

COVID-19 VACCINES IN INDIA: JUDICIAL BLIND SPOTS IN UPHOLDING THE RIGHT TO HEALTH

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The COVID-19 pandemic brought to the forefront the intrinsic link between health and human rights and exposed the conflict between public health measures and individual rights and liberties. These conflicts are apparent in the context of COVID-19 vaccines as well. Vaccines were fast-tracked, given emergency approval and produced and distributed by a few manufacturers with the help of the government and multiple agencies, to control the COVID-19 pandemic. However, the lack of transparency in regulation, the formulation of arbitrary policies, unfair pricing, unequal procurement, restricted and discriminatory distribution, lack of informed consent and lack of accountability for adverse events following immunization (AEFI) also created conflicts and controversies, exacerbated inequities and violated the right to life and health. As people turned to the courts, the judiciary received appreciation for reiterating the recognition of the constitutional right to health and nudging the government's vaccine policy in the right direction. However, a closer look at various aspects and questions before the courts reveals certain blind spots on the part of the judiciary in fully upholding the right to health. The article relies on key elements of the right to health, in particular the availability,

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accessibility, acceptability and quality (AAAQ) framework to analyse court orders, the government's stand and their impact on individual and public health. This analysis is contextualized with the help of media reports, investigative journalism and interventions by civil society organisations. In presenting the right to health as an important and useful foundation for the government and the judiciary to reflect on and review the decisions and actions of the past three years, this paper seeks to lend support to efforts to ensure that the injustices and inequities of these pandemic years are not repeated.

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I. INTRODUCTION

The right to health requires that the State formulate public health policies to prevent the spread of disease and control pandemics, while maintaining and respecting human rights. Historically, measures to control the spread of infectious diseases were based on limiting the rights of a few people through mandatory testing, quarantine, isolation, treatment, care and support.¹ Mandatory and coercive approaches conflict with human rights and had largely become irrelevant before the COVID-19 pandemic.² Limitations on rights are permissible, but they need to be the least restrictive, least intrusive, non-arbitrary and evidence-based.³ Contemporary thinking and modern public health practices have instead emphasized on respecting the rights of the people, providing them with full information and the tools and technologies to protect themselves and others.⁴ This has been the hallmark of public health programs in recent

¹ Jonathan M. Mann, Lawrence Gostin, Sofia Gruskin, Troyen Brennan, Zita Lazzarini, Harvey V. Fineberg, 'Health and Human Rights' (1994) 1 Health and Human Rights Journal 6.

² *ibid.*

³ 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights', (E/CN.4/1985/4, UN Commission on Human Rights 1984) <<https://www.refworld.org/docid/4672bc122.html>> accessed 12 April 2023.

⁴ *ibid.*

years for diseases like HIV and tuberculosis.⁵ However, the COVID-19 pandemic witnessed these well-established rights-based public health approaches give way to fear and panic, which allowed governments to use force, coercion, arbitrary and discriminatory methods to control the spread of the coronavirus. The global health challenge of the COVID-19 pandemic has brought the intrinsic link between health and human rights to the forefront, and has exposed the conflict between public health measures and civil liberties.

These conflicts are apparent in the context of COVID-19 vaccines as well. In India, as elsewhere, the disastrous social and economic consequences of lockdowns fueled the urgency to find a vaccine, cure, or treatment against SARS-CoV-2. In early 2021, two vaccines against SARS-Cov-2 were given emergency use approval in India and were rolled out in stages across the adult and pediatric populations. Since then, several other vaccines have also received approval and over three years since the pandemic hit India, vaccine coverage is widespread.⁶ However government messaging, which has promoted a narrative of triumphalism, masks the many legal and ethical concerns that have arisen in the development, approval and rollout of these vaccines.

At its core, vaccination represents an individual intervention, wherein understanding risks and benefits, and providing informed consent are important. However these individual interventions are in reality public health measures, which not only benefit individuals but also the society, as they are meant to prevent and treat diseases at a community level. Individual autonomy is juxtaposed against societal interests raising many legal and ethical issues in vaccines and vaccinations. These legal and ethical issues lie at the intersection of science, law, ethics and public health and have been the subject of crucial cases before the Supreme Court (SC) and the High Courts (HC). The SC, in particular, has passed two important judgments relating to COVID-19 vaccines. In a suo moto writ petition, *Distribution of Essential Supplies and Services During Pandemic, In re*⁷ the SC in a series of orders examined vaccine availability and access from the perspective of the rights to health, life and equality. In

⁵ See for eg., OHCHR and UNAIDS, 'Handbook on HIV and Human Rights for National Human Rights Institutions' (2007) <<https://www.ohchr.org/sites/default/files/Documents/Publications/HandbookHIVNHRIs.pdf>> accessed 3 July 2023; World Health Organization, 'Ethics guidance for the implementation of the End TB Strategy' (2017) <<https://apps.who.int/iris/bitstream/handle/10665/254820/9789241512114-eng.pdf?sequence=1&isAllowed=y>> accessed 3 July 2023; Licence: CC BY-NC-SA 3.0 IGO.

⁶ Number of vaccinations: Total vaccinations: 2,20,06,25,208; Dose 1: 1,02,71,66,278; Dose 2: 95,11,41,127; Precaution Dose: 22,23,17,803³ (*Co-Win: Winning Over COVID-19*) <<https://web.archive.org/web/20221225221137/https://dashboard.cowin.gov.in/>> accessed 2 May 2023.

⁷ *Distribution of Essential Supplies and Services During Pandemic, In re*, <https://main.sci.gov.in/supremecourt/2021/11001/11001_2021_35_301_27825_Judgement_30-Apr-2021.pdf> accessed 2 May 2023 and, *Distribution of Essential Supplies and Services During Pandemic, In re*, (2021) 7 SCC 772 https://main.sci.gov.in/supremecourt/2021/11001/11001_2021_35_301_28040_Judgement_31-May-2021.pdf accessed 2 May 2023.

Jacob Puliyel v Union of India,⁸ it examined issues related to the right to privacy and bodily integrity in the context of public health as well as concerns with transparency in vaccine approvals and the reporting of adverse events. In both cases the SC held that while it would normally defer to the executive in matters of policy making, it had the jurisdiction to review those policies in case of violations of fundamental rights. In the ongoing case of *Rachna Gangu v Union of India*,⁹ the SC may also examine in greater detail the issue of informed consent and of government responsibility for compensating those who suffer from adverse effects of vaccination.

The SC in effect has been examining various aspects of the right to health while reviewing India's COVID-19 vaccine policy and has been appreciated for reiterating the recognition of the constitutional right to health and nudging government policy in the right direction. However, a closer look at various aspects and questions before the SC as well as before some of the HCs, reveals certain blind spots on the part of the judiciary in fully upholding this right. In highlighting these blind spots, this article seeks to raise pertinent questions on the use of government resources and funds, issues related to clinical trials which provide data on vaccine safety, efficacy and side effects, the affordability, availability, and accessibility of the vaccines and the relationship and roles of key stakeholders, including academic researchers, experts, scientists, government, pharmaceutical companies and civil society groups.

The article relies on key elements of the right to health, in particular the availability, accessibility, acceptability and quality (AAAQ) framework, to highlight key legal and policy questions that have arisen in the context of COVID-19 vaccines in India and how the courts, particularly the SC, have approached these issues. The analysis of the approaches taken by the government and the courts and their impact is contextualized with the help of media reports, investigative journalism and reports and interventions by civil society organisations. Although multiple vaccines are now approved in India, this article focuses on the two vaccines that were the backbone of the government's rollout i.e., Serum Institute of India's Covishield and Bharat Biotech's Covaxin. While COVID-19 vaccine-related cases continue to be litigated in Indian courts, the article has attempted to include key developments till 31 December 2022.

II. RIGHT TO HEALTH AND THE AAAQ FRAMEWORK

In *Distribution of Essential Supplies and Services During Pandemic*, *In re*, the SC stated that, "vaccinations being provided to citizens constitute a valuable public good," and pointed out that vaccine access required a, "rational

⁸ *Jacob Puliyel v Union of India* 2022 SCC OnLine SC 533.

⁹ *Rachana Gangu v Union of India* 2022 SCC OnLine SC 1125.

*method of proceeding in a manner consistent with the right to life (which includes the right to health) under Article 21.*¹⁰ The SC was referring to the long-standing recognition of the right to health as part of the right to life under the Indian Constitution.¹¹ Over the decades, the courts have continuously evolved various facets of the right to health including access to emergency medical care, essential drugs, drugs for rare diseases, blood safety, standards to be followed in government hospitals, working conditions of healthcare workers, maternal health, sexual and reproductive rights and health as well as the social determinants of health.¹²

India is also signatory to international treaties that recognise the right to health. India's international law obligations under the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which it is a signatory and which enshrines the right to health, are recognised in the *Protection of Human Rights Act, 1993* and in several court decisions.¹³ According to Article 12 of the ICESCR, "*States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*"¹⁴ General Comment 14 issued by the Committee on Economic, Social and Cultural Rights explains in detail the obligations of governments in the fulfilment of this right – both domestically and internationally.¹⁵ The Comment outlines the specific legal obligations of State Parties to "*respect, protect and fulfil*" the right to health.¹⁶ While the right to health casts a duty on the State to take steps towards its full realization i.e., towards a progressive realisation of the right, it also includes core obligations of every State that are accorded the highest priority and which are non-derogable including "*... the prevention, treatment, and control of epidemic, endemic, occupational and other diseases.*"¹⁷

The Comment notes that the fulfilment of this right rests on the overlapping principles of availability, accessibility, acceptability and quality which have

¹⁰ *Distribution of Essential Supplies and Services During Pandemic, In re* (n 7).

¹¹ *Vincent Panikurlangara v Union of India* (1987) 2 SCC 165; *Paramanand Katara v Union of India* (1989) 4 SCC 286; *Surjit Singh v State of Punjab* (1996) 2 SCC 336; *Ashok v Union of India* (1997) 5 SCC 10; *State of Punjab v Ram Lubhaya Bagga* (1998) 4 SCC 117.

¹² Kajal Bhardwaj, Veena Johari and Vivek Divan, 'The Right to Health: A Winding Road to Actualization' in Purendra Prasad and Amar Jesani(eds), *Oxford India Studies in Contemporary Society: Health Care Studies in India* (OUP 2018).

¹³ See *Navtej Johar v Union of India* (2018) 10 SCC 1 (Supreme Court) and *National Legal Services Authority v Union of India* (2014) 5 SCC 438.

¹⁴ International Covenant on Economic, Social and Cultural Right 1966, art 12.1.

¹⁵ 'CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (art 12)', (Adopted at the Twenty-second Session of the Committee on Economic, Social and Cultural Rights, Office of the High Commissioner for Human Rights 2000) <<https://www.ref-world.org/pdfid/4538838d0.pdf>> accessed 12 April 2023.

¹⁶ *ibid.*

¹⁷ *ibid.*

come to be known as the ‘AAAQ framework’ (see Figure 1¹⁸). Some scholars note that the AAAQ framework, “*is an authoritative set of standards,*”¹⁹ that is increasingly applied internationally and nationally.²⁰ They suggest that with the importance of the AAAQ framework being underscored by governments and health authorities, it is “*emerging as a norm of customary international (health) law.*”²¹ While the AAAQ framework lacks precision, “*it helps frame the analysis and debate about how the right to health is guaranteed in the context of COVID-19, and it shows the extent to which countries are prepared to address future crises.*”²²

AAAQ	Four essential elements of the right to health
Available	Health goods, facilities and services must be <i>available</i> in sufficient quantity everywhere the country. This includes, for example, hospitals, clinics, trained health professionals and essential medicines, as well as underlying determinants, such as safe drinking water and adequate sanitation facilities.
Accessible	Health goods, facilities and services must be <i>accessible</i> to everyone without discrimination. They must be physically accessible, meaning within safe physical reach of all sections of the population, including people with disabilities and people in rural areas. They must be economically accessible, meaning affordable to all.
Acceptable	Health goods, facilities and services must be <i>acceptable</i> , in other words, respectful of medical ethics, including the right to confidentiality, and they must be sensitive to cultures, communities and gender.
Quality	Health goods, facilities and services must be scientifically and medically appropriate and of good <i>quality</i> . The underlying determinants of health, such as water and health education, must be of good quality too.

Figure 1: AAAQ Framework. Figure from Hunt and MacNaughton (2006)

While reviewing various aspects of the government’s vaccine policy, the SC did find violations or the potential for violations of the right to health and other fundamental rights in the government’s procurement policy, in the use of a digital platform as the sole means for accessing the vaccines and in imposing vaccine mandates. These are discussed in greater detail below. This article, however, argues that reviewing the development and rollout of COVID-19

¹⁸ Paul Hunt and Gillian MacNaughton, ‘Impact Assessments, Poverty and Human Rights: A Case Study Using the Right to the Highest Attainable Standard of Health’ (2006) Health and Human Rights Working Paper Series No 6, WHO and UNESCO <https://www.researchgate.net/publication/237555118_Impact_Assessments_Poverty_and_Human_Rights_A_Case_Study_Using_The_Right_to_the_Highest_Attainable_Standard_of_Health> accessed 2 May 2023.

¹⁹ Brigit Toebe, Lisa Forman and Giulio Bartolini, ‘Toward Human Rights-Consistent Responses to Health Emergencies: What is the Overlap between Core Right to Health Obligations and Core International Health Regulation Capacities?’ 22 Health and Human Rights Journal 99.

²⁰ See for instance the judgment of Justice DY Chandrachud in *Navtej Johar v Union of India* (2018) 10 SCC 1 where he notes, “Pursuant to General Comment No. 14, India is required to provide marginalized populations, including members of the LGBTIQ community, goods and services that are available (in sufficient quantity), accessible (physically, geographically, economically and in a non-discriminatory manner), acceptable (respectful of culture and medical ethics) and of quality (scientifically and medically appropriate and of good quality).”

²¹ Toebe (n 19).

²² *ibid.*

vaccines in India through the lens of the AAAQ framework highlights several other areas of concern from a right to health perspective that require greater attention from the SC and the HCs. These 4 principles have been discussed below.

A. Availability

“The cumulative number of COVID19 vaccine doses administered in the country has crossed 14.19 Cr today as part of the world’s largest vaccination drive, which completed 100 days yesterday.”

— Press Information Bureau, 26 April 2021²³

“Sankaran Punneri Peroor, 66, took his first dose on March 4 and is running out of time for the second. Several clinics canceled his appointment citing low stocks. On Monday morning, Peroor and his wife were among more than 100 people standing for hours under a scorching sun at the Maasaheb Meenatai Thackeray Hospital in Navi Mumbai. The hospital’s vaccination target for a day is 200. “I managed to get admission in another private clinic which is 10 kilometers away from my residence. But on the vaccination day, the registration itself was canceled,” Peroor said. “I am pursuing all efforts as the coronavirus is spreading like wildfire.””

— theprint.in, 26 April 2021²⁴

“Nepal launched its vaccination campaign in January and gave shots to 1.9 million people, all provided by India and China. But health experts feared that continuation of the vaccination drive was uncertain after officials had failed to procure more doses from India or any other source. More than 90 developing nations, including Nepal, rely on India – home to the Serum Institute, the world’s largest vaccine maker – for the doses to protect their own populations, but India has

²³ ‘India’s Cumulative Vaccination Coverage Exceeds 14.19 Crore as the Largest Vaccination Drive Completes 100 Days’ (Ministry of Health and Family Welfare, 2021) <<https://pib.gov.in/PressReleasePage.aspx?PRID=1714035>> accessed 2 May 2023.

²⁴ PR Sanjai, Dhvani Pandya and Bibhudatta Pradhan, ‘India’s Vaccine Shortage Threatens to Prolong its Covid Crisis’ (*The Print*, 26 April 2021) <<https://theprint.in/health/indias-vaccine-shortage-threatens-to-prolong-its-covid-crisis/646407/>> accessed 2 May 2023.

now prioritised its own needs as a second wave of the epidemic there rages out of control.”

— *Al Jazeera, 26 April 2021*²⁵

The principle of *availability* requires that public health and health-care facilities, goods and services, and programmes, have to be available in sufficient quantity within a country.²⁶ While General Comment 14 acknowledges that the nature of these requirements will vary based on numerous factors including the development level of a country, it specifies that adequate hospitals, trained medical staff, and essential drugs must be available. During a majority of the first year of the vaccine rollout programme, vaccines were simply not available in the required quantities, particularly when the government opened up vaccination for everyone over the age of 18.²⁷ This section explores three issues that impacted the availability of vaccines i.e., procurement, production and wastage, and an additional issue in the context of India’s international obligations on the right to health i.e., exports.

1. *Procurement*

COVID-19 vaccination started in India in January 2021 with healthcare workers and frontline workers. Over the next few months, eligibility expanded across different age groups. In its first order, the government ordered only 11 million of the 55 million doses that Serum had already stock piled before approval under tweaked regulatory rules,²⁸ leading to a temporary halt in production.²⁹ In Parliament, the Minister of Health stated that procurement initially was aimed only at current requirements rather than projected requirements.³⁰ Analysts suggest that the government’s approach to procurement was

²⁵ ‘Nepal COVID Infections Surge, Fuelled by India’s Mutant Strains’ (*Al Jazeera*, 26 April 2021) <<https://www.aljazeera.com/news/2021/4/26/nepal-covid-infections-surge-fuelled-by-indias-mutant-strains>> accessed 2 May 2023.

²⁶ ‘CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health(art 12)’ (n 15).

²⁷ Ravi Duggal, ‘Covid-19 in India: Vaccine Shortages are Leading to Discrimination in Access’ (*The BMJ Opinion*, 10 August 2021) <<https://blogs.bmj.com/bmj/2021/08/10/covid-19-in-india-vaccine-shortages-are-leading-to-discrimination-in-access/>> accessed 4 April 2023.

²⁸ Central Drugs Standard Control Organization, Directorate General of Health Services, ‘Notification’ (*Ministry of Health & Family Welfare*) <https://cdsco.gov.in/opencms/opencms/system/modules/CDSKO.WEB/elements/download_file_division.jsp?num_id=NjMzMzMQ==> accessed 28 April 2023.

²⁹ Bharath Manjesh, ‘India Coronavirus Dispatch: Serum Sitting on a Stockpile of 55 mn Shots’ (*Business Standard*, 6 February 2021) <https://www.business-standard.com/article/current-affairs/india-coronavirus-dispatch-serum-sits-on-55-mn-stockpile-of-shots-121020600646_1.html> accessed 12 April 2023.

³⁰ ‘Lok Sabha Questions’ <<http://164.100.47.194/loksabha/Questions/QResult15.aspx?qref=20666&lsno=17>> accessed 12 April 2023.

based on a miscalculation³¹ of India's capacity to make COVID-19 vaccines. This miscalculation proved costly not just for India but for the rest of the developing world that was relying on COVID-19 vaccines supply from India.³²

By April 2021, the government overhauled its cautious approach, placed large orders and unlike previous orders, paid the entire amount upfront.³³ Until this point, the Central government was procuring the vaccines that were then provided through government and private vaccination centres. The following month, vaccination opened up for the 18-44 age group and under the *Liberalised and Accelerated Phase 3 Strategy of the National Covid-19 Vaccination Program*,³⁴ that came into effect on 1 May 2021, procurement was split between the Central government, State governments and the private sector. While the Central government would continue to procure vaccines for the over 45 age group, procurement for the 18-44 group was left to the State governments. Private sector hospitals were also now allowed to procure and provide vaccines. Manufacturers were asked to reserve 50% of the stock for the Central government, 25% for the state governments and 25% for the private sector.

