure was emphasised in the initial stages of the COVID-19 response. A national lockdown[1] was imposed by the central government under the Central Disaster Management Act, 2005,[2] and detailed guidelines[3] for curbing the spread of the virus were notified by the Ministry of Home Affairs to all the states. Under this Act, the federal government is empowered to enact any measures, for the public welfare on behalf of state and local governments. Despite having the authority to enact measures/reforms under a more specific statute, "the Epidemic Diseases Act of 1897"[4] the states conceded to this arrangement and ensured that the central guidelines continued to be enacted.[5]

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1. Shamika Ravi, ' India's COVID-19 balancing act' *East Asia Forum* (14 July 2020) < https://www.eastasiaforum.org/2020/07/14/indias-covid-19-balancing-act/ > accessed 1 July 2021
2. 'National Disaster Management Authority' (Government of India) < https://ndma.gov.in/images/ndma-pdf/DM_act2005.pdf > accessed on 1 July 2021
3. 'Government of India : Ministry of Home Affairs' *prsindia* (17 May 2020) < https://prsindia.org/files/covid19/notifications/IND_MHA_Lockdown_Extension_upto_May31_17052020.pdf > accessed on 1 July 2021
4. 'India Code : Digital Repository of All Central and State Acts', Digital India < https://www.indiacode.nic.in/bitstream/123456789/10469/1/the_epidemic_diseases_actper%20cent2C_1897.pdf > accessed on 1 July 2021
5. 'Centre considering request from most states to extend lockdown by almost two weeks : Government sources' (newindianexpress, 11 April 2020) < https://www.newindianexpress.com/nation/2020/apr/11/centre-considering-request-from-most-states-to-extend-lockdown-by-two-weeks-government-sources-2128754.html > accessed on 1 July 2021.

Undeterred by the considerable confusion[6], as exemplified by the migrant crisis, this unitary arrangement persisted.

The separation of powers in the Indian constitution outlines an elaborate scheme between the centre and the states. The Finance Commission[7] enumerates the division of revenues between the centre and state with the former historically holding a sizable percentage of the revenue. However, specific contours of this relationship have evolved as evidenced by the introduction of a more centralised taxation mechanism (The Goods and Services Tax).[8] These alterations have often transpired on occasions of the central government's assertion of direct political power. At other times, a consensus between the state and the central government has agreed on the requirement for such alteration. However, the pandemic's economic repercussions on the revenue-generating capacity of state governments have provided an opportunity for the central government to rebalance the playing field in its favour.

In particular, even though the state governments had more autonomy in the later stages of the lockdown, it was futile as their revenue generation capacity was hampered significantly[9] because of the lockdown which required the cessation of almost all economic activities. Many Indian states, before the lockdown, had already exceeded[10] – or were nearly exceeding – their fiscal deficit limits and as a result, they became more dependent on the central bank. Many of the measures announced[11] by the finance minister infringing on state governments' autonomy and were only accepted in light of the pandemic's unprecedented impact. For instance, even though the borrowing limit for states was increased from 3% to 5%, then a 2%[12] the increase was not entirely unconditional. Only if the borrowing concerned specific measures impacting employment, sustainability of debt,[13] urbanisation etc, was it to be allowed. Furthermore, the final 0.5 per cent increase was allowed only if significant success was achieved in these sectors by the states which were to be reported to and decided by the centre. Therefore, even though prima facie the central government appeared to be in favour of providing funds to these states to rejuvenate the depressed economy, upon a closer introspection, the conditional challenges become apparent such as how the need for revenue shortfalls within the states was ignored blatantly and how in name of checking the progress of the states in the respective sectors as mentioned above the centre infringed on their autonomy, prompting a shakedown of the constitutionally mandated co-operative structure.