With little information on the actual manufacturing capacities of the companies, the basis on which orders would be received, and when deliveries would be made, the rollout fell into chaos. State government orders were not being filled,³⁵ smaller hospitals could not compete with orders from large corporate hospitals³⁶ and the private sector started offering high-priced deals promising a vaccination with a hotel.³⁷ Individual States floated global tenders but received

³¹ Neeta Sanghi, 'How the Modi Government Overestimated India's Capacity to Make COVID Vaccines' (*The Wire*, 22 April 2021) <<https://science.thewire.in/health/narendra-modi-government-overestimated-india-covid-vaccine-manufacturing-capacity-shortage/>> accessed 12 April 2023.

³² GS Mudur, 'How India Landed in Covid Vaccine Mess' (*The Telegraph Online*, 19 April 2021) <<https://www.telegraphindia.com/india/how-we-landed-in-covid-vaccine-mess/cid/1812969>> accessed 28 April 2023.

³³ 'Serum Institute Bharat Biotech to Get 4,500-cr Govt "Advance"' (*The Hindu Business Line*, 19 April 2021) <<https://www.thehindubusinessline.com/news/national/serum-institute-bharat-biotech-to-get-4500-cr-govt-advance/article34361376.ece>> accessed 4 April 2023.

³⁴ *Government of India Announces a Liberalised and Accelerated Phase 3 Strategy of Covid-19 Vaccination from 1st May (Ministry of Health and Family Welfare*, 19 April 2021) <<https://pib.gov.in/PressReleasePage.aspx?PRID=1712710>> accessed 12 April 2023.

³⁵ Aishwarya Paliwal, 'Phase 3 Vaccination for 18+ Begins Today but State Say that don't have Vaccine Stock' (*India Today*, 1 May 2021) <<https://www.indiatoday.in/coronavirus-outbreak/story/vaccines-for-all-adults-unlikely-from-tomorrow-states-say-no-stocks-1796605-2021-04-30>> accessed 2 May 2023.

³⁶ Kaunain Sheriff M, 'Next Up: Ensuring Small Hospitals Get Supply, E-vouchers for Poor' (*The Indian Express*, 8 June 2021) <<https://indianexpress.com/article/india/next-up-ensuring-small-hospitals-get-supply-e-vouchers-for-poor-free-vaccines-pm-modi-7348606/>> accessed 2 May 2023.

³⁷ 'Covid-19: Government Warns Hotels against Stay-Vaccination Packages' (*Times of India*, 31 May 2021) <<https://timesofindia.indiatimes.com/india/covid-19-government-warns-hotels-against-stay-vaccination-packages/articleshow/83101705.cms>> accessed 12 April 2023.

no responses.³⁸ The chaos was taken note of by the SC in *In Re: Distribution of Essential Supplies and Services During Pandemic*, where it held that this policy was prima facie arbitrary in its April order. According to the SC:

“The vaccinations being provided to citizens constitute a valuable public good. Discrimination cannot be made between different classes of citizens who are similarly circumstanced on the ground that while the Central government will carry the burden of providing free vaccines for the 45 years and above population, the State Governments will discharge the responsibility of the 18 to 44 age group on such commercial terms as they may negotiate. Prima facie, the rational method of proceeding in a manner consistent with the right to life (which includes the right to health) under Article 21 would be for the Central Government to procure all vaccines and to negotiate the price with vaccine manufacturers...While we are not passing a conclusive determination on the constitutionality of the current policy, the manner in which the current policy has been framed would prima facie result in a detriment to the right to public health which is an integral element of Article 21 of the Constitution. Therefore, we believe that the Central Government should consider revisiting its current vaccine policy to ensure that it withstands the scrutiny of Articles 14 and Article 21 of the Constitution.”³⁹

The SC remained unconvinced by the government’s explanations for the change in policy and in its May order,⁴⁰ reiterated its finding that paid vaccination for the 18-44 group was prima facie arbitrary and irrational. The SC also expressed concerns with the role of the private sector in direct procurement and freedom in pricing. Nudged by the SC, the Central government reverted to central procurement for the States but maintained the new role of the private sector in procuring and providing vaccines albeit with price caps. The SC did not look into this aspect any further. This was unfortunate, because as the SC predicted, private sector procurement created a privileged class of people who could access both public and private sector settings to get a vaccine, while those without the ability to pay often had to wait for days for a slot in the public sector. A similar scenario then played out in the context of precaution/booster doses, which were announced in January 2022 for healthcare and front-line workers, and those above the age of 60 who had co-morbidities. In April 2022, precautionary doses were opened to all persons above the age of 18

³⁸ ‘State’s Vaccine Global Tenders Draws a Blank’ (*The Hindu*, 6 June 2021) <<https://www.thehindu.com/news/national/telegana/states-vaccine-global-tenders-draws-a-blank/article34746015.ece>> accessed 12 April 2023.

³⁹ *Distribution of Essential Supplies and Services During Pandemic, In re* (n 7).

⁴⁰ *Distribution of Essential Supplies and Services During Pandemic, In re* (n 7).

only on payment at private centers.⁴¹ Some States announced free precautionary doses at government centres.⁴² In July, the central government announced free precautionary doses for all age groups at government centres for 75 days only.⁴³ Thus, despite the observations of the SC, the government continued to frame policies that discriminated both directly and indirectly against similarly circumstanced people based on their ability to pay.

2. *Expanding production*

The chaos in procurement and exports discussed above was directly related to the limited production of the vaccines. It was evident from the very beginning that only two manufacturers would not be able to supply enough doses of the vaccines for the entire nation, especially when they had already entered into agreements to supply COVID-19 vaccines to other developing countries. As vaccine shortages dogged India's vaccine rollout, and given India's co-sponsorship of the TRIPS Waiver proposal,⁴⁴ even economically conservative papers demanded that the government buy out Covaxin⁴⁵ and various HCs questioned why the government was not using compulsory licensing.⁴⁶ In *Distribution of Essential Supplies and Services During Pandemic, In re*, the SC went to great lengths to explain the provisions on compulsory licenses for the government to take note of in deciding its course of action. In its reply, the government stated in its affidavit that the use of compulsory licenses or legal tools would be "counter-productive."⁴⁷ The government also put out a '*Myths and Facts*' document⁴⁸ stating that compulsory licenses would not be an attrac-

⁴¹ 'Precaution Dose to be now available to 18+ Population Group from 10th April, 2022, at Private Vaccination Centres' (*PIB Delhi*, 8 April 2022) <<https://pib.gov.in/PressReleasePage.aspx?PRID=1814804>> accessed 28 April 2023.

⁴² PTI, 'Delhi Govt Says Free Precaution Doses at its Hospitals Soon' (*The New Indian Express*, 15 April 2022) <<https://www.newindianexpress.com/cities/delhi/2022/apr/15/delhi-govt-says-free-precaution-doses-at-its-hospitals-soon-2442464.html>> accessed 28 April 2023.

⁴³ 'All Adults to get Free Covid Precaution Dose from Today for Next 75 Days' (*India Today*, 15 July 2022) <<https://www.indiatoday.in/coronavirus-outbreak/vaccine-updates/story/adults-free-covid-precaution-dose-from-today-next-75-days-1975812-2022-07-15>> accessed 28 April 2023.

⁴⁴ 'Waiver From Certain Provisions of the Trips Agreement for the Prevention, Containment and Treatment of Covid-19' (*WTO*, 2 October 2020) <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W669.pdf&Open=True>> accessed 2 May 2023.

⁴⁵ 'Buy Out Covaxin's IPR, for World's Sake' (*Economic Times*, 8 March 2021) <<https://economictimes.indiatimes.com/blogs/et-editorials/buy-out-covaxins-ipr-for-worlds-sake/>> accessed 2 May 2023.

⁴⁶ KC Gopakumar, 'Kerala High Court seeks Centres Response to Invoke Compulsory Licensing of Covid Vaccines' (*The Hindustan Business Line*, 2 July 2021) <<https://www.thehindubusinessline.com/news/national/kerala-high-court-seeks-centres-response-to-invoke-compulsory-licensing-of-covid-vaccines/article34534257.ece>> accessed 12 April 2023.

⁴⁷ *In Re: Distribution of Essential Supplies and Services During Pandemic*, Suo Motu Writ Petition (C) No.3/2021, affidavit dated 09.05.2021 on behalf of the Union of India <https://www.livewlaw.in/pdf_upload/centres-affidavit-in-suo-moto-covid-case-supreme-court-393164.pdf> accessed 28 April 2023.

⁴⁸ 'Myths & Facts on India's Vaccination Process' (*PIB Delhi*, 27 May 2021) <<https://pib.gov.in/PressReleasePage.aspx?PRID=1722078>> accessed 2 May 2023.

tive option for vaccine manufacturing, which requires licensing and technology transfer; ironically these were the same arguments used by developed countries and the multinational pharmaceutical industry to oppose India's TRIPS waiver proposal at the WTO.⁴⁹

Review of patents on vaccines reveal a confusing web of multiple patents, often granted to multiple entities creating an extremely difficult pathway for other manufacturers to make the vaccines without infringing several existing patents.⁵⁰ While patents may not be the only barrier to vaccine production by other manufacturers, they are certainly a significant barrier. For instance, while patents related to Covishield specifically may not have been filed or granted by mid-2021, it could be protected by an older patent held by Astrazeneca in India on simian and hybrid adenoviral vectors and a patent application on the method for generating a recombinant adenoviral vector.⁵¹ Compulsory licensing and government use provisions enshrined in the Patents Act, 1970 are meant to remedy several adverse consequences of exclusive control over technologies that patents can result in, particularly in terms of availability and affordability.⁵² The use of these tools is as much a political act as it is a legal one and it can be argued that the government's formal reluctance to use this tool expressed to the SC and its listing of reasons for not doing so in a press release, severely undermined not only its own domestic policy space but also its international position on the TRIPS Waiver.

The SC also sought details on whether the government had invited expressions of interest for the voluntary licensing of Covaxin. Indeed, the government's explanation that technology transfer and licensing are needed to promote additional vaccine manufacturing has raised the question of why this was not done for Covaxin. The confusion over the intellectual property related to Covaxin⁵³ was clarified by the government's affidavit filed before the SC, which revealed that the intellectual property is shared between the government and Bharat Biotech, the government receives 5% royalty and its name is required to be printed on the Covaxin bottles.⁵⁴ The government informed the

⁴⁹ 'Seven Reasons the EU is Wrong to Oppose TRIPS Waiver' (*Human Rights Watch*, 3 June 2021) <<https://www.hrw.org/news/2021/06/03/seven-reasons-eu-wrong-oppose-trips-waiver>> accessed 2 May 2023.

⁵⁰ 'A Fair Shot for Vaccine Affordability' (*Access Campaign*, 2017) <https://www.msaccess.org/sites/default/files/2018-06/VAC_report_A%20Fair%20Shot%20for%20Vaccine%20Affordability_ENG_2017.pdf> accessed 28 April 2023.

⁵¹ 'VaxPal: COVID-19 Vaccines Patent Database' (*Medicines Patent Pool*) <[https://www.vaxpal.org/?product%5B%5D=ChAdOx1+nCoV-19+\(AZD1222\)+0.5+ml&countries%5B%5D=India&page=1](https://www.vaxpal.org/?product%5B%5D=ChAdOx1+nCoV-19+(AZD1222)+0.5+ml&countries%5B%5D=India&page=1)> accessed 2 May 2023.

⁵² Patents Act 1970, ss 84-103.

⁵³ R Ramakumar, 'Whose Intellectual Property is Bharat Biotech's Publicly Funded Covaxin? India Deserves an Answer' (*Scroll.in*, 26 April 2021) <<https://scroll.in/article/993257/why-its-vital-for-indians-to-know-who-owns-intellectual-property-rights-to-bharat-biotechs-covaxin>> accessed 2 May 2023.

⁵⁴ *Distribution of Essential Supplies and Services During Pandemic*, In re (n 47).

SC that three of its public sector units (Haffkine Biopharmaceuticals, Indian Immunologicals Limited and Bharat Immunologicals and Biologicals Limited) would be involved in manufacturing of Covaxin.⁵⁵ Bolstering public sector manufacturing which had been systematically dismantled over the years⁵⁶ could have had important short-term and long-term benefits. However, it remains unclear whether those units eventually manufactured Covaxin.

It is important to note that during a public health emergency, even if the government is taking the aid of the private sector, there are substantial public funds, public investments, human labour and resources that are used to bring out the product on time to curb, or mitigate the emergency in the shortest period of time. It is therefore pertinent that the government involves as many manufacturers as possible, particularly in a country like India with multiple manufacturers,⁵⁷ and place in the public domain processes, technical know-how, etc. so that those with the capacity are able to help in the production, manufacturing, distribution of the products. Profits and intellectual property rights ought not to take precedence over the fundamental right to life and health of people.

While the primary context within which demands for the expansion of production arose was domestic needs, two additional factors should have given the government the impetus to use their powers either under the Patents Act 1970 or as joint holders of the intellectual property and co-developers of Covaxin. The first relates to India's international obligations under the right to health discussed in greater detail below; at a time when procurement missteps and a sudden expansion of vaccine eligibility resulted in the stoppage of the vaccine exports from India, it was imperative for the government to explore and use every avenue available to expand production – both for Covishield and for Covaxin. The second factor that should have been taken into account was the emerging information on the increased risk of a particular side-effect of Covishield for young persons, i.e., Thrombosis and Thrombocytopenia Syndrome or TTS. In the one month that the SC and the government went back and forth on the availability and accessibility of COVID-19 vaccines, clear data on this serious and severe AEFI, which had a significant chance

⁵⁵ 'Bharat Biotech Ready to Share COVAXIN Formula with other Manufacturers: Centre' (*Livemint*, 13 May 2021) <<https://www.livemint.com/news/india/bharat-biotech-agrees-to-give-covaxin-formula-to-other-manufacturers-centre-11620906716372.html>> accessed 2 May 2023, and 'Covaxin Production. Three More Firms get the Nod to Produce Covaxin' (*Hindu Business Line*, 16 May 2021) <<https://www.thehindubusinessline.com/news/three-more-firms-get-the-nod-to-produce-covaxin/article34567892.ece>> accessed 2 May 2023.

⁵⁶ Vibha Varshney, 'COVID-19 Vaccines: Waiting for Advantage India' (*Down to Earth*, 17 April 2021) <<https://www.downtoearth.org.in/news/health/covid-19-vaccines-waiting-for-advantage-india-76543>> accessed 28 April 2023.

⁵⁷ 'List of Licensed Human Vaccine Manufacturing Facilities in India' (CDSCO) <https://cdsco.gov.in/opencms/export/sites/CDSCO_WEB/Pdf-documents/biologicals/facilitiesLIST.pdf> accessed 2 May 2023.

of resulting in death, had emerged from other countries and many had either stopped the use of the vaccine for the under 40 age group or were at least offering an alternative vaccine. Unlike most developing countries, India did have an alternative to offer in Covaxin, but with half-hearted efforts to expand production beyond the exclusive control of Bharat Biotech, this option could not really be exercised.

3. *Vaccine wastage*

India's immunization program had a wide reach and was well-organized prior to the COVID-19 pandemic. In keeping with WHO guidance, the government announced vaccination in phases starting with key priority groups. However, a certain amount of flexibility could have been built into the system to allow extra doses in opened vials to be given to persons outside of the priority groups to avoid vaccine wastage. The Delhi HC noted that as per one report about 44 lakhs vaccines had been wasted out of the 10 crore vaccines allocated to different States, because of the restriction of age and category of people who were entitled to take the vaccine. The court directed the government to devise ways and means to register volunteers who may be below the age of 45 years but above 18 years, who could be called upon to take the residual doses of vaccines, in case the doses are left unutilized after 5 PM every day, and requested the government to modify the Co-WIN app accordingly.⁵⁸ Instead of questioning and investigating the wastage caused by the vaccination policy, and checking on pilferage and corruption, in some cases, unfortunately, the blame was placed on healthcare providers. In one case, the anticipatory bail application of a nurse was rejected by the Allahabad HC, for her alleged involvement in the wastage of 29 vaccine doses of COVID-19 vaccines.⁵⁹ Vaccine wastage of another kind was reported throughout 2022 in relation to expiries of vaccine stocks. In July 2022, reports suggested that nearly 6 lakh Covishield doses in Maharashtra were likely to expire in the coming months.⁶⁰ In November 2022, Bharat Biotech announced that 200 million doses of Covaxin were about to expire.⁶¹ While this wastage has been blamed on low uptake of precaution

⁵⁸ 'Delhi HC on Status of Availability of COVID Beds, Supply of Ventilators, Need of Medical Oxygen and Essential Medications || "Wastage of a Single Dose of Vaccine is a Criminal Waste"' (*SCC Blog*, 21 April 2021) <<https://www.scconline.com/blog/post/2021/04/21/covid-19-7/>> accessed 2 May 2023.

⁵⁹ *Niha Khan v State of U.P.* Criminal Misc Anticipatory Bail Application U/S 438 CR.P.C. No. - 12674 of 2021.

⁶⁰ Nisha Nambiar, '6 Lakh Covishield Vaccine Doses to Expire in August, Maharashtra Races to Use Up Vials in Time' (*Times of India*, 31 July 2022) <<https://timesofindia.indiatimes.com/city/pune/6-lakh-covishield-vaccine-doses-to-expire-in-august-maharashtra-races-to-use-up-vials-in-time/articleshow/93243024.cms>> accessed 2 May 2023.

⁶¹ Gopavajhala Diwakar, 'Owing to Poor Demand, 50 Million Doses of Covaxin Set to Expire Early 2023' (*The Wire*, 6 Nov 2022) <<https://thewire.in/health/covaxin-50-million-doses-expire-early-2023>> accessed 2 May 2023.

doses, as noted above, precaution doses were initially only available on payment likely dampening the demand for boosters from the very beginning.

4. Exports

Right to health obligations are usually discussed in the domestic or national context. However, the right to health also places international obligations on governments; most often it is the obligation of developed countries that are the subject of these discussions. According to General Comment 14, “[S]tates parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. Depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible, and provide the necessary aid when required.”⁶² With the Indian government recognizing and in fact advertising its role as the key supplier of COVID-19 vaccines for the rest of the developing world, how India’s domestic policy impacted international access to vaccines is worth discussing.

There were international expectations that Serum Institute would be the key supplier of COVID-19 vaccines for developing countries from early on as the manufacturer entered into multiple collaborations with Oxford University, Astrazeneca, the Coalition for Epidemic Preparedness Innovations (CEPI), Global Alliance for Vaccines and Immunisation (GAVI) and the Bill and Melinda Gates Foundation (BMGF) in 2020. BMGF provided at-risk funding of 300 million dollars to Serum for supplying 200 million doses of COVID-19 vaccines to the international COVAX facility.⁶³ Within days of the national rollout starting, exports from India started with the government’s launch of its “Vaccine Maitri” mission of gifting doses to several neighbouring and friendly countries.⁶⁴ By end March 2021, however, both Serum Institute and Bharat Biotech were asked to prioritise domestic supplies as the Delta wave worsened.⁶⁵ Even as dismay grew across developing countries with

⁶² General Comment No. 14 (n 15).

⁶³ ‘New Collaboration Makes Further 100 Million Doses of COVID-19 Vaccine Available to Low- and Middle-income Countries’ (*Gavi The Vaccine Alliance*, 29 September 2020) <<https://www.gavi.org/news/media-room/new-collaboration-makes-further-100-million-doses-covid-19-vaccine-available-low>> accessed 2 May 2023.

⁶⁴ Prashasti Singh, “Vaccine Maitri’: Covid vaccine doses from India reach Bhutan, Maldives’ (*Hindustan Times*, 20 January 2021) <<https://www.hindustantimes.com/world-news/vaccine-maitri-covid-vaccine-doses-from-india-reach-bhutan-maldives-101611139314272.html>> accessed 2 May 2023.

⁶⁵ Himani Chandna and NayanimaBasu, ‘Prioritise Covid Vaccine Supplies within India Over Exports, Govt Tells Serum & Bharat Biotech’ (*The Print*, 25 March 2021) <<https://theprint.in/health/prioritise-covid-vaccine-supplies-within-india-over-exports-govt-tells-serum-bharat-biotech/628300/>> accessed 2 May 2023.

GAVI's announcement of delays of 90 million doses that were expected from Serum Institute⁶⁶, it is of note that the greatest concern for both Serum and Astrazeneca appeared to be a shipment of 5 million doses destined not for COVAX or other developing countries, but for the UK,⁶⁷ which had already cornered a significant portion of international vaccine supplies.⁶⁸ The predicted re-start of exports within a few months was upended with the announcement of vaccination being opened up to everyone over the age of 18 in India. According to the WHO, the stoppage of vaccine exports from India affected 91 countries.⁶⁹ Exports restarted only about six-months later.⁷⁰

The government of India and many experts have rightly noted that the blame for the international scarcity of COVID-19 vaccines hardly lay at India's doorstep. Not only had developed countries snapped up the majority of vaccine supplies as early as 2020,⁷¹ they actively opposed the TRIPS Waiver proposal by India and South Africa at the WTO that could have cleared the pathway for widespread local production (and continue to oppose the vastly watered-down TRIPS decision on vaccine patents from being extended to diagnostics and therapeutics)⁷² and did little to support a global technology transfer initiative by the WHO and the Government of Costa Rica.⁷³

However this is not to say that missteps by the government of India did not exacerbate the situation or that there weren't legal, policy and other steps that

⁶⁶ PTI, 'Gavi Announces Supply Delays for up to 90 Million Vaccine Doses as India Sees Covid Surge' (*India TV*, 25 March 2021) <<https://www.indiatvnews.com/news/world/covid-vaccine-doses-delayed-gavi-un-vaccine-delivery-program-announcement-india-covid-surge-693545>> accessed 2 May 2023.

⁶⁷ PTI, 'Serum Institute Seeks Govt Nod to give 5 Million Vaccine Doses to UK' (*Business Standard*, 23 March 2021) <https://www.business-standard.com/article/pti-stories/sii-seeks-govt-s-nod-to-give-50l-covishield-doses-to-uk-says-won-t-affect-india-s-vaccination-drive-121032301300_1.html> accessed 2 May 2023.

⁶⁸ AFP, 'UK Starts Mass Coronavirus Vaccination Programme' (*The Economic Times*, 8 December 2020) <<https://economictimes.indiatimes.com/news/international/business/uk-starts-mass-coronavirus-vaccination-programme/articleshow/79620085.cms?from=mdr>> accessed 2 May 2023.

⁶⁹ 'India's Covid Vaccine Export Ban has Affected 91 Countries, Says WHO Chief Scientist' (*Scroll.in*, 1 June 2021) <<https://scroll.in/latest/996305/indias-covid-vaccine-export-ban-has-affected-91-countries-says-who-chief-scientist>> accessed 2 May 2023.

⁷⁰ Elizabeth Roche, 'After 6-month pause, India resumes covid vaccine exports' (*Live mint*, 11 October 2021) <<https://www.livemint.com/news/india-restarts-covid-vaccine-export-11633865328184.html>> accessed 2 May 2023.

⁷¹ 'Coronavirus: Rich Nations Snap up Vaccine Stocks in Global Race for Jab' (*The Economic Times*, 17 September 2020) <<https://economictimes.indiatimes.com/industry/healthcare/biotech/healthcare/coronavirus-rich-nations-snap-up-vaccine-stocks-in-global-race-for-jab/articleshow/78168230.cms>> accessed 2 May 2023.

⁷² 'WTO: North Countries Stalemate TRIPS Decision on Diagnostics & Therapeutics' (*TWN*, 19 October 2022) <<https://www.twon.my/title2/health.info/2022/hi221002.html>> accessed 2 May 2023.

⁷³ Carlos M Correa, 'Expanding the Production of COVID-19 Vaccines to Reach Developing Countries Lift the Barriers to Fight the Pandemic in the Global South' (*South Centre*, 2021) <<https://www.southcentre.int/wp-content/uploads/2021/04/PB-92.pdf>> accessed 2 May 2023.

the government could have taken to expand vaccine production that could have helped ease both domestic and international shortages. As noted above, the initial cautious procurement by the government resulted in a temporary halt in production by Serum Institute. The other decision by the government was a far more significant one i.e., the opening up of vaccination to all those above the age of 18 resulting in a sudden, and by all accounts, unplanned massive expansion of domestic needs, with an immediate adverse impact on international needs.

The unfortunate developments around vaccine exports from India highlighted another key gap in law and policy. The development of COVID-19 vaccines is based on multiple agreements, licenses and collaborations almost none of which are available in the public domain. Public health groups pointed out concerns with the lack of transparency in these agreements and the dangers of relying on non-transparent commercial arrangements while dealing with a public health emergency. With Serum Institute in particular, health groups noted that the lack of transparency in these agreements meant that there was little information on Serum's legal obligations to export which needed to be taken into account while determining what supplies would actually be available for domestic procurement.⁷⁴ This became apparent when Astrazeneca served Serum with a legal notice for failure to supply COVID-19 vaccines internationally.⁷⁵ A clause in the contract of particular interest that came to light only because of the export stoppage, was the requirement for Serum to prioritise any supply commitments that Astrazeneca had made.⁷⁶

There is one other aspect that requires some attention and that relates to the actions of Indian manufacturers in the international market. News reports indicate that Serum charged much higher prices to developing countries when supplying bilaterally; for instance, Uganda, a Least Developed Country was reportedly being charged USD 7 per dose in an order it placed with Serum.⁷⁷ Bharat Biotech's international dealings have brought forth other aspects such as the allegations of corruption in the negotiations for the supply of Covaxin to Brazil at a high price of USD 15 per dose for a government contract⁷⁸ and

⁷⁴ All India Drug Action Network, 'Letter from All India Drug Action Network on Serum Institute of India's Application for Emergency Approval for Covishield' (*Health, Ethics and Law*, 8 December 2020) <<https://fmesinstitute.org/serum-institute-of-indias-application-for-emergency-approval-for-covishield/>> accessed 4 April 2023.

⁷⁵ 'SII Receives Legal Notice from AstraZeneca Over Vaccine Delays' (*The Quint*, 8 April 2021) <<https://www.thequint.com/news/india/sii-gets-legal-notice-from-astrazeneca-over-vaccine-delays>> accessed 28 April 2023.

⁷⁶ PTI (n 67).

⁷⁷ Esther Nakkazi, 'Uganda Defends Price Paid for AstraZeneca COVID19 Vaccine; New Study Suggests Vaccine Could Cut Transmission By Two-Thirds' (*Health Policy Watch*, 3 February 2021) <<https://healthpolicy-watch.news/uganda-defends-astrazeneca-price-says-its-not-higher-than-other-countries/>> accessed 28 April 2023.

⁷⁸ Leroy Leo, 'Brazil Suspends \$320 Million Deal with Bharat Biotech for Covaxin' (*Live mint*, 30 June 2021) <<https://www.livemint.com/companies/news/>

the flagging of Good Manufacturing Practice (GMP) concerns by the WHO in April 2022.⁷⁹

The ethical implications of decisions by countries who had vaccine doses to prioritise mass domestic vaccination beyond key vulnerable groups when the vast majority of developing countries had barely even rolled out a small number of first doses to their vulnerable groups, is a hotly debated topic.⁸⁰ Vaccine distribution is also at the heart of ongoing negotiations on a Pandemic Treaty.⁸¹ In India's case, arguably the responsibility became acute as exports had in fact started, several developing countries commenced their vaccination drives as first doses had already arrived from India,⁸² others put in place rollout plans and host of other actions were taken by multilateral agencies in anticipation of the exports from India.⁸³ Particularly for those in need of second doses in these countries, a total stoppage of exports from India should have been reconsidered. In the interest of those countries clearly reliant on India, the question of whether India should have continued a gradual expansion of eligibility with a focus on those with co-morbidities instead of a sudden, unrestricted expansion to the 18+ age group is a matter that deserves some reflection. Certainly, as noted in the section on expanding production above, India had an obligation to increase the availability of vaccines by involving other vaccine manufacturers in the production of both the vaccines to meet domestic and international needs.

It is of note that no formal ban on the exports of COVID-19 vaccines was in place during the period that exports were halted indicating that the government

brazil-suspends-320-million-deal-with-bharat-biotech-for-covaxin-11625073987131.html> accessed 4 April 2023.

⁷⁹ 'Suspension of Supply of COVID-19 Vaccine (COVAXIN)' (*WHO*, 2 April 2022) <<https://www.who.int/news/item/02-04-2022-suspension-of-supply-of-covid-19-vaccine-covaxin>> accessed 28 April 2023.

⁸⁰ Nancy S Jecker, Aaron G Wightman and Douglas S Diekema, 'Vaccine Ethics: An Ethical Framework for Global Distribution of COVID-19 Vaccines' [2021] National Library of Medicine <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7887861/>> accessed 2 May 2023.

⁸¹ Kerry Cullinan, 'Pandemic Treaty 'Zero-Draft' is Out – Proposes WHO Gets 20% of All Pandemic Products to Ensure Equity' (*Health Policy Watch*, 1 February 2023) <<https://health-policy-watch.news/pandemic-treaty-zero-draft-proposes-who-gets-20-of-products/>> accessed 2 May 2023. See also: 'WHO's Pandemic Treaty: Promises of Equity should be Kept' (*The Lancet Global Health*, 1 March 2023) <[https://www.thelancet.com/journals/langlo/article/PIIS2214-109X\(23\)00121-3/fulltext](https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(23)00121-3/fulltext)> accessed 2 May 2023.

⁸² 'COVID-19 Vaccine Doses Shipped by the COVAX Facility Head to Ghana, Marking Beginning of Global Rollout' (*WHO*, 24 February 2021) <<https://www.who.int/news/item/24-02-2021-covid-19-vaccine-doses-shipped-by-the-covax-facility-head-to-ghana-marking-beginning-of-global-rollout>> accessed 2 May 2023 and Suhasini Haidar, 'Hit by India's Vaccine Export Ban, Bhutan Seeks Help' (*The Hindu*, 27 June 2021) <<https://www.thehindu.com/news/international/hit-by-indias-vaccine-export-ban-bhutan-seeks-help/article35006213.ece>> accessed 2 May 2023.

⁸³ 'UNICEF Begins Shipping Syringes for the Global Rollout of COVID-19 Vaccines under COVAX' (*UNICEF*, 23 February 2021) <<https://www.unicef.org/press-releases/unicef-begins-shipping-syringes-global-rollout-covid-19-vaccines-under-covax>> accessed 2 May 2023.

had sufficient informal power to effect changes in the decisions of the vaccine manufacturers. This power could certainly have been exercised to expand the pool of vaccine manufacturers even if the government was reluctant to take any legal steps to force the sharing of technology or intellectual property. It could also be used to increase the government's oversight of the actions of Indian manufacturers abroad. Although India's international obligations on the right to health, at least in so far as increasing and ensuring availability were concerned, did not find mention in the SC's deliberations in *In Re: Distribution Of Essential Supplies And Services During Pandemic*, given the significant impact that India's capacity to produce and supply medical products has internationally, perhaps these aspects should also be taken into consideration in the future.

B. Accessibility

Anushi, 26 years of age, registered on the CoWIN platform for her Covid-19 vaccination the very first day registrations were thrown open for those above 18 years. However, she is still waiting for a slot at a government vaccination centre. "I have been trying to get myself and my brother vaccinated but I cannot seem to find any slots at government centres. My parents also need to get their second dose. Private facilities are too expensive," Anushi said... For the 18-45 age group, all 368 government centres...have been suspended for around two weeks now. Meanwhile, people are getting vaccinated in droves at private hospitals. The situation is diametrically opposite to what is happening at government centres. At a private hospital vaccination centre in Delhi, Deepanshu Mehta told India Today, "At government centres, you will get a slot if you are lucky. Otherwise, the wait can be endless. My office requires a vaccination certificate and that is why I got vaccinated at a private hospital. I had to pay a lot but there was no option."

— *India Today*, 6 June 2021⁸⁴

Ram Kumari, 26, from Gurugram, Haryana, said: "I didn't even know we had to register on the phone. I don't have a smartphone. My husband has one, but I don't know how to use it." She added: "I want to get the vaccine, and I thought

⁸⁴ Milan Sharma, Aishwarya Paliwal Sushant Mehta, 'With Govt Centres Shut and Private Hospitals Pricey, Delhi's Youngsters Left without Covid Vaccines' (*India Today*, 6 June 2021) <<https://www.indiatoday.in/cities/delhi/story/govt-centres-shut-private-hospitals-delhi-youngsters-left-covid-vaccines-1811389-2021-06-05>> accessed 2 May 2023.

of going to the government hospital, but it is too far to walk. I have no way of getting there, especially alone.”

— *The Guardian*, 28 June 2021⁸⁵

“Last week I had told you that I do not have the figures. Today I have the figures. So if we take the figures from 1 May to 22 September — this is a big qualification, so we are not talking of the entire period of vaccination, we are talking of May, June, July, August, and 22 days of September — roughly 6 per cent doses have been administered in private hospitals and remaining doses have been administered in public health facilities,” Bhushan said while replying to a question from ThePrint.”

— *The Print*, 23 September 2021⁸⁶

Only 4,018 people with disabilities have received both doses of COVID-19 vaccine till November 28, as per figures released by the Health Ministry during the ongoing session of Parliament. It added that as per the CoWIN portal, 8,390 people with disabilities received the first dose. As per Census 2011, the differently abled population in India stands at 26.8 million.

— *The Hindu*, 7 December 2021⁸⁷

The principle of *accessibility* requires that health services, goods and facilities be physically⁸⁸ and economically⁸⁹ accessible to all without discrimination.

⁸⁵ Nayanika Guha, ‘India’s Covid Gender Gap: Women Left Behind in Vaccination Drive’ (*The Guardian*, 28 June 2021) <<https://www.theguardian.com/global-development/2021/jun/28/india-covid-gender-gap-women-left-behind-in-vaccination-drive>> accessed 2 May 2023.

⁸⁶ Abantika Ghosh, ‘Private Sector Administered 6% of Covid Vaccines Since May, Maharashtra Tops List, Says Centre’ (*The Print*, 23 September 2021) <<https://theprint.in/india/private-sector-administered-6-of-covid-vaccines-since-may-maharashtra-tops-list-says-centre/738899/>> accessed 2 May 2023.

⁸⁷ Bindu Shajan Perappadan, ‘COVID-19 | Only 4,018 People with Disabilities got Both Doses of Vaccine Till November-end’ (*The Hindu*, 7 December 2021) <<https://www.thehindu.com/news/national/only-4018-people-with-disabilities-got-both-doses-of-covid-19-vaccine-till-november-end/article37880304.ece>> accessed 2 May 2023.

⁸⁸ “Physical accessibility: health facilities, goods and services must be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups, such as ethnic minorities and indigenous populations, women, children, adolescents, older persons, persons with disabilities and persons with HIV/AIDS. Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within safe physical reach, including in rural areas. Accessibility further includes adequate access to buildings for persons with disabilities.” See, CESCR General Comment No. 14: The right to the highest attainable standard of health (art 12) (n 15).

⁸⁹ “Economic accessibility (affordability): health facilities, goods and services must be affordable for all. Payment for health-care services, as well as services related to the underlying

Accessibility also includes the right to seek, receive and impart information and ideas concerning health issues. However, accessibility of information should not impair the right to have personal health data treated with confidentiality. These aspects of informational accessibility are discussed later in the context of the principles of acceptability and quality. This section focusses on the issues of prioritisation and discrimination in vaccine access and economic accessibility in terms of vaccine pricing.

1. *Prioritisation*

As soon as it became clear that COVID-19 vaccines were likely to be effective and that there would likely be restricted supplies, the WHO's SAGE committee issued guidance for countries to take into account while deciding which population groups would be prioritised in vaccination.⁹⁰ India's rollout of COVID-19 vaccines started in January 2021 for healthcare workers and frontline workers, in March 2021 for the 65+ and 45+ (with co-morbidities) age groups and in April 2021 for the entire 45+ age group. In May 2021, eligibility for vaccination was declared for everyone who was 18+. It is this announcement of the sudden expansion of eligibility to all adults that resulted in the most controversy.

In the SC, in *Distribution of Essential Supplies and Services During Pandemic, In re*, the controversy related to the government's departure from centralized procurement and paid vaccinations for this age group. But the very basis of opening up of vaccine eligibility was also questioned and a group of researchers and doctors contended that the move in effect de-prioritised the previously eligible groups noting that, "from 3 May to 5 June 2021, more first doses were administered to people under 45 than over 60, even though at least 77 million people aged 60 remain unvaccinated."⁹¹ Several States facing vaccine shortages announced suspensions of vaccination for the 18+ group to preserve vaccine stock for the 45+ age group.⁹² In Chhattisgarh,

determinants of health, has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households." *ibid*.

⁹⁰ 'WHO SAGE Roadmap for Prioritizing Uses of Covid-19 Vaccines in the Context of Limited Supply' (WHO, 2020) <<https://www.who.int/docs/default-source/immunization/sage/covid/sage-prioritization-roadmap-covid19-vaccines.pdf>> accessed 2 May 2023.

⁹¹ Peter Llyod Sherlock, Nidheesh Manee Kandiyil, Martin McKee, Arokiasamy Perianayagam, Sridhar Venkatapuram, Soumithra Pathare, Aravinda Meera Guntupali, Ramesh Kumar K, Soumitra Ghosh, 'Pandemic Lessons from India: Inappropriate Prioritisation for Vaccination' (*BMJ*, 9 June 2021) <<https://www.bmj.com/content/373/bmj.n1464>> accessed 2 May 2023.