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6. PTI, ' Lockdown 3.0 : More shop expected to reopen but confusion reigns, says retailers' *Timesofindia* (May 3 2020) < https://timesofindia.indiatimes.com/india/lockdown-3-0-more-shops-expected-to-re-open-but-confusion-reigns-say-retailers/articleshow/75518786.cms > accessed on 1July 2021
7. The Constitution of India, asrt. 280.
8. Roshan Kishore, ' India's fiscal federalism is not the pandemic's creation' *Hindustan Times* (Sep 29 2020) < https://www.hindustantimes.com/india-news/india-s-fiscal-federalism-crisis-is-not-the-pandemic-s-creation/story-xGx0OgajpML1r80O4kvKdK.html > accessed on 1 July 2021
9. ' Summary of announcements : Aatma Nirbhar Bharat' (PRSIndia) < https://www.prsindia.org/report-summaries/summary-announcements-aatma-nirbhar-bharat-abhiyaan > accessed on 1 July 2021
10. Shayan Ghosh, ' Covid has eroded states' finances : RBI' *livemint* (28 Oct 2020) < https://www.livemint.com/news/india/covid-has-eroded-states-finances-rbi-11603853645435.html > accessed on 1 July 2021
11. 'Part-5:Government Reforms and Enablers' *The Hindu* (17 May 2020)< https://www.thehindu.com/news/resources/article31606441.ece/binary/AtmaNirbharBharatFullPresentationPart5.pdf > accessed on 1July 2021
12. PTI, ' Raise states borrowing limits to 5% of GSDP sans conditions, Bengal urges FM' *Economic Times* (June 4 2021) < https://economictimes.indiatimes.com/news/economy/finance/raise-states-borrowing-limits-to-5-pc-of-gsdp-sans-condition-bengal-urges-fm/articleshow/83240724.cms > accessed on 1 July 2021
13. John West, ' India squanders its comparative advantage' *East Asia Forum* (10 July 2020) < https://www.eastasiaforum.org/2020/07/10/india-squanders-its-comparative-advantage/ > accessed on 1 July 2021

On a more recent note, when it comes to price fixation for vaccines, previous pandemics or health adversities in India like Polio showcased that states have always received vaccines free of cost from the centre. However, that is not the case during this pandemic where the states have been allowed to purchase vaccines from countries abroad which has not only taken a toll on their financial condition but also reflects the dwindling cooperation between the centre and states. Even after this allowance, they have received lukewarm responses to their demands for vaccines from global manufacturers due to the indemnity issue. Thus, it is the centre who should have taken the responsibility of procurement as only it can assure indemnity to the manufacturers. Further, the centre's domination by way of determining a common framework about prioritising age groups is not reasonable as the states should be provided with the freedom in this matter keeping in mind the peculiarities specific to the concerned states (geography, tradition and culture).

In conclusion, the lacuna and discrepancies identified while implementing the laws and policies by the central government without considering the interests of the states exposed a shakedown of the co-operative federalist structure of India. The pandemic essentially exposed that the financial vulnerabilities faced by each state is unique to its socio-economic conditions and taking a decision at the centre is not beneficial. Carrying out the decision of taking fiscal measures affecting states' revenues raises pertinent questions regarding the functioning of such federal structure in the country. Though the Centre had allowed the states to procure vaccines; shrugging off the financial responsibility it owed towards the states in process however, when it came to more pertinent, state-specific decisions like lockdown, it failed to loosen the reins. In light of the changes witnessed in the federal structure of the country during the pandemic, it is still to see how the legislature reacts to the so-called cooperative federalist structure as enshrined under the Indian constitution.

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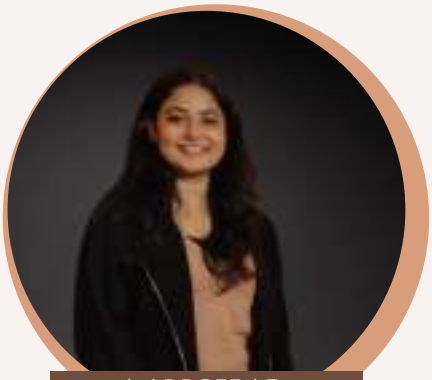

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