⁹² Bhavika Jain, Richa Pinto and Sumitra Debroy, '60+ in Mumbai now Walk in for 2nd Dose 3 Days a Week' (*Times of India*, 13 May 2021) <<https://timesofindia.indiatimes.com/city/mumbai/60-in-city-can-now-walk-in-for-2nd-dose-3-days-a-week/articleshow/82590158.cms>> accessed 2 May 2023; 'Delhi: Vaccination for 18-44 Category Suspended for 5th Day, No COVAXIN for any Age Grp, says AAP MLA' (*Live mint*, 28 May 2021) <<https://www>

given the shortages for the 18-44 group, the government announced three phases for the vaccination of the 18+ group starting with those enrolled in the Antyodaya Anna Yojana, followed by those who were below the poverty line and in the third phase expanding to those above the poverty line. The HC of Chhattisgarh, however, directed the government to earmark vaccines for all the three groups in an equal ratio of 33% instead of the phase-wise approach.⁹³ Public health activists noted that the approach of the Chhattisgarh government had been in line with WHO's priority groups and that equality in access as directed by the HC would end up undermining equity; what our courts have so eloquently described in the past as substantive equality rather than formal equality.⁹⁴

2. Discrimination

The SC in *Distribution of Essential Supplies and Services During Pandemic, In re*, found that prima facie the government's procurement policy in providing free vaccines to those above 45 and not to those in the 18-45 age group was discriminatory. However, this was not the only aspect of the vaccine policy that was discriminatory. The COVID-19 vaccine rollout programme appeared to adopt a one-size-fits-all approach. There was scant attention paid to the many vulnerabilities and barriers that keep people away from healthcare. The rollout excluded a large number of differently abled persons, elderly, non-citizens living in India, pregnant women, and others who were unable to register on the app or reach the centres to get the vaccine.

One of the first barriers to access related to the so-called 'digital divide', as reports came in of hardships faced in registering through the Co-WIN application (Co-WIN app). Many people did not have smart phones or even access to the internet to register to get a vaccine. In a *suo motu* petition, the HC of Tripura, issued directions to the State to provide fullest assistance to such persons so that there was no class divide for access to vaccination, and to make a road map for securing vaccination to the majority of the eligible population.⁹⁵ Prodded by the SC in its April order in *Distribution of Essential Supplies and Services During Pandemic, In re* the Central government announced walk-in

livemint.com/news/india/delhi-vaccination-for-18-44-category-suspended-for-5th-day-no-covaxin-for-any-age-grp-says-aap-mla-11622210148892.html> accessed 4 April 2023.

⁹³ *Suo Motu v State of Chhattisgarh*, 2021 SCC OnLine Chh 1008 (High Court of Chhattisgarh), <<https://www.livemint.com/news/india/delhi-vaccination-for-18-44-category-suspended-for-5th-day-no-covaxin-for-any-age-grp-says-aap-mla-11622210148892.html>> accessed 28 April 2023.

⁹⁴ Sulakshana Nandi, 'Chhattisgarh took the Right Step towards Vaccine Equity – But the High Court Blocked it with Quotas' (*Scroll.in*, 9 May 2021) <<https://scroll.in/article/994435/chhattisgarh-took-the-right-step-towards-vaccine-equity-but-the-high-court-laid-down-quotas>> accessed 4 April 2023.

⁹⁵ *Court on Its Own Motion*, Writ Petition PIL No. 9 of 2020, High Court of Tripura, Agartala, order dated 31.5.2021.

registrations for the 18-44 age group but only at government centres.⁹⁶ In its May order, the SC found that a vaccination policy relying only on a digital portal would create an accessibility barrier for the marginalized and, “*could have serious implications on the fundamental right to equality and the right to health,*” of such persons.

The courts also dealt with cases related to vaccine access for non-citizens. A petition was taken up by the Uttarakhand HC based on a letter by a student stating that people from Nepal who are living in India were unable to register on the Co-WIN app to get vaccinated as they did not have Aadhaar cards.⁹⁷ The HC of Rajasthan gave directions to the state government in a *suo motu* petition for Pakistani minority migrants living in the State to be provided with vaccines and food grains. The court issued a set of guidelines that could be followed for varied groups and beneficiaries to avail of the vaccines and directed the state government to chalk out a plan.⁹⁸

The rollout also made little provision for persons with disabilities. Two cases, one in the SC and one in the Bombay HC, are important to examine in this context. The Bombay HC heard a PIL between April 2021 and October 2021 on the need for door-to-door vaccination facilities for senior citizens and specially-abled persons who are unable to reach the vaccination centres. The State contended that the reasons that there was no door-to-door vaccination policy was because of difficulties in managing AEFIs and observing beneficiaries for 30 minutes, vaccine contamination, vaccine wastage and difficulty in maintaining social distancing with elderly who have co-morbidities. The HC on hearing both parties found that such a policy was arbitrary and unreasonable, the elderly are also entitled to protection under Article 21 of the Constitution of India and it was for the State to figure out how to deal with the risks it had identified,⁹⁹ and in a series of orders oversaw the establishment of a door-to-door vaccination policy in Maharashtra. The court also asked for a record of AEFIs when the door-to-door vaccination was started and found this concern was unfounded. By the time the case was disposed of in October 2021, the Central government had finally instituted door-to-door vaccination, something it then highlighted in a PIL before the SC asking for similar directions as the Bombay HC case. The case in the SC is ongoing with interim orders citing the right of accommodation under the *Rights of Persons with Disabilities Act, 2016*, noting that only 23,678 persons with disabilities had been vaccinated and

⁹⁶ ‘Walk-in Vaccine Registration for 18-44 Age Group Allowed at Govt-Run Centres’ (*Indian Express*, 24 May 2021) <<https://indianexpress.com/article/india/walk-in-vaccination-at-government-run-centres-now-allowed-for-people-in-18-44-age-group-7328081/>> accessed 4 April 2023.

⁹⁷ *In Writ Petition PIL No. 62 of 2021*, suo motu taken up by the Uttarakhand High Court, dated 19.5.2021.

⁹⁸ *Suo Motu v. Union of India &anr.*, D.B. Civil WP no. 10075 of 2017, order dated 27.5.2021.

⁹⁹ *Dhruvi Kapadia v Union of India* 2021 SCC OnLine Bom 659.

directing the Central government to call for suggestions on strengthening the framework for vaccination of the disabled.¹⁰⁰

Persons in care homes and custodial settings were also not accounted for. In a case relating to conditions in mental healthcare homes, the SC gave interim orders to all the States and Union Territories to lay down a time schedule to facilitate vaccination of people lodged in the mental health care institutions and their care givers, and provide a progress report.¹⁰¹ The Uttarakhand HC, recognizing that the uptake of vaccinations in the prisons has been low, passed orders to drastically increase the uptake of vaccinations.¹⁰²

The lack of gender sensitivity in the vaccine policy was raised before the SC by the Delhi Commission for Protection of Child Rights, which contended that the exclusion of pregnant and lactating women from the vaccination drive was discriminatory and violative of Articles 14, 15 and 21 of the Constitution of India.¹⁰³ The petitioners contended that there was medical evidence available to show that the vaccines were safe for pregnant and lactating women, a fact that was also endorsed by the Federation of Obstetrics and Gynecological Societies of India, stating that they should also be given COVID-19 vaccines to protect themselves and their children.¹⁰⁴ As pregnant and lactating women were included in the vaccination drive during the pendency of the petition, additional concerns raised by the Petitioner on the manner of declaration of pregnancy or lactation and for tracking AEFIs were considered policy level submissions requiring experts with domain knowledge and the SC asked for these to be submitted to the government for their consideration. Additionally, the SC dismissed an intervention in the case asking for stoppage of vaccination for pregnant and lactating women, stating that the decision of the government was based on guidance from the WHO and other domain experts and that, “*this Court cannot take medical decisions regarding the safety of COVID-19 vaccination among pregnant and lactating persons.*”¹⁰⁵

3. Pricing

The pricing of vaccines has been a critical issue with the sale and administration of the vaccines through the private sector. When private sector hospitals were roped in at the beginning of the rollout in the administration of the vaccines, the government announced a price cap of Rs. 250 (Rs. 150 as vaccine

¹⁰⁰ *Evava Foundation v Union of India* Writ Petition (Civil) No. 58 of 2021, Supreme Court, interim order dated 23.02.2022.

¹⁰¹ *Gaurav Kumar Bansal v Dinesh Kumar* 2018 SCC OnLine SC 3522, interim order dated 01.09.2021.

¹⁰² *Omveer Singh v State of Uttarakhand* 2021 SCC OnLine Utt 561.

¹⁰³ *Delhi Commission for Protection of Child Rights v Union of India* 2021 SCC OnLine SC 3143.

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

charge and Rs. 100 as service charge) for administering the vaccine. The real issue with pricing arose when vaccination was opened up for the 18-44 age group. At this stage, while the government negotiated lower prices for itself,¹⁰⁶ pricing in the private sector presented several problems.

From the beginning of the rollout, vaccine manufacturers complained about the low government procurement prices. Serum stated that while they were making profits, they were unable to make super profits to invest in expansion.¹⁰⁷ When the government opened up vaccination for the 18+ age group, the companies were given a free hand to set the price at which the vaccine would be sold to the States and to the private sector as long as this was disclosed upfront. Both Serum and Bharat announced three sets of prices with the lowest for the Central government, a higher band for State governments and the significantly higher prices for the private sector.¹⁰⁸

As noted in the section on procurement above, the SC found the Central government's policy discriminatory but its nudging only resulted in the Central government reverting to centralized procurement for the Central and State roll-outs. Private sector procurement at higher prices was maintained. The price for both vaccines to the government was Rs. 150 per dose. Prices to the private sector were Rs. 600 for Covishield and Rs. 1200 for Covaxin. Reports of widely varying high prices being charged across large corporate hospitals and cities¹⁰⁹ resulted in the government stepping in to cap prices (taking into account GST and a Rs. 150 service charge) at Rs. 780 for Covishield and Rs. 1410 for Covaxin per dose in the private sector.¹¹⁰ By the time precaution doses were announced both companies had reduced their price to Rs. 255 per dose for the private sector.¹¹¹ It is interesting to note that the Maximum Retail Prices (MRP) for both vaccines have never been announced. It is also worth noting that estimates suggest that with high volumes, the production of adenovirus vector vaccines should cost between Rs. 12.26 to Rs. 18.80 per dose

¹⁰⁶ Affidavit on behalf of the Union of India (n 47).

¹⁰⁷ NDTV, “‘Making Profit, But not Enough to Reinvest,’ Says Adar Poonawalla to NDTV” (*YouTube*, 6 April 2021) <https://www.youtube.com/watch?v=T6gSk0GsQE4&ab_channel=NDTV> accessed 4 April 2023.

¹⁰⁸ Rhythma Kaul, ‘Covaxin Price Dropped to 400 for States; Still 1,200 for Pvt Hospitals’ (*Hindustan Times*, 29 April 2021) <<https://www.hindustantimes.com/india-news/covaxin-price-dropped-to-rs-400-for-states-still-rs-1-200-for-pvt-hospitals-101619705802978.html>> accessed 4 April 2023.

¹⁰⁹ Rema Nagarajan, ‘At Rs 700-Rs 1,500, Price of Covid Vaccine in India’s Private Sector Among Costliest’ (*Times of India*, 10 May 2021) <<https://timesofindia.indiatimes.com/india/at-rs700-rs1500-price-of-covid-vaccine-in-indias-private-sector-among-costliest/articleshow/82509814.cms>> accessed 4 April 2023.

¹¹⁰ Special Correspondent, ‘Government Caps Prices of COVID-19 Vaccines at Private Hospitals’ (*The Hindu*, 8 June 2021) <<https://www.thehindu.com/news/national/high-cost-of-vaccination-at-private-hospitals-unacceptable-paul/article34763106.ece>> accessed 4 April 2023.

¹¹¹ Priyanka Sharma, ‘Bharat Biotech, Serum Institute Reduce Covid Booster Dose Price to 225’ (*Live mint*, 9 April 2022) <<https://www.livemint.com/news/india/bharat-biotech-serum-institute-reduce-covid-booster-dose-price-to-rs-225-11649503209141.html>> accessed 4 April 2023.

depending on the process used.¹¹² Factoring in post-production and delivery costs, the price of a viral vector vaccine like Covishield should be closer to the median price of Rs. 65.38 per dose paid by countries for other vaccines.¹¹³ While there are no estimates for inactivated vaccines, experts suggest the cost to Bharat Biotech for producing and supplying Covaxin should be between Rs. 60 – 100.¹¹⁴ This suggests that both companies were already making significant profits at the government's procurement price. Reports show massive revenue increases for both companies for 2021-22,¹¹⁵ which begs the question of whether in a pandemic, the extremely high private sector pricing of both vaccines was at all justified.

The SC highlighted another factor while discussing the higher prices in the private sector and raised the pertinent question of how the government's funding of COVID-19 vaccine research and development was being reflected in the private sector prices. The SC noted that the government spent ₹11 crore on Covishield clinical trials and that Serum had not invested in the vaccine's R&D and it had spent ₹35 crore on Covaxin clinical trials where it shared the R&D and the IP with Bharat Biotech.¹¹⁶ Some analysts believe even these amounts are an underestimate.¹¹⁷ This was really the only data on the arrangements between the government and the manufacturers that was made available in the public domain and efforts to access more information through RTI applications have been futile.¹¹⁸ Apart from the investments disclosed in the SC affidavits, there have been reports of an additional ₹900 crore R&D grant for vaccines by the government. However, details on who has received these

¹¹² Rafael G Ferreira, Neal F Gordon, Rick Stock, Demetri Petrides, 'Adenoviral Vector COVID-19 Vaccines: Process and Cost Analysis' (*MDPI*, 18 August 2021) <<https://www.mdpi.com/2227-9717/9/8/1430#B58-processes-09-01430>> accessed 4 April 2023.

¹¹³ Olivier J Wouters, 'Challenges in Ensuring Global Access to COVID-19 Vaccines: Production, Affordability, Allocation, and Deployment' (*The Lancet Global Health*, 13 March 2021) <[https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(21\)00306-8/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(21)00306-8/fulltext)> accessed 28 April 2023.

¹¹⁴ Himani Chandna, 'Bharat Biotech Promised Shot Cheaper than Bottled Water. But Covaxin is 3rd Costliest in World' (*The Print*, 14 June 2021) <<https://theprint.in/india/bharat-biotech-promised-shot-cheaper-than-bottled-water-but-covaxin-is-3rd-costliest-in-world/677108/>> accessed 28 April 2023.

¹¹⁵ 'Serum Institute of India Continues to Lead in Indian Biopharmaceutical Industry Survey 2022' (*Bio Spectrum*, 11 April 2023) <<https://www.biospectrumindia.com/features/18/22925/serum-institute-of-india-continues-to-lead-the-indian-biopharmaceutical-industry-survey-2022.html>> accessed 28 April 2023.

¹¹⁶ *Distribution of Essential Supplies and Services During Pandemic, In re*, (n 47).

¹¹⁷ R Ramakumar, 'As Indian Government Offers Some Answers on Covaxin Patent Rights, More Questions Emerge' (*Scroll.in*, 12 May 2021) <<https://scroll.in/article/994763/as-indian-government-offers-some-answers-on-covaxin-patent-rights-more-questions-emerge>> accessed 28 April 2023.

¹¹⁸ Aniket Aga and Chitraganda Choudhary, 'Modi Govt Keeps Financial Deal with Bharat Biotech Secret, Covaxin Among World's Costliest Vaccines' (*Article 14*, 16 November 2021) <<https://article-14.com/post/modi-govt-keeps-financial-deal-with-bharat-biotech-secret-covaxin-among-world-s-costliest-vaccines--619317364e311>> accessed 2 May 2023.

grants and how much remain vague.¹¹⁹ It is also worth noting that estimates suggest that 97-99% of funding for the Oxford vaccine, which was licensed to Serum Institute through Astrazeneca, came from public and charitable sources till Autumn 2020.¹²⁰ As noted previously, BMGF provided at-risk funding of 300 million dollars to Serum Institute which included a price ceiling of USD 3 per dose.¹²¹ Additionally, the US NIH also revealed that the adjuvant used in Covaxin was developed with their funding.¹²²

It appeared that the risks of investing in a vaccine candidate were minimized for the private sector and taken on by the government and funding agencies. Despite the rapid and significant amount of this public and philanthropic investment, pharmaceutical companies appear to have largely retained control over the production, supply and prices of the vaccines. Despite the SC's pointed questions in this regard, high prices continued to be charged in the private sector for COVID-19 vaccines and as noted previously, the SC did not return to this issue.

C. Acceptability

“...because Ritu was a normal child it didn't even occur to me that I have to go to a paediatrician and ask if there are any potential side effects of this and even at the vaccination centres there was no information put up, nothing of concern...it was just by word of mouth that I hear from others that you might expect high fever the next day or body pains but that should subside within a few days. That was the only information we had. We both, Ritu and I got our vaccines on the 29th of May around 9.30 am and we both got Covishield...

¹¹⁹ E Kumar Sharma, 'Where did the Govt's Rs 900 Crore R&D Grant for COVID Vaccine Development Go?' (*Financial Express*, 14 April 2021) <<https://www.financialexpress.com/lifestyle/health/where-did-the-govts-rs-900-crore-rd-grant-for-covid-vaccine-development-go/2232734/>> accessed 2 May 2023; See also Department-Related Parliamentary Standing Committee on Science and Technology, Environment, Forests and Climate Change, *Demands for Grants (2021-2022) of the Department of Biotechnology (Demand No. 89) (342nd Report, 2021)*.

¹²⁰ Samuel Cross, 'Who Funded the Research Behind the Oxford-AstraZeneca COVID- 19 Vaccine?' (*BMJ*) <<https://gh.bmj.com/content/6/12/e007321>> accessed 2 May 2023.

¹²¹ 'Serum Institute of India to Produce up to an Additional 100 Million Covid-19 Vaccine Doses for India and Low-and Middle-Income Countries in 2021' (*Serum Institute of India Pvt. Ltd.*, 29 September 2020) <https://www.seruminstitute.com/news_sii_gavi_bmgf.php> accessed 2 May 2023.

¹²² 'Adjuvant Developed with NIH Funding Enhances Efficacy of India's COVID-19 Vaccine' (*National Institutes of Health*, 29 June 2021) <<https://www.nih.gov/news-events/news-releases/adjuvant-developed-nih-funding-enhances-efficacy-indias-covid-19-vaccine>> accessed 2 May 2023.

...the early hours of June 5th around 3.30 am...she woke up saying mama my head is really hurting...I feel as if lice are crawling all over my head...she woke up around 12 or 12.30, this was still the 5th of June...she said her left thumb was really, really sore...one of the small toes on her left foot was also hurting...finger tips are tingling and they feel numb...palms are kind of itchy...it was the 7th of June and I had been giving her avil for two days [on doctor's advice] and she wasn't better so we took her for bloodwork. She started noticing spots under the skin on her palm...around 9 in the night got a call... from Vijay Diagnostics...her platelets are extremely low...the next day [on the video call with the GP at Apollo and after re-test confirmed low platelets] the doctor said no need to panic...then my uncle who is a retired doctor who sent me a link about covishield and blood clots...I didn't have the knowledge to think this was life threatening...

...around 6 in the evening on 8th June, Ritu started getting a headache... shooting pain... started throwing up...every 20-30 minutes...it was around 10.30 in the night...we rushed her to Apollo...neurologist said get her an MRI...technician said there is a problem in her brain get her admitted right away...doctor came around 6.30 am...said she seems to have a clot in her brain...within a few hours she got seizures right in front of our eyes...she was put on the ventilator...she went in for a surgery, a craniotomy...this all happened on the 9th of June. 10th of June...doctor said your daughter has CVST [cerebral venous sinus thrombosis]...50% chance of her survival...yes clots happen but you see symptoms over a month...but the way your daughter got it...it started like a drizzle but became a storm...

...the next few days they did every possible test to see if she had an underlying condition, they couldn't find anything to link it to...in between I heard from the doctors this could be a vaccine induced thrombocytopenia...around 15th of June they said we tried everything...there's no brain signals...and at this point we consider her brain dead...I didn't trust them...how can she be brain dead in 6 days...toughest decision in my entire life to just let her go...so we could continue in the process of Jeevan dan [organ donation]...at 1.30 am on 20th June they took her to the operation theatre...somehow the government got involved and delayed our discharge...they didn't give us the result of the autopsy...

...recently we found out about AEFI and tried to file but we found vaccination department had reported it...when I talked to people, to doctors they say it's one in one million, one in one lakh but ask the person, the family member who have lost...even one in million is not true...in some countries its one in 26,000...I think it all depends on the transparency of the country so we are not being transparent...after this happened to us I feel it should not happen to any other parent...its devastating...an 18 year old lost her life for no reason...I hear from some doctors it's a rare adverse event...the benefit outweighs the risk...what does that mean...doesn't that one life have any value? All I'm saying is people need to be educated. We didn't know about any of this. If I had known that Covishield could cause such an issue...I could have done something if I was informed...and maybe she would have still been living...that lack of information...it's what is really missing...that is the main thing we want to push for, the information and the warning...I don't think people realise how life threatening the blood clots could be..."

*Excerpts taken from Pavan Omtri & Rachna Gangu,
AEFI Testimonial, Rithaika, Age 18, Hyderabad,
19 November 2021¹²³*

The principle of *acceptability* requires that all health facilities, goods and services must be respectful of medical ethics and be culturally appropriate as well as being designed to respect confidentiality and improve the health status of those concerned.¹²⁴ This section focusses on two key aspects of medical ethics which are free and informed consent and that of privacy and confidentiality.

1. *Consent*

Any medical intervention requires the consent of the individual. It is well established now that “*every human being of adult years and sound mind has a right to determine what shall be done with his body*”¹²⁵ and that consent is an important aspect of vaccination.¹²⁶ Consent for immunization and the balancing of individual autonomy with public health concerns has been the subject of much debate in recent years with increasing trends in some countries

¹²³ Awaken India Movement 2 (AIM) ‘AEFI Testimonial 3: Rithaika, Age 18, Hyderabad’ (YouTube, 19 November 2021) <https://www.youtube.com/watch?v=dTEtofvwptc&ab_channel=AwakenIndiaMovement2%28AIM%29> accessed 2 May 2023.

¹²⁴ General Comment No. 14 (n 15).

¹²⁵ *Schloendorff v Society of New York Hospital* (1914) 211 NY 125.

¹²⁶ Richard Griffith, ‘Obtaining Consent for Immunization of Adults’ (*Human Vaccines and Immunotherapeutics*, 30 November 2015) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4962744/>> accessed 4 April 2023.

of parents refusing some vaccinations for their children.¹²⁷ In India, the controversy surrounding HPV vaccines raised issues of informed consent.¹²⁸ For COVID-19 vaccines, there are several aspects that are both similar and distinct from pre-pandemic debates; perhaps the biggest difference is the speed at which COVID-19 vaccines were developed, tested and approved and the evolving information inter alia on safety signals, adverse events, length of protection, differences in protection with the emergence of newer variants, possibly varying levels of protection in certain populations, impact on transmission and impact on disease severity, hospitalization and death as the vaccines were and continue to be administered in unprecedented numbers across entire populations – pediatric, adolescent and adult. The matter of voluntariness is discussed below in the context of mandates. How consent is taken is another crucial aspect and how informed consent should have been insured in the case of COVID-19 vaccines is the second issue explored in this section.

2. *Vaccination Certificates and Mandates*

From the beginning the government maintained that vaccination was going to be purely voluntary. However, people who were vaccinated with both doses of the vaccine received certificates of being vaccinated, which later created a privileged class of people who had to access to public services and settings. High Courts across the country found themselves dealing with a range of discriminatory policies based on vaccination status. The Guwahati HC held that the policy of issuing permits to development workers in both public and private sector to only those persons who were vaccinated was violative of Article 14 by discriminating between vaccinated and unvaccinated persons in the absence of evidence that vaccination prevented infection or transmission.¹²⁹ It also directed the modification of rules for the re-opening of the schools and colleges that required vaccination of teaching and non-teaching staff to include those who choose not to be vaccinated and instead opted for testing every 15 days.¹³⁰ The Delhi HC directed the government to pay an unvaccinated teacher who was unable to take the vaccine due to allergies, his monthly salaries in a petition seeking reinstatement and removal of “on leave” status.¹³¹ The HC of Manipur directed the State authorities not to deny supply of PMGKAY food grains to beneficiaries yet to be vaccinated.¹³² In some cases, courts asked the

¹²⁷ Daniel R Bronfin, ‘Childhood Immunization Controversies: What are Parents Asking?’ (*National Library of Medicine*, 3 August 2008) <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3096324/>> accessed 4 April 2023.

¹²⁸ Ganapati Mudur, ‘Indian MPs Criticize HPV Vaccination Project for Ethical Violations’ (*BMJ*, 6 September 2013) <<https://www.bmj.com/content/347/bmj.f5492>> accessed 4 April 2023.

¹²⁹ *Madan Mili v Union of India* 2021 SCC OnLine Gau 1503.

¹³⁰ *Kohima v State of Nagaland* 2021 SCC OnLine Gau 1170.

¹³¹ *R.S. Bhargava v State (NCT of Delhi)* 2022 SCC OnLine Del 3076.

¹³² *Thangjam Santa Singh v State of Manipur* 2021 SCC OnLine Mani 309.

government to rethink these policies or to reconsider individual cases¹³³ while some found in favour of vaccine mandates.¹³⁴

In *Jacob Puliyel*, the SC examined the issue of vaccine mandates in some detail. While noting the importance of vaccination, the SC analysed the scope of right to privacy, and reiterated that “*nobody can be forcefully vaccinated as it would result in bodily intrusion and violation of individual’s right to privacy, protected under Article 21 of the Constitution of India*”.¹³⁵ Referring to the *Puttaswamy* judgement, the judgment highlighted the three requirements to be fulfilled by the State while placing restraints on the right to privacy to protect legitimate interests of the State – (a) there must be a law in existence to justify encroachment of privacy; (b) aim of the State should fall within the framework of Article 14, which should not be arbitrary; and (c) the means that are adopted by the State are proportional to the object to be achieved that needs to be fulfilled by the law. The SC concluded that (a) Bodily integrity is protected under Article 21, and no individual can be forced to be vaccinated; (b) Personal autonomy involves individual determination of their own life, medical treatment, etc.; (c) Persons not keen on being vaccinated, can avoid vaccination, however, if they are likely to spread infection to others or contribute to the mutation of the virus or burden public health infrastructure, thereby affecting communitarian health at large, the Government can regulate such public health concerns by imposing certain limitations on individual rights that are reasonable and proportionate to the object to be fulfilled.

Noting that the government did not present any evidence to indicate that the transmission of the virus by unvaccinated persons was greater than by vaccinated persons, the SC held that in the present scenario vaccine mandates should not be enforced. This remains a very narrow ground identified by the SC which went on to caution that if the situation changed and the evidence of the impact of unvaccinated persons on different aspects of the pandemics changed then the government could impose restrictions. Unfortunately, the SC appears to accept a binary classification between vaccinated and unvaccinated persons which it may be argued is in itself arbitrary as it does not consider other aspects such as prior infection, the use of masks and other measures that impact transmission and disease severity.

¹³³ “*The compulsory vaccination policy of the Indian Air Force was challenged in the court, wherein directions were given to the Air Force to consider the case of an unvaccinated employee and not to take any coercive action against the petitioner for not being vaccinated, as vaccination was purely voluntary.*” *Yogendra Kumar v Indian Air Force* 2021 SCC OnLine Guj 1197.

¹³⁴ *Sanil Narayanan v State of Kerala* 2021 SCC OnLine Ker 11608.

¹³⁵ *Jacob Puliyel v Union of India* (n 8).

3. *Informed consent*

Informed consent is generally required for medical interventions, as the person has a right to know the benefits, risks, alternatives, etc., and take an informed decision on whether to take the medical treatment or undergo the procedure or not. In the medical context, informed consent is considered a powerful tool to balance the unequal relationship between a healthcare provider and a patient. While consent may be written or verbal, express or implied, it must always be informed. In several countries, including India, consent for mass or routine vaccinations is considered to be implied as the people themselves go to the vaccination center.¹³⁶ Whether implied consent for routine vaccinations is sufficient to assume that such consent is also informed is an issue that has arisen even before the pandemic. In the case of COVID-19 vaccines, a stronger case can be made for express consent as (i) people trust the vaccines approved by the authorities and submit themselves to taking the vaccine, (ii) approaching the center to take the vaccine even though this would mean implied consent, does not mean that the person is aware of the risks, side effects, adverse events, that may occur, even if they are rare and when to see timely medical help in such cases; (iii) while giving emergency approvals, even the authorities also do not know all the adverse events or side effects that the vaccines may cause.

When the COVID-19 vaccines were approved and first rolled out, there were two documents released by the government in January 2021: an operational guide¹³⁷ and a communications guide.¹³⁸ The only mention of consent in these documents related to the use of peoples' images in communication campaigns. Identifying vaccine hesitancy as a key issue, the documents place greater emphasis on promoting the benefits of the vaccines and while awareness related to AEFIs is included in these documents there is no real consent process envisaged. Interestingly, the rather confusing approval given to Covaxin in "clinical trial mode" (discussed below) resulted in the creation of an information sheet, a screening sheet, and an informed consent form that could have provided the framework for ensuring informed consent for all COVID-19 vaccines;¹³⁹ to be clear the argument here is not for paperwork. Often debates around informed consent focus on written forms when in fact

¹³⁶ Veena Johari, 'Identifying Ethical Issues in Development of Vaccines and in Vaccination' (2017)2 (2) Indian Journal of Medical Ethics <<https://ijme.in/articles/identifying-ethical-issues-in-the-development-of-vaccines-and-in-vaccination/?galley=html>> accessed 4 April 2023.

¹³⁷ 'COVID-19 Vaccines Operational Guidelines' (Ministry of Health and Family Welfare) <<https://main.mohfw.gov.in/newshighlights-31>> accessed 4 April 2023.

¹³⁸ 'COVID-19 Vaccine Communication Strategy' (Ministry of Health and Family Welfare) <<https://www.mohfw.gov.in/pdf/Covid19CommunicationStrategy2020.pdf>> accessed 4 April 2023.

¹³⁹ 'Restricted Use of COVAXIN Under Clinical Trial Mode' (Indian Council of Medical Research, 11 January 2021) <<https://www.mohfw.gov.in/pdf/Version4PDFCOVAXINImplementationPlan11Jan2021.pdf>> accessed 4 April 2023.

informed consent is a process.¹⁴⁰ Arguments have been made against informed consent processes over concerns that these can be time-consuming. From a practical point of view, the sheer number of people being vaccinated meant that people were spending hours at vaccination centers; the concern over immediate allergic reactions meant that people were observed for an additional 30 minutes post-vaccination. It may be argued that this scenario was a missed opportunity as it provided a reasonable amount of time where a creative, thoughtful, empathetic, and balanced informed consent process for COVID-19 vaccination could have taken place; most crucially people could have been provided with correct and timely information to support AEFI reporting and recording.

The importance of informed consent in the case of COVID-19 vaccines is now before the SC in *Rachana Gangu v Union of India*.¹⁴¹ The case has been brought by the parents of two girls who passed away after taking Covishield. In the case of the first petitioner's daughter who was 19 years old, she received the vaccine on 29 May 2021 and passed away on 19 June 2021 from Thrombosis and Thrombocytopenia Syndrome (TTS). This AEFI assessment found that her death was linked to the vaccine. It is of note that in the months before vaccination was opened up for the 18+ group, some countries in Europe paused the vaccination drive to investigate the AstraZeneca vaccine, due to reports of blood clots, or risk of thromboembolic events post-vaccination. This appeared to be a particular risk for young people. By May 2021, in less than 4 months of vaccination in India, 498 serious and severe AEFIs had been reported of which 26 cases were reported to be "potential thromboembolic events following the administration of the Covishield vaccine."¹⁴² On 17 May 2021, the government issued an advisory to healthcare service providers on the identification and treatment of TTS with a recurring message that the risk was "minuscule."¹⁴³ Although this advisory mentions ongoing investigations in other countries, it fails to mention that the UK, the only other country using the Astrazeneca vaccine as widely as India had in April decided to offer under-30s an alternative,¹⁴⁴ and well before this advisory was issued had increased the age limit to under-40s who would be offered an alternative to the

¹⁴⁰ Jennifer O'Neill, 'The COVID-19 Vaccine, Informed Consent and the Recruitment of Volunteers' (*Journal of Medical Ethics*, 23 November 2020) <<https://blogs.bmj.com/medical-ethics/2020/11/23/the-covid-19-vaccine-informed-consent-and-the-recruitment-of-volunteers/>> accessed 4 April 2023.

¹⁴¹ 2022 SCC OnLine SC 1125.

¹⁴² 'Bleeding and Clotting Events Following COVID Vaccination Minuscule in India' (*PIB Delhi*, 17 May 2021) <<https://pib.gov.in/PressReleasePage.aspx?PRID=1719293>> accessed 2 May 2023.

¹⁴³ Government of Odisha, Health & Family Welfare Department, 'File No. PT2-HFW-SCH-I-MISC-0023-2020-15621/H' <<https://health.odisha.gov.in/sites/default/files/2021-12/Advisory-diagnosis-treatment-Thrombosis-Thrombocytopenic-26052021.pdf>> accessed 2 May 2023.

¹⁴⁴ Nick Triggle, 'Covid: Under-30s Offered Alternative to Oxford-AstraZeneca Jab' (*BBC News*, 7 April 2021) <<https://www.bbc.com/news/health-56665517>> accessed 2 May 2023.

Astrazeneca vaccine due to the risk of TTS.¹⁴⁵ Health experts noted that this advisory was hardly circulated or widely advertised by the government.¹⁴⁶

The second petitioner's daughter received the vaccine on 8 June 2021 and passed away on 10 July 2021. In this case, the cause was considered to be Multisystem Inflammatory Syndrome in Children/Adults (MIS-C/A) and considered an Adverse Event of Special Interest (AESI) but with no definitive evidence of a link with COVID-19 vaccines. With representations from the parents to the government going unanswered, the parents filed the writ petition seeking a thorough investigation into their daughters' deaths and for the investigation report to be shared with them, the preparation of a protocol for early detection of COVID-19 vaccine AEFIs like the ones suffered by their daughters and for compensation from the government. The critical argument made by the petitioners was that there was no informed consent taken and neither they nor their daughters were informed of the possible severe AEFI from the vaccine before it was administered.

The SC noted that ordinarily, they would have asked the petitioners to seek other remedies as there may be basic questions of fact to be ascertained to bring the case within the framework of medical negligence. But given the documents filed, the lack of any response from the government and the directions sought, the SC directed the government to file its reply.¹⁴⁷ To the dismay of health groups and legal experts,¹⁴⁸ the government in its reply has taken the position that,

“the concept of informed consent is inapplicable to the voluntary use of a drug such as a vaccine...vaccine beneficiary always has the option to access even more information about the vaccine and its possible adverse effect from the health workers at the vaccination site or their doctor before making an informed decision on their own....once a vaccine beneficiary who has access to all relevant information, voluntarily chooses to enter a vaccination center and receive

¹⁴⁵ James Gallagher, 'Under 40s to be Offered Alternative to AZ Vaccine' (*BBC News*, 7 May 2021) <<https://www.bbc.com/news/health-57021738>> accessed 2 May 2023.

¹⁴⁶ Taran Deol, 'COVID-19: Activists Slam Centre's Affidavit Washing Hands Off Compensation for Vaccine Mortality' (*Down to Earth*, 1 December 2022) <<https://www.downtoearth.org.in/news/health/covid-19-activists-slam-centre-s-affidavit-washing-hands-off-compensation-for-vaccine-mortality-86296>> accessed 2 May 2023.

¹⁴⁷ *Rachana Gangu v Union of India* 2022 SCC OnLine SC 1125 affidavit dated 23.11.22 on behalf of the Union of India.

¹⁴⁸ Taran Deol, 'COVID-19: Activists Slam Centre's Affidavit Washing Hands Off Compensation for Vaccine Mortality' (*Down to Earth*, 1 December 2022) <<https://www.downtoearth.org.in/news/health/covid-19-activists-slam-centre-s-affidavit-washing-hands-off-compensation-for-vaccine-mortality-86296>> accessed 2 May 2023.

*vaccination, the question of a lack of informed consent does not arise.*¹⁴⁹

Not taking informed consent from vaccinees, is a breach of their right to autonomy and right to take an informed decision on whether to take the risks of the vaccine or to take the risk of acquiring the disease. The government's arguments, in this case, attempt to stand the concept of informed consent on its head by placing the responsibility of ascertaining benefits and risks on the shoulders of the vaccine beneficiary instead of the government or healthcare provider. This is an extraordinary position taken by the government as it not only attempts to negate its liability but also that of the manufacturers.

4. *Privacy and Confidentiality*

The right to privacy and confidentiality has been guaranteed under the Constitution of India. Although breaches of vaccination data¹⁵⁰ have been reported they have simply been dismissed by the government instead of being investigated.¹⁵¹ When it was launched, the Co-WIN app had no specific privacy policy. In June 2021, the Delhi HC directed the government to upload a privacy policy within 4 weeks.¹⁵² In September 2021, the government announced a new feature on the app that would reveal a person's vaccination status to a third party. As pointed out by experts, this violated the privacy policy that was eventually uploaded on Co-WIN which limited access to a person's data only to government agencies and for specific purposes.¹⁵³ The new feature would also in effect exacerbate the many concerns raised above with vaccine certificates. In addition, the data of persons who used their Aadhaar numbers to register and get vaccinated appear to be feeding into the automatic creation of Health IDs with little information on the purpose of these IDs, absolutely no consent, informed or otherwise taken from those who registered on the Co-WIN app and no information in the public domain on safeguards and restrictions on the use of these Health IDs.¹⁵⁴

¹⁴⁹ *Rachana Gangu v Union of India* 2022 SCC OnLine SC 1125 affidavit dated 23.11.22 on behalf of the Union of India.

¹⁵⁰ 'Massive Public Health Data Leak Puts Personal Data of Scores of Citizens at Risk | The Probe Investigation' (*The Probe*, 31 January 2022) <<https://theprobe.in/massive-public-health-data-leak-puts-personal-data-of-scores-of-citizens-at-risk-the-probe-investigation/>> accessed 4 April 2023.

¹⁵¹ Adam Ang, 'India Dismisses CoWIN Vaccination Data Leak' (*Healthcare IT News*, 24 January 2022) <<https://www.healthcareitnews.com/news/asia/india-dismisses-cowin-vaccination-data-leak>> accessed 4 April 2023.

¹⁵² *Manisha Chauhan v State (NCT of Delhi)* 2021 SCC OnLine Del 1018.

¹⁵³ 'Read our Joint Letter with C-Help & FMES to NHA on CoWIN's Updated API #SaveOurPrivacy' (*Internet Freedom Foundation*) <<https://internetfreedom.in/read-our-joint-letter-with-c-help-fmes-to-nha-on-cowins-updated-api/>> accessed 28 April 2023.

¹⁵⁴ Sarthak Dogra, 'Took Covid Vaccine Using Aadhaar? Your National Health ID has been Created without Your Permission' (*India Today*, 24 May 2021) <<https://www.indiatoday.in/>

D. Quality

“I got my first [Covishield] shot on October 8 and the second shot on November 6. The participant in Chennai reported sick on October 11. Why didn’t they tell us about it? This case came out only because the participant threatened to file a suit. Who knows how many such cases have actually happened that we don’t even know about,” asked Anil Hebbar, adding that he would have taken the second dose anyway but feels it was the duty of those involved to inform all the participants... “They are saying they didn’t tell me because they thought I might get scared. Now my doctor is saying the serious adverse event was not caused by the vaccine. But what if it was causally linked? Should she not have waited to find that out before giving all of us the second dose?” asked Hebbar. He added that he has lost friends to Covid-19 and has seen his 85-year-old mother, a cancer survivor, live in fear of being infected, which impelled him to volunteer. “I participated hoping that could help bring out a vaccine faster. But I am shocked by the company threatening to sue a participant like me,” said Hebbar.”

— *Times of India*, 2 December 2020¹⁵⁵

“Rajesh Panti, 45, a survivor of the Bhopal gas tragedy, said when he received the first [Covaxin trial] dose, he was not asked whether he was taking any medicine. Chillaar said he takes medication for diabetes every morning, but was not asked at the hospital whether he had any underlying health issues. Sarita Jathav, 26, said she is pregnant, but was only told that pregnant women couldn’t take the vaccine when she went to take her second dose, which she did not receive... Chillaar...said that when hospital administrators called to check on him following the shot, he told them that he was having neck problems. They told him to come in for treatment, but when he did, he said he was told to pay more than 3,000 rupees (\$41).”

CNN, 26 February 2021¹⁵⁶

technology/features/story/took-covid-vaccine-using-aadhaar-your-national-health-id-has-been-created-without-your-permission-1806470-2021-05-24> accessed 28 April 2023.

¹⁵⁵ ‘Adverse Event Kept a Secret, Vaccine Volunteers Feel Betrayed’ (*Times of India*, 2 December 2020) <<https://timesofindia.indiatimes.com/india/adverse-event-kept-a-secret-vaccine-volunteers-feel-betrayed/articleshow/79521198.cms>> accessed 2 May 2023.

¹⁵⁶ Esha Mitra and Julia Hollingsworth ‘More than a Dozen Slum Residents in an Indian City say they Thought they were being Vaccinated. They were Part of Clinical Trials’ (*CNN*, 26

“We also spoke to Venugopalan Govindan, a resident of Coimbatore in Tamil Nadu, whose daughter Karunya Venugopalan died on July 10, 2021... developed complications post getting a Covishield jab...later diagnosed with multisystem inflammatory syndrome (MIS-A). “This is a known side effect of the Covid vaccine, according to The Brighton Collaboration. But my daughter was not diagnosed properly for a long time,” said Venugopalan, adding that filing an AEFI was a taxing process for him. “I rang up the Serum Institute of India right after Karunya was hospitalised. Post this, a doctor from SII called me up and I was told that this (MIS-A) was not a side-effect of the vaccine,” he said. AEFIs initially could be reported only through the vaccine manufactured or through the District Immunisation Officer. Venugopalan said he got to file it only after he reached out to an AEFI committee zonal in-charge through Twitter, in September. “The causality analysis of her death, however, was done only on November 18, 2021. We found it out only when we checked out the MoHFW website. No one had intimated anything to us,” he said.”

— *The Hindu*, 5 January 2023¹⁵⁷

The element of *quality* requires that health facilities, goods, and services must be scientifically and medically appropriate, of good quality, and in the case of medical products like drugs and vaccines, must be scientifically approved.¹⁵⁸ There are several aspects to be considered in the scientific approval of COVID-19 vaccines. This section explores the legal and ethical concerns that arose during the clinical trials of Covishield and Covaxin as well as the key issue of adverse events following immunization (AEFI) that have arisen during the government rollout of the vaccines.

The development and approval of COVID-19 vaccines in India have taken place within a complex web of laws, rules, regulations, and guidelines and through multiple regulatory agencies. The safety, efficacy, and quality of COVID-19 vaccines in India are regulated by the *Drugs and Cosmetics Act, 1940*, and various rules and regulatory bodies under the Act. Of particular importance are the provisions in the *New Drugs and Clinical Trial Rules, 2019 (NDCTR)*. Drafted in response to a public interest litigation in the SC

February 2021) <<https://edition.cnn.com/2021/02/25/asia/india-vaccine-trials-covid-ethics-intl-dst-hnk/index.html>> accessed 2 May 2023.

¹⁵⁷ Parvathi Benu, ‘A Close Look at Low Rate of Covid Vaccine Side Effects in India’ (*Hindu Business Line*, 5 January 2023) <<https://www.thehindubusinessline.com/data-stories/data-focus/a-close-look-at-low-rate-of-covid-vaccine-side-effects-in-india/article66329777.ece>> accessed 2 May 2023.

¹⁵⁸ General Comment No. 14 (n 15).

highlighting gaps in the clinical trial regulatory framework,¹⁵⁹ the NDCTR contains detailed provisions covering a range of issues related to the research and development of medical products including accelerated and expedited processes and for the payment of compensation in case of injury or death during clinical trials.

Although the NDCTR had been notified just a year earlier, the COVID-19 outbreak led to further changes in the regulatory framework for clinical trials. Beginning in March 2020, the CDSCO regularly issued notifications on regulatory pathways for clinical trials related to COVID-19.¹⁶⁰ Timely guidance was also issued in April 2020 by ICMR in the *National Guidelines for Ethics Committees Reviewing Biomedical & Health Research, During the COVID-19 pandemic (ICMR COVID-19 Guidelines)*.¹⁶¹ For the first time ever, electronic consent from trial participants was allowed. The Guidelines address a multitude of issues related to clinical trials; conflicts of interest, post-research access and benefit sharing, communication of research findings to individuals and communities, need for appropriate safety, funds, care, and compensation, expeditious review processes for clinical trials for new drugs/compassionate use, etc.

Of great importance to this discussion is ICMR's 2017 guidance¹⁶² providing for monitored emergency use of unregistered and experimental interventions (MEURI) in case of an outbreak of an infectious disease that was also included in the ICMR COVID-19 Guidelines. MEURI approvals are subject to a list of precautions: thorough scientific review followed by an ethics review locally or by a national level ethics committee (EC); tackling public concerns and ensuring oversight by a local EC; the use of Good Manufacturing Practice (GMP) products and making rescue medicines or supportive treatment accessible; the meticulous documentation of therapeutic processes including adverse events; fast track research and possible sharing of data on safety and efficacy for further research; the importance of the consent process which must be carried out with care; and community engagement and ensuring the fair distribution of scarce supplies.¹⁶³

¹⁵⁹ *Swasthya Adhikar Manch v Union of India* (2014) 14 SCC 788 (Supreme Court).

¹⁶⁰ See Ministry of Science & Technology Department of Biotechnology, *Rapid Response Regulatory Framework to Deal with Applications for COVID 19 Vaccine Development* (Office Memorandum, BT/03/27/2020-PID, 2020). <https://cdsco.gov.in/opencms/opencms/system/modules/CDSCO.WEB/elements/download_file_division.jsp?num_id=NTk1NA==> accessed 4 April 2023.

¹⁶¹ 'National Guidelines for Ethics Committees Reviewing Biomedical and Health Research During COVID-19 Pandemic' (ICMR, 2020) <https://main.icmr.nic.in/sites/default/files/guidelines/EC_Guidance_COVID19_06_05_2020.pdf> accessed 4 April 2023.

¹⁶² 'National Ethical Guidelines for Biomedical and Health Research Involving Human Participants' (ICMR, 2017) <https://ethics.ncdirindia.org/asset/pdf/ICMR_National_Ethical_Guidelines.pdf> accessed 4 April 2023.

¹⁶³ 'National Guidelines for Ethics Committees Reviewing Biomedical and Health Research During COVID-19 Pandemic' (n 161).

As the development of COVID-19 vaccines progressed, further regulatory changes were introduced. Trial phases for some of the vaccine candidates were clubbed to expedite the trials¹⁶⁴ and in April 2021, the government replaced the requirement for local trials with “post-approval parallel bridging trials” for vaccines approved in the United States, European Union, United Kingdom, Japan or those approved for WHO’s Emergency Use Listing.¹⁶⁵

The rapid changes to time-tested regulatory pathways should have been balanced with strict clinical trial oversight by the CDSCO, in particular, related to the rights and well-being of clinical trial participants and heightened transparency and accountability standards post-approval. Interestingly, in March 2020 the CDSCO issued a notice for all stakeholders highlighting the “paramount importance” of the protection of the rights of clinical trial participants in ongoing clinical trials even where adhering to all protocols may have been made difficult by the pandemic.¹⁶⁶ Unfortunately, as the desperation for vaccine candidates increased, this balance was never achieved as can be seen from the discussion below.

1. *Ethical Concerns with the Covishield and Covaxin Trials*

The clinical trials for Covishield and Covaxin raised different ethical issues. In the case of Covishield, a key ethical issue was how reports of adverse events were dealt with. In September 2020, due to safety concerns, AstraZeneca, in the UK, paused their Phase 3 trial of the vaccine candidate ChAdOx-nCoV-19, to allow an independent committee to investigate an unexplained illness in one of the trial participants - transverse myelitis – inflammation of the spinal cord.¹⁶⁷ The trials in India were paused only after the DCGI sent a notice to Serum Institute.¹⁶⁸ After AstraZeneca re-started the trials in the UK and provided an explanation that it was a rare occurrence, the DCGI

¹⁶⁴ ‘Restricted use of Covaxin under Clinical Trial Mode’, *Implementation Plan issued by Bharat Biotech and ICMR* <Version4PDFCOVAXINImplementationPlan11Jan2021.pdf (mohfw.gov.in)> accessed 4 April 2023.

¹⁶⁵ Directorate General of Health Services CDSCO (Public Relations Office), *Guidance for approval COVID-19 Vaccines in India for restricted use in emergency situation which are already approved for restricted use by US FDA, EMA, UK MHRA, PMDA Japan or which are listed in WHO Emergency Use Listing (EUL)* (Notice, X-11026/07/2020-PRO, 2021) <https://cdsco.gov.in/opencms/export/sites/CDSCO_WEB/Pdf-documents/notice15april21.pdf> accessed 4 April 2023.

¹⁶⁶ Directorate General of Health Services CDSCO, *Conduct of Clinical Trial in Present Situation Due to Outbreak of COVID-19 Reg.* (Notice, F. No.- DCGI/MISC/2020 (104), 2020). <https://cdsco.gov.in/opencms/opencms/system/modules/CDSCO.WEB/elements/download_file_division.jsp?num_id=NjM2Mg==> accessed 4 April 2023.

¹⁶⁷ See Eric Sagonowsky, ‘How does AstraZeneca’s Trial Pause Affect other COVID-19 Vaccines? Analysts Weigh in’ (*Fierce Pharma*, 9 September 2020) <<https://www.fiercepharma.com/vaccines/how-does-astrazeneca-s-trial-pause-affect-other-covid-19-vaccines-analysts-weigh>> accessed 4 April 2023.

¹⁶⁸ Bindu Shajan Perappadan, ‘Coronavirus | Serum Institute Pulled up for not Pausing Vaccine Trial’ (*The Hindu*, 9 September 2020) <<https://www.thehindu.com/sci-tech/health/>>

issued another notice to conduct the trials carefully and to provide additional information in the informed consent form.¹⁶⁹ In November 2020 a young business consultant in India, who was part of the Covishield trial sent a legal notice to Serum Institute claiming he developed severe neurological conditions after taking the first dose of the vaccine in October, after which he was hospitalized for 15 days of which 8 days were in the intensive care unit.¹⁷⁰ The trial was not halted either by Serum or the DCGI. Instead of assuring the participant that they would inquire and provide compensation and treatment, Serum threatened to file a defamation suit of Rs.100 crore on the participant for a “malicious and misconceived” link of his adverse event to the vaccine.¹⁷¹

In December 2020 news reports quoted the DCGI’s announcement that an independent committee had concluded that the trial participant’s adverse event was not linked to the vaccine.¹⁷² Serious adverse events during clinical trials are usually reported to the DCGI, the concerned Ethics Committees (EC), and the Sponsors by the Principal Investigators (PI) of the trial. The assessment of relatedness is conducted by the EC and the DCGI, and a committee appointed by the DCGI, based on the records available, and the opinion of the PI. The participant is not a part of the process of assessment. The ECs, DCGI, or any other authority or committee are not mandated to involve the participant or their relatives (in case of death) in the process of assessing the relatedness of the adverse event to the investigational product. If relatedness is established, then the participant is entitled to compensation based on a formula as stated in the NDCTR.¹⁷³ In the case of the Covishield trial participant, while the media carried the news of the DCGI’s announcement that relatedness was not established, details of the investigation, the reports and documents assessed by the committee, or its final report have not been placed in the public domain. The trial participant filed a writ petition for compensation before the Madras High

coronavirus-serum-institute-pulled-up-for-not-pausing-vaccine-trial/article32565181.ece> accessed 4 April 2023.

¹⁶⁹ ‘Serum Institute of India gets DCGI Nod to Resume Clinical Trial of Oxford Covid-19 Vaccine’ (*Times of India*, 16 September 2020) <<https://timesofindia.indiatimes.com/india/serum-institute-of-india-gets-dcgi-nod-to-resume-clinical-trial-of-oxford-covid-19-vaccine/articleshow/78136760.cms>> accessed 4 April 2023.

¹⁷⁰ Sanjay Kumar, ‘Malicious and Misconceived. Indian Vaccine Producer Hits Back at Complaint from Trial Volunteer’ (*Science*, 2 December 2020) <<https://www.science.org/content/article/malicious-and-misconceived-indian-vaccine-producer-hits-back-complaint-trial-volunteer>> accessed 4 April 2023.

¹⁷¹ *ibid.*

¹⁷² ‘DCGI Finds no Link between Covid Vaccine Shot, “Adverse” Reaction: Report’ (*Business Standard*, 2 December 2020) <https://www.business-standard.com/article/current-affairs/dcgi-finds-no-link-between-covid-vaccine-shot-adverse-reaction-report-120120201293_1.html> accessed 4 April 2023

¹⁷³ New Drugs and Clinical Trials Rules, Chapter VI read with Schedule Seventh <https://cdsco.gov.in/opencms/export/sites/CDSCO_WEB/Pdf-documents/NewDrugs_CTRules_2019.pdf> accessed 4 April 2023.

Court which admitted the matter and issued notice in February 2021.¹⁷⁴ The matter remains pending.

On 21 December 2020, a Covaxin trial participant died 9 days after taking the trial shot. Restricted emergency use approval for Covaxin was given approximately two weeks after this death on 3 January 2021. Information about the death and other details were not made public either by Bharat Biotech or the regulatory authorities and only emerged through media reports.¹⁷⁵ It was only in reaction to those reports, that on 9 January 2021, Bharat Biotech issued a press release stating that the death was not linked to the vaccine.¹⁷⁶ There is no record that the trial was stopped after this death was reported to Bharat Biotech and while the circumstances of the death were being investigated. And again, no details of who conducted the investigation and how are in the public domain. As a bioethics expert noted, “*India’s expert panel also recommended Covaxin for approval in January, but the death of Maravi happened in December 2020. The drug regulator ought to explain whether the expert panel knew of this death and had factored it in when they gave emergency approval to this vaccine.*”¹⁷⁷

News of the Covaxin trial death unearthed other ethical issues, as at some trial sites, the vaccine candidate was given to vulnerable populations without taking proper informed consent.¹⁷⁸ After the Bhopal Gas Tragedy, the world’s deadliest industrial accident at the Union Carbide factory, victims including second and third generations and those living around the area continue to be adversely affected by contaminated water, and many have been born with and live with myriad health conditions.¹⁷⁹ In a letter to the Prime Minister and Health Minister, survivors of the Union Carbide disaster detailed the multiple ethical violations at the Covaxin trial sites that recruited gas tragedy victims or those living in the affected area including the manner of recruitment of vulnerable people for the trial including monetary inducements, violations of

¹⁷⁴ *Asif Riaz v Govt. of India* W.P. No. 3346 of 2021 (Madras High Court).

¹⁷⁵ PTI, ‘Man Dies Days after Participating in Covaxin Covid-19 Vaccine Trial in Bhopal’ (*Deccan Herald*, 9 January 2021) <<https://www.deccanherald.com/national/man-dies-days-after-participating-in-covaxin-covid-19-vaccine-trial-in-bhopal-937050.html>> accessed 4 April 2023.

¹⁷⁶ ‘Covaxin Bhopal Statement’ (*Bharat Biotech*, 9 January 2021) <<https://www.bharatbiotech.com/images/press/covaxin-bhopal-statement.pdf>> accessed 28 April 2023.

¹⁷⁷ Anoo Bhuyan, ‘How Covaxin Trial Participants in Bhopal were Mised’ (*The Wire*, 14 January 2021) <<https://science.thewire.in/health/peoples-hospital-bhopal-covaxin-clinical-trials-exploitation-ethics-ground-report/>> accessed 4 April 2023.

¹⁷⁸ *Ibid.* Anoo Bhuyan, ‘How Covaxin Trial Participants in Bhopal were Mised’ (*The Wire*, 14 January 2021) <<https://science.thewire.in/health/peoples-hospital-bhopal-covaxin-clinical-trials-exploitation-ethics-ground-report/>> accessed 4 April 2023.

¹⁷⁹ Hannah Ellis-Petersen, ‘Bhopal’s Tragedy has not Stopped’: The Urban Disaster Still Claiming Lives 35 Years on’ (*The Guardian*, 8 December 2019) <<https://www.theguardian.com/cities/2019/dec/08/bhopals-tragedy-has-not-stopped-the-urban-disaster-still-claiming-lives-35-years-on>> accessed 28 April 2023.

informed consent processes, the lack of follow up and treatment and failures in reporting of adverse events including the death of the trial participant.¹⁸⁰ The letter asked for urgent intervention in stopping the trial at these trial sites and for the setting up of an investigation. Multiple organizations and individuals echoed the demands of the gas tragedy victims and wrote to the authorities at the Centre and the State demanding that, “*the trial sponsors, Bharat Biotech and ICMR, must take full responsibility for the serious, unconscionable and unlawful lapses in the Bhopal trial.*”¹⁸¹ Regrettably, no action was taken nor were the ethical lapses at the Bhopal trial sites ever investigated.

These and other ethical issues¹⁸² relating to the trials were raised time and again not by the regulator or the institutional mechanisms put in place to oversee trials but by participants and health groups. It is imperative that clinical trials are conducted meticulously and in a transparent manner even in the emergency caused by the coronavirus. Data transparency in clinical trials is now well-established internationally.¹⁸³ The large amounts of government funding, and grants from international funding agencies, for the trials and manufacturing of the vaccine candidates, made it even more important for the government and the manufacturers to be open and transparent in their dealings. It was also important to speak the truth about the data relating to the vaccine candidates. In this regard, the protocols, end-points of the trials, the anonymized data collected, case report forms, informed consent forms, tests, and results conducted to analyze the safety and efficacy of the vaccine candidates ought to have been placed in the public domain.¹⁸⁴

While the government, regulatory bodies, and ICMR largely shunned right to information (RTI) requests related to COVID-19 vaccines, the SC,

¹⁸⁰ ‘Irregularities and Ethical Violations in the Conduct of the Clinical Trial for Bharat Biotech’s COVAXIN’ (*Health, Ethics and Law*, 12 January 2021) <<https://fmesinstitute.org/blog-20-heal-institute-ijme-covid-19-insights-jan-11-2021/#:ZFHgH3ZBxD8>> accessed 28 April 2023.

¹⁸¹ ‘Covid-19 Insights: Analysis from Ethics, Human Rights and Law Perspectives’ (*Health, Ethics, and Law*, 2021) <<https://fmesinstitute.org/wp-content/uploads/2021/01/Blog-202.pdf>> accessed 28 April 2023; see ‘Stop Bharat Biotech’s COVAXIN trial in Bhopal – 42 Organizations and 189 Citizens Demand Investigation’ (*Kractivism*, 14 January 2021) <<https://www.kractivist.org/stop-bharat-biotechs-covaxin-trial-in-bhopal-42-organizations-and-189-citizens-demand-investigation/>> accessed 28 April 2023.

¹⁸² See for eg, Angana Chakrabarti, ‘Scientists Oppose Placebo Trials for Covid Vaccines, Call them ‘Unethical, Inappropriate’’ (*The Print*, 10 March 2021) <<https://theprint.in/health/scientists-oppose-placebo-trials-for-covid-vaccines-call-them-unethical-inappropriate/618664/>> accessed 28 April 2023.

¹⁸³ “A wide range of institutions, from pharmaceutical companies, government agencies, trade organizations, journals and non-for-profit organizations, have acknowledged the importance of data sharing, including the release of deidentified individual participant data. Many policies, regulations and platforms now exist to facilitate data access, including landmark transparency policies from the European Medicines Agency (EMA) and Health Canada.” Sarah Tanveer, ‘Transparency of COVID-19 Vaccine Trials: Decisions without Data’ (*BMJ Evidence-Based Medicine*) <<https://ebm.bmj.com/content/27/4/199>> accessed 28 April 2023.

¹⁸⁴ *ibid.*

unfortunately, also did not seize the opportunity to bring greater transparency and access to clinical trial data. In the *Jacob Puliye* case, the Petitioner sought directions for the government to make public the segregated data of the clinical trials for the vaccines being administered under emergency use approval in India.¹⁸⁵ The SC, however, considered that the detailed legal regime covering clinical trials and the minutes of the Subject Expert Committee (SEC) meetings to have sufficient data for the citizens to know. Although the SC examined legal and judicial examples from other countries on clinical trial data transparency, it stated that disclosure requirements in India were covered by the existing law and held that “*in light of the statutory regime, we do not see it fit to mandate the disclosure of primary clinical trial data, when the results and key findings of such clinical trials have already been published.*”¹⁸⁶

“*Restricted Use for Emergency Situation,*” “*Clinical Trial Mode*” and “*Conditional Market Authorization*”

The discussion above in relation to the clinical trials for the two vaccines and the lack of access to data is linked to the approval process; this is the statutory process the SC refers to in *Jacob Puliye* above while denying the prayer for greater clinical trial data transparency. Usually, the analysis of the data collected during trials is done by a Data Safety Monitoring Board (DSMB), which is constituted by the Sponsor of the trials but requires members of the Board to be independent. The data is then presented to the DCGI and the concerned SEC, who decide on further action, provide recommendations on approval of the vaccine candidates, or the need to gather more data, etc. The minutes of the meetings of the SEC are usually available in the public domain. The DCGI, based on the recommendation of the SEC, may approve the vaccine candidate or drug in question.

As noted above, due to the nature of the emergency, various requirements related to the development and approval of COVID-19 medical products were relaxed. These changes should have been matched with increased efforts at transparency by the regulatory authorities. Instead, minutes of the COVID SEC were not published for several months.¹⁸⁷ Additionally, the names, qualifications, affiliations, conflicts of interest, influences, etc. of the members of the DSMB board and the COVID SEC have not been placed in the public domain, making it difficult to determine if conflicts of interest, bias, or lack of expertise affected decision making. The minutes that were finally uploaded only captured the final decision and provided scant details of the kind of data presented

¹⁸⁵ *Jacob Puliye v Union of India* (n 8).

¹⁸⁶ *ibid*; *Jacob Puliye v Union of India* 2022 (n 8).

¹⁸⁷ Raghendra Shukla, ‘Lack of Transparency in Subject Expert Committee Formed for Approval of COVID-19 Drugs: AIDIAN’ (*Healthwire*, 1 July 2020) <<https://www.healthwire.co/lack-of-transparency-in-subject-expert-committee-formed-for-approval-of-covid-19-drugs-aidian/>> accessed 28 April 2023.

before them, who analyzed the data, what were the clinical end-points, what were the tests conducted, and the results to reach the conclusions, were there other factors that could have influenced the results, what were the adverse events experienced by the participants, how were they managed, etc. This was particularly important due to the unusual nature of approvals that were granted to COVID-19 vaccines i.e. ‘restricted use for emergency situation’, ‘restricted use for emergency situation in clinical trial mode’, and most recently ‘conditional market authorization.’

In January 2021, both Serum Institute and Bharat Biotech received “restricted use for emergency situation” approvals for their vaccine candidates, Covishield and Covaxin, respectively. This is not the first time that such approval has been given; for instance, in the past, such approvals were given for two MDR TB medicines by the DCGI. However, the DCGI’s approval for Covaxin created a new category i.e. “restricted use in an emergency situation under clinical trial mode”.¹⁸⁸ Covaxin had not completed Phase III trials, and approval was given based on data received from the Phase I and II clinical trials that enrolled a small number of participants. There was speculation that the rushed approval for the fully indigenous vaccine was in service to India’s image of self-sufficiency as Serum Institute’s candidate was the result of foreign collaboration.¹⁸⁹ Just two months later, in March 2021, Covaxin was given “restricted use in emergency situation” approval and was no more in “clinical trial mode”.¹⁹⁰

The initial approvals generated considerable controversy. On 1 January 2021, the COVID SEC had only recommended the approval of Covishield and asked Bharat Biotech to complete its trials before approval could be recommended.¹⁹¹ However, the very next day, the same COVID SEC recommended Covaxin for approval as well albeit in clinical trial mode.¹⁹² The

¹⁸⁸ ‘Restricted use of Covaxin under Clinical Trial Mode’ (n 164).

¹⁸⁹ Priyanka Pulla, ‘How Covaxin became a Victim of Vaccine Triumphalism’ (*Livemint*, 27 May 2021) <<https://www.livemint.com/science/news/how-covaxin-became-a-victim-of-vaccine-triumphalism-11622022760541.html>> accessed 28 April 2023.

¹⁹⁰ ‘Covaxin Out of Clinical Trial Mode, Granted Restricted Emergency use of Authorization’ (*Times of India*, 11 March 2021) <<https://timesofindia.indiatimes.com/india/covaxin-out-of-clinical-trial-mode-granted-restricted-emergency-use-authorisation/article-show/81453563.cms>> accessed 28 April 2023.

¹⁹¹ Directorate General of Health Services CDSCO, ‘Recommendations of the SEC Meeting to Examine COVID—19 Related Proposals under Accelerated Approval Process Made in its 134th Meeting held on 01.01.2021 CDSCO, HQ New Delhi’ (*CDSCO*) <https://cdsco.gov.in/opencms/opencms/system/modules/CDSCO.WEB/elements/common_download.jsp?num_id_pk=MTMwMQ==> accessed 28 April 2023.

¹⁹² Directorate General of Health Services CDSCO, ‘Recommendations of the SEC Meeting to Examine COVID-19 Related Proposals under Accelerated Approval Process made in its 135th Meeting held on 02.01.2021 CDSCO, HQ New Delhi’ (*CDSCO*) <https://cdsco.gov.in/opencms/opencms/system/modules/CDSCO.WEB/elements/common_download.jsp?num_id_pk=MTMwMA==> accessed 28 April 2023.

announcement¹⁹³ of the approvals on 3 January 2021 by the DCGI led to much consternation among public health activists,¹⁹⁴ the scientific community,¹⁹⁵ and healthcare workers who were first in line to get vaccinated¹⁹⁶ and even led to a public spat between Serum Institute and Bharat Biotech that played out across news channels before they issued a joint press release burying the hatchet.¹⁹⁷

Even as health groups critiqued the approval process, the courts seemed reluctant to inquire into whether there was a breach of the integrity of the processes and whether they had the sanctity of the law. A petition filed before the Karnataka HC raising questions on the approvals was dismissed with costs as the court opined that the petition was not in the public interest.¹⁹⁸ In *Jacob Puliyeel*, the SC examined the legal regime governing clinical trials and drug regulation and largely relying on information submitted by the government concluded that these provisions were followed and did not inquire further into the processes followed for granting the approvals.

In January 2022, yet another new form of approval was announced by the DCGI when it gave “conditional marketing authorization” for Covishield and Covaxin. According to the government’s press release, “*Conditional Market Authorization*” is a new category of market authorization that has emerged during the current global pandemic COVID19. The approval pathways through this route are fast-tracked with certain conditions to enhance the access to certain pharmaceuticals for meeting the emerging needs of drugs or vaccines.”¹⁹⁹ Among the conditions attached to this approval is the requirement for submission of complete trial data from abroad, provision of vaccines through the national rollout and registered through Co-WIN, and submission of AEFI data. In April 2022, the WHO suspended the emergency use approval

¹⁹³ ‘Press Statement by the Drugs Controller General of India (DCGI) on Restricted Emergency Approval of COVID-19 Virus Vaccine’ (*Ministry of Health and Family Welfare*, 3 January 2021) <<https://pib.gov.in/PressReleaseDetail.aspx?PRID=1685761>> accessed 28 April 2023.

¹⁹⁴ ‘Drug Activist Group AIDAN Raises Concerns over EUA for COVAXIN’ (*Express Pharma*, 4 January 2021) <<https://www.expresspharma.in/drug-activist-group-aidan-raises-concerns-over-eua-for-covaxin/>> accessed 4 April 2023.

¹⁹⁵ R Prasad, ‘Indian Scientists Divided Over Nod for Covaxin’ (*The Hindu*, 15 January 2021) <<https://www.thehindu.com/sci-tech/science/scientists-divided-over-restricted-use-approval-for-covaxin/article61740753.ece>> accessed 4 April 2023.

¹⁹⁶ ‘Vaccination Drive: Fewer Takers for Covaxin among Healthcare Workers’ (*Times of India*, 22 January 2021) <<https://timesofindia.indiatimes.com/india/vaccination-drive-fewer-takers-for-covaxin-among-healthcare-workers/articleshow/80395554.cms>> accessed 4 April 2023.

¹⁹⁷ Himani Chandna, ‘After Public Spat, Bharat Biotech & SII Jointly Pledge Smooth Roll out of Covid Vaccines’ (*The Print*, 5 January 2021) <<https://theprint.in/health/after-public-spat-bharat-biotech-sii-jointly-pledge-smooth-roll-out-of-covid-vaccines/579773/>> accessed 4 April 2023.

¹⁹⁸ *Mathew Thomas v Govt. of India*, WP No. 9242 of 2021 (DM-RES-PIL), order dated 26.5.2021 available at <<https://indiankanoon.org/doc/14588988/>> accessed 4 April 2023.

¹⁹⁹ ‘National Regulator Approves “Conditional Market Authorization” of Two COVID19 Vaccines— Covaxin and Covishield’ (*Ministry of Health and Family Welfare*) <<https://pib.gov.in/PressReleasePage.aspx?PRID=1792956>> accessed 2 May 2023.

it had given to Covaxin due to deficiencies in good manufacturing practices (GMP).²⁰⁰ In November 2022, in response to news reports that quoted a Bharat Biotech executive stating that there was pressure for the early approval of Covaxin, Bharat Biotech revealed that Phase III trials were commenced even before Phase II data was available raising more questions about the entire approval process for the vaccine. None of these developments appear to have affected the conditional approval given to Covaxin.

Perhaps the biggest question in these evolving approval processes, not just for Covishield and Covaxin, but for the additional COVID-19 vaccines (including for use in children and adolescents) that have received approvals in India for use as either primary doses or as precaution doses/boosters²⁰¹ is whether the MEURI safeguards included in ICMR's COVID-19 Guidelines were fully and properly applied. With the lack of any detailed information in the public domain, independent scrutiny in this regard by public health or legal experts, bioethicists, health activists or the scientific community has not been possible.

2. COVID-19 vaccine-related AEFIs

India's Universal Immunization Program (UIP), which targets almost 57 million people each year to vaccinate newborns and their mothers, has a well-developed AEFI, tiered surveillance system at the district, state, and national levels with committees set up at each tier.²⁰² For the COVID-19 vaccine rollout, the government set up a Special Group comprising specialists like a cardiologist, neurologist, pulmonary medicine specialist, & an obstetrician-gynecologist to assess the causality of COVID-19 vaccine AEFIs. Several months into the vaccine rollout however, data regarding AEFIs were not available and a group of doctors, lawyers, social workers, and journalists wrote to the government to release this data²⁰³ as media reports highlighted post-vaccination deaths that were being attributed to cardio-vascular problems or brain stroke.²⁰⁴

²⁰⁰ 'Suspension of Supply of COVID-19 Vaccine (COVAXIN)' (*WHO*, 2 April 2022) <<https://www.who.int/news/item/02-04-2022-suspension-of-supply-of-covid-19-vaccine-covaxin>> accessed 28 April 2023.

²⁰¹ Directorate General of Health Services CDSCO, 'Approved COVID-19 Vaccines as on 08.07.2022' (*CDSCO*) <https://cdsco.gov.in/opencms/opencms/system/modules/CDSCO.WEB/elements/download_file_division.jsp?num_id=ODc2OQ==> accessed 28 April 2023.

²⁰² Revised AEFI Guidelines: Executive Summary, *Ministry of Health and Family Welfare* (Revised Guidelines) <<https://main.mohfw.gov.in/sites/default/files>> accessed 4 April 2023.

²⁰³ Hamza Lakdawala, 'Doctors, Lawyers, Journalist, and Social Workers Write to Centre again: Share details of 65 Covid Vaccine-Related Deaths and Adverse Events', (*The Leaflet*, 22 March 2021) <<https://theleaflet.in/doctors-lawyers-journalists-and-social-workers-write-to-centre-again-share-details-of-65-covid-vaccine-related-deaths-and-adverse-events/>> accessed 4 April 2023.

²⁰⁴ Veena Johari, 'Why the Secrecy Around Vaccine Deaths and Data Relating to Serious Adverse Events?' (*The Leaflet*, 22 March 2021) <<https://theleaflet.in/why-the-secrecy-around-vaccine-deaths-and-data-relating-to-serious-adverse-events/>> accessed 4 April 2023.

Eventually, the assessment reports of these AEFIs started getting uploaded on the MOHFW website.²⁰⁵ However, the reports are listed haphazardly and contain minimal information. No details are provided as to the process of assessment, how they have arrived at the conclusion of causality, and whether documents, papers, reports, autopsy reports, etc. were available for them to scrutinize before concluding their findings. The AEFI reports essentially provide the classification of the AEFIs; for instance, one report released in August 2021, revealed 78 cases of AEFIs investigated by the Special Group.²⁰⁶ They found 48 cases to have a causal association with the vaccination of which 28 were product-related reactions and 20 were anxiety-related reactions. They found 22 cases with inconsistent causal association – that is not linked to the vaccination and 7 cases in the indeterminate category that included 2 deaths and 1 death was in the unclassifiable category. As causality is linked to liability and given the social benefits arising from individual vaccination, AEFIs categorized as indeterminate, or inconclusive, which is due to lack of evidence, should be presumed to have a causal connection to give the benefit of the doubt to persons facing the AEFI or to the relatives of the person who has died.

AEFI cases were also taken by some courts. In a petition filed before the Allahabad HC, the Petitioner claimed that her husband went blind due to the COVID-19 vaccine.²⁰⁷ The petition was disposed of with an observation to make a fresh representation with all relevant medical papers before the District Magistrate. In another petition, the Madras HC ordered an autopsy of a 40-year-old conservancy worker who was vaccinated and whose health subsequently started deteriorating and he collapsed and died while on his way to the healthcare facility.²⁰⁸

In the *Jacob Puliyel* case, the Petitioner sought directions from the court for information related to AEFIs to be placed in the public domain to identify the occurrence of those adverse events, such as blood clots, strokes, and take adequate steps to prevent or mitigate the occurrence of such adverse events.²⁰⁹

²⁰⁵ AEFI Reports, *Department of Health and Family Welfare* <<https://main.mohfw.gov.in/Organisation/Departments-of-Health-and-Family-Welfare/immunization/ae-fi-reports>> accessed 4 April 2023.

²⁰⁶ *ibid.*

²⁰⁷ Sparsh Upadhyay, 'Man Allegedly Goes Blind Due To COVID Vaccine: Allahabad HC Directs DM to Decide on Wife's Representation Seeking Compensation' (*Livelaw*, 30 June 2021) <<https://www.livelaw.in/news-updates/wife-compensation-husband-goes-blind-covid-vaccine-allahabad-hc-directs-dm-decide-representation-176548>> accessed 4 April 2023.

²⁰⁸ Jegadeeswari Pandian, 'Alleged Vaccine Death: Madurai Bench asks if Autopsy was Performed as Per Guidelines' (*Indian Express*, 4 February 2021) <<https://www.newindianexpress.com/states/tamil-nadu/2021/feb/04/alleged-vaccine-death-madurai-bench-asks-if-autopsy-was-performed-as-per-guidelines-2259623.html>> accessed 4 April 2023.

²⁰⁹ *Jacob Puliyel v Union of India* (n 8).

Many countries had collected and reported AEFI data systematically.²¹⁰ In response, the government submitted that they were not conducting a detailed assessment and were conducting a rapid review and assessment of all AEFIs reported through a well-defined mechanism. The Apex court did not question the process of collection of the AEFI reports or the assessment of the same. However, the Court while stating that there is an imminent need for the collection of adverse events and wider participation of people, directed the Union of India to facilitate reporting of suspected adverse events by individuals and private doctors through Co-WIN, and for the reports to be made publicly accessible after giving unique identification numbers, and without listing personal and confidential data of persons reporting.²¹¹

Unfortunately, this order from the SC to simplify AEFI reporting came in mid-2022 while the majority of AEFIs likely occurred during the peak of the vaccine rollout in 2021. As of 19 November 2022, 92,114 AEFI cases had been reported from 219.86 crore vaccine doses (0.0042%) of which 2782 were serious and severe AEFIs (0.00013%).²¹² Even these significant numbers of AEFIs likely do not reflect reality given that the majority of vaccinations took place with Covishield and AEFI rates from the equivalent Astrazeneca vaccine in countries like the UK were far higher.²¹³ The likely underreporting of AEFIs in India has drawn concern from public health experts²¹⁴ and should concern the government as well. As noted by the WHO, “*effective spontaneous reporting of adverse events following immunization (AEFI) is the first step to making sure that vaccine products are safe and are being safely administered.*”²¹⁵ For those who suffer serious and severe AEFIs, this reporting would have been critical to their ability to access early, effective, and possibly life-saving treatment. The lapses in this regard should be a cause for serious reflection within the government and regulatory authorities.

²¹⁰ ‘Reported Adverse Events’ (CDC, 13 January 2023) <<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/safety/adverse-events.html>> accessed 28 April 2023 makes the adverse event data available at and have set up a Vaccine Adverse Event Reporting system/ portal that is available at <<https://vaers.hhs.gov/>> accessed 28 April 2023. Also, the European Medicines Agency makes public the adverse reactions available at <<https://www.adrreports.eu/en/index.html>> accessed 28 April 2023. The government in Canada also makes public the side effects following vaccination available at <<https://health-infobase.canada.ca/covid-19/vaccine-safety/summary.html>> accessed 28 April 2023.

²¹¹ *Jacob Puliyel v Union of India* (n 8).

²¹² Affidavit of Union of India filed in the *Rachna Gangu case*, <<https://awakenindiamovement.com/rachna-gangu-vs-uo-i-wpcivil-1220-of-2021-case-for-vaccine-compensation-in-sc/>> accessed 2 May 2023.

²¹³ Karina Soboleva, ‘Geographical distribution of TTS cases following AZD1222 (ChAdOx1 nCoV-19) vaccination’ (*The Lancet Global Health*, 2022) <[https://www.thelancet.com/journals/langlo/article/PIIS2214-109X\(21\)00545-3/fulltext](https://www.thelancet.com/journals/langlo/article/PIIS2214-109X(21)00545-3/fulltext)> accessed 4 April 2023.

²¹⁴ Nisha Nambiar, ‘Increased under-reporting of AEFI Events a Worry: Experts’ (*Times of India*, 20 November 2021) <<https://timesofindia.indiatimes.com/city/pune/increased-under-reporting-of-ae-fi-events-a-worry-experts/articleshow/87807072.cms>> accessed 4 April 2023.

²¹⁵ ‘Reporting form for AEFI’ (*WHO*, 13 April 2021) <<https://www.who.int/publications/m/item/reporting-form-ae-fi>> accessed 4 April 2023.

3. Compensation and liability for COVID-19 vaccine AEFIs

When serious and severe AEFIs do occur and are linked to the vaccine, questions of liability and compensation arise. This question of liability has been central to the development and rollout of COVID-19 vaccines. After the initial approvals, in the orders placed by the government for Covishield and Covaxin, the government refused to provide the indemnity initially demanded by the manufacturers.²¹⁶ When it emerged that the government might consider giving indemnity to foreign vaccine manufacturers who were refusing to supply their vaccines without the indemnity, Serum demanded that all manufacturers should have the same rules.²¹⁷ Eventually, the government decided against providing any indemnity preferring to rely on local vaccines.²¹⁸ For those suffering adverse events, the government maintained that they would have to approach the manufacturers for compensation.²¹⁹

Processes for liability and compensation for injuries related to medical products are complicated in India involving criminal laws or criminal provisions in the *Drugs and Cosmetics Act, 1940*, or civil laws like tort law and the *Consumer Protection Act, 2019*. Such cases require considerable financial resources and usually stretch over decades. For those suffering from AEFIs, the fact that the adverse event is not caused by a defect or negligence in manufacturing but is inherent to the vaccine may complicate matters for individuals and families further. And in a context where a vaccine manufacturer threatened a clinical trial participant who faced adverse events with enormous damages and defamation cases, people suffering AEFIs are unlikely to file cases against the manufacturers.

By the time of the *Rachana Gangu* case, the government had further diluted the question of liability for AEFIs not just for itself but also for the manufacturers by arguing that the voluntary nature of vaccination negated any liability

²¹⁶ Leroy Leo, 'No Indemnity for Vaccine Makers in Purchase Pacts' (*Livemint*, 13 January 2021) <<https://www.livemint.com/news/india/no-indemnity-for-vaccine-makers-in-purchase-pacts-11610475232075.html>> accessed 4 April 2023.

²¹⁷ 'India Close to giving Indemnity to Foreign Vaccine Makers Like Pfizer: Report' (*Livemint*, 10 June 2021) <<https://www.livemint.com/news/india/india-close-to-giving-indemnity-to-foreign-vaccine-makers-like-pfizer-report-11623321981463.html>> accessed 4 April 2023; see also 'Serum Institute Seeks Indemnity, Says "Same Rules for all": Sources' (*NDTV*, 9 June 2021) <<https://www.ndtv.com/india-news/serum-institute-seeks-indemnity-against-liabilities-says-rules-should-be-same-for-everyone-sources-2455161>> accessed 4 April 2023.

²¹⁸ Abantika Ghosh and Moushumi Das Gupta, 'India Unlikely to give Indemnity to Foreign Vaccines, may Consider only if Shortage Persists' (*The Print*, 7 August 2021) <<https://theprint.in/health/india-unlikely-to-give-indemnity-to-foreign-vaccines-may-consider-only-if-shortage-persists/710493/>> accessed 4 April 2023.

²¹⁹ 'Govt: No Provision to Compensate the Vaccinated in Case of Adverse Events' (*Times of India*, 6 April 2021) <<https://timesofindia.indiatimes.com/india/govt-no-provision-to-compensate-the-vaccinated-in-case-of-adverse-events/articleshow/81923434.cms>> accessed 2 May 2023.

for side effects. The government further hardened this position arguing that even informed consent or the lack of it was irrelevant as long as the vaccine was taken voluntarily. While the *Rachana Gangu* Petitioners are (rightly) arguing for fixing government responsibility for an abject failure in informed consent processes, it may be worth also considering whether the government and manufacturers should be liable for AEFIs as a matter of strict liability given that vaccination is as much a social good as it is for individual benefit. The government's response in the *Rachana Gangu* case on the matter of compensation states that strict liability should not be considered as the government only administered the national vaccine rollout, the vaccines were produced by third parties and had gone through regulatory review and were globally considered safe and effective. In such a scenario, according to the government, "*holding the State directly liable to provide compensation under the narrow scope of strict liability for extremely rare deaths occurring due to AEFIs from the use of vaccines may not be legally sustainable.*"²²⁰

No matter how rare a serious adverse event is, it adversely affects the life of an individual and their family. Further, if the adverse events are rare, and have occurred in a small population, there is no reason why the manufacturers of the vaccines cannot pay compensation to those who have been adversely affected post-vaccination. As seen earlier, a significant portion of the financial risks for research and development and conducting clinical trials for the two COVID-19 vaccines was shouldered by the government and funding agencies. The government also purchased the vaccines from the manufacturers and also allowed them to sell the vaccines in the private sector for a significant profit. The lack of any mechanism for compensation for AEFIs was taken note of by the Parliament Standing Committee on Health in its September 2022 report related to COVID-19; the Standing Committee "strongly" recommended that, "*the Ministry... create a clear framework of vaccine liability for the manufacturer in case of AEFI so that adequate compensation can be provided to the aggrieved individuals.*"²²¹ The Kerala HC has also directed the National Disaster Management Authority and the MOHFW to formulate a compensation policy for those who have died due to vaccine side effects.²²²

But the government too cannot absolve its responsibility in paying compensation for AEFIs or even for AESI, because (a) the COVID-19 vaccines were developed by the manufacturers with the help of the government and government funds, and funds from other agencies; (b) the vaccines were given fast

²²⁰ Affidavit of Union of India filed in the *Rachana Gangu* case (n 147).

²²¹ Department-Related Parliamentary Standing Committee on Health and Family Welfare, *137th Report on Vaccine Development, Distribution Management and Mitigation of Pandemic COVID-19*, Rajya Sabha Secretariat, New Delhi, September 2022/Asvina, 1944 (SAKA) <https://sansad.in/getFile/rsnew/Committee_site/Committee_File/ReportFile/14/160/137_2022_12_12.pdf?source=rajyasabha> accessed 2 May 2023.

²²² *Sayeeda K.A. v Union of India* 2022 SCC OnLine Ker 4514.

track approval, and all AEFI or AESI relating to the vaccines were not documented or recorded or found in the clinical trials that took place on small populations over a small period of time while AEFI can emerge over a much longer period of time and across a much larger population; (c) the vaccines were administered as part of a national vaccine rollout whether in the public or private sectors with strict government control in matters of registration, pricing, dosing, and other aspects as well as strong government messaging that the vaccines were safe and urging individuals to get vaccinated. Even the argument of ‘voluntariness’ during the height of the vaccine rollout by the government is questionable as the SC order striking down vaccine mandates came over a year and a half into the vaccine rollout.

In light of these considerations, the government and the manufacturers of the vaccines should be jointly and severally liable for persons experiencing serious adverse events, or even death, and in the interest of justice, they would be duty-bound to pay compensation for the same.

There is some international experience in this regard and vaccine injury compensation programs do exist in other countries,²²³ and no-fault compensation programs were also established by UNICEF²²⁴ and as part of COVAX, which in theory should also cover India but it is unclear how a person would know if their vaccine came through COVAX or government procurement.²²⁵ Reports suggest that these programs have not been easy for individuals and families to access and compensation payments are often delayed.²²⁶ For India, in consultation with individuals and families who have suffered serious and severe AEFIs as well as health groups and other experts, the government should as a matter of urgency establish a compensation fund that includes contributions from the manufacturers; the mechanism should be generous, empathetic and easy to use. This mechanism should also give the benefit of

²²³ Randy G Mungwira and Others, ‘Global Landscape Analysis of No-Fault Compensation Programmes for Vaccine Injuries: A Review and Survey of Implementing Countries’ (*Plos One*, 21 May 2021) <<https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0233334>> accessed 2 May 2023 and Institute of Medicine, ‘Appendix E: Vaccine-Injury Compensation in other Countries’ in *Vaccine Supply and Innovation* (National Academies Press 1985) <<https://www.ncbi.nlm.nih.gov/books/NBK216811/>> accessed 2 May 2023.

²²⁴ ‘COVID-19 Vaccine Facility No-Fault Compensation Scheme’ (*ESIS*) <<https://c19vaccinenfc.com/>> accessed 2 May 2023.

²²⁵ ‘No-Fault Compensation Programme for COVID-19 Vaccines is a World First’ (*WHO*, 22 February 2021) <<https://www.who.int/news/item/22-02-2021-no-fault-compensation-programme-for-covid-19-vaccines-is-a-world-first>> accessed 2 May 2023.

²²⁶ Jacqui Wise, ‘UK Makes First Payments to Compensate Injury or Death from Vaccines’ (*BMJ*, 24 June 2022) <<https://www.bmj.com/content/377/bmj.o1565>>; Mary Ward, ‘Thousands left waiting for compensation after claims of COVID-19 vaccines injury’ (*The Sydney Morning Herald*, 16 April 2023) <<https://www.smh.com.au/national/thousands-left-waiting-for-compensation-after-claims-of-covid-19-vaccine-injury-20230413-p5d03y.html>> accessed 2 May 2023; Karin Larsen, ‘\$2.8 Million Paid out so Far by Vaccine Injury Support Program’ (*CBC News*, 6 January 2023) <<https://www.cbc.ca/news/canada/british-columbia/covid-19-vaccine-injuries-compensation-canada-1.6704655>> accessed 2 May 2023.

the doubt to victims in cases where the causal link to vaccinations for serious and severe AEFIs or AESIs cannot be determined for a lack of evidence and give compensation even in such cases. Finally, such a mechanism should not preclude legal action by individuals and families who suffer AEFIs or AESIs that can be linked to negligence or other lapses on the part of the government and/or the manufacturers as in the *Rachana Gangu* case in the SC or the case before the Bombay HC filed by a father who argues that the government and the manufacturers should be liable in the death of his daughter who, as a health professional, was compelled to take Covishield in the first month of the national rollout.²²⁷

III. CONCLUDING REMARKS

It is said that “*a courtroom trial is to law what a laboratory experiment is to science – the primary methods of establishing facts.*”²²⁸ Both law and science are based on evidence, even though the techniques for the collection of evidence are different, the integrity of the process is vital for both.²²⁹ The pandemic exposed the loss of integrity in collecting evidence, both by science and the law, particularly as seen in the case of vaccines. The integrity of the scientific process was severely undermined by a lack of transparency, independent collection of data and information, and the impaired accountability of institutions established to protect scientific rigor. Legislative and policy-making has seen arbitrary, sweeping actions by the government with little to no accountability. The failure to take the process of AEFI reporting seriously and to treat and compensate those who suffer from AEFIs has been particularly disheartening, as those who suffer from these AEFIs do so in the public interest that underlies mass vaccination.

There were umpteen opportunities for the Courts (the custodians of justice, the protectors of rights and liberties), to intervene, hold the government accountable, uphold rights and liberties, and set right the arbitrary, unscientific decisions of the government that abrogated the right to life and other fundamental rights of its people. While the SC and several HCs did pass orders directing the Central and State governments to correct arbitrary, unreasonable, and problematic vaccine and vaccination policies, far too often, explanations offered by the executive for the decisions, commissions, and omissions that violated rights, including the right to life, health, and healthcare have been taken at face value.

²²⁷ Sharmeen Hakim, ‘Death Due to Alleged Side Effects of Covid Vaccine: Doctor’s Father Files Plea in Bombay HC, Seeks Rs 1,000 Crore Compensation’ (*Livewlaw*, 1 February 2022) <<https://www.livewlaw.in/news-updates/bombay-high-court-covid-19-vaccine-death-due-to-side-effect-1-crore-compensation-190899>> accessed 2 May 2023.

²²⁸ Lee Loevinger, ‘Review: Science and Legal Rules of Evidence’ (1992) 32 *Jurimetrics* 487.

²²⁹ *ibid.*

Although courts played a far more active, and perhaps in some cases even activist role, during the pandemic - a welcome break from the near total retreat of the constitutional courts from the heydays of public interest litigation in the 1980s and 1990s - in nearly every decision, the courts have gone to pains to explain that the proceedings before them were not adversarial and they are not interfering in policy-making and identified narrow areas of inquiry. Most courts relied on a strategy of nudging government policy away from the violation of rights with delayed, mixed results. In several cases, it has taken multiple hearings and interim orders over several months to achieve these outcomes; some cases are still pending. With cases pending for decades in our courts, this may seem to be a period of relatively quick resolution of cases. However, in a health emergency where every day that a decision was delayed or a bad policy remained in effect had an impact on the lives and health of millions, these delays were costly.

In some instances, despite the nudging of the courts, the government persisted with policies the courts found prima facie untenable and the courts let these policies stand as in the case of private sector procurement and pricing of vaccines despite the SC's concerns. As the Bombay HC noted when the State government persisted with its travel restrictions on unvaccinated persons, *"The hope and trust reposed by us in the Committee that it would take a decision, which is reasonable and not in derogation of the Fundamental Rights of the citizens guaranteed by Article 19(1)(d), stand belied. We were utterly mistaken...In hindsight, we feel that...it would have been appropriate if we had struck down the further orders... in the exercise of our suo motu powers instead of, in accordance with judicial discipline, permitting the Committee to take a fresh decision. This decision of the Committee, in the circumstances, is unexpected, to say the least."*²³⁰

Another worrying aspect of court hesitancy in these cases, was the delay in taking up and hearing certain matters even though the courts admitted them and issued notice. In a public interest litigation pending before the SC on AEFIs, the court is reported to have said that *"we have to look at the countervailing benefits of vaccination. We cannot send a message that there are some problems with the vaccination. The WHO has spoken in favour of vaccines, and countries across the world are doing it. We cannot just doubt it"*.²³¹ Similarly, although the *Jacob Puliyel* petition was filed in August 2021, at the height of the vaccine rollout, the SC remained reluctant to pass any order in

²³⁰ *Sohan Rajeve Agate v State of Maharashtra* 2022 SCC OnLine Bom 882 <<https://indiankanoon.org/doc/59335163/>> accessed 4 April 2023.

²³¹ Mehal Jain, "We Cannot Just Cast Doubt on Vaccination": Supreme Court on Plea Seeking Investigation on Deaths Allegedly Linked to Vaccination' (*Livelaw*, 26 November 2021) <<https://www.livelaw.in/top-stories/supreme-court-covid-vaccination-plea-seeking-follow-up-deaths-adverse-effects-186345>> accessed 4 April 2023; Reported conversations during the hearing of the case *Ajay Kumar Gupta v Union of India*, WP(s) (C) No.588/2021.

the petition due to the “fear” that it would lead to “vaccine hesitancy.”²³² The final order in the case was passed in May 2022 and while it made an important direction for the government to allow individuals to report AEFIs, this order came far too late in the 1.5-year-old vaccine rollout.²³³ Unfortunately, the hesitancy argument appears to have clouded the vision of the courts in these crucial cases.

The repeated concern of the courts that they should not interfere or appear to interfere in policymaking or their hesitation in hearing certain matters could have been balanced to some extent by insisting on higher standards of transparency and accountability in policymaking. Deficiencies in policies could have been addressed then through measures and orders to strengthen accountability and transparency as well-established methods of democratic checks and balances – in access to information, clinical trial data, detailed minutes of meetings where policies were deliberated, details of decision-making bodies, their members and their proceedings - yet here too the courts hesitated instead trusting the government to identify and consult the right experts or determine when and what information should be available in the public domain severely undermining any independent scrutiny of the government’s actions.

The urgent need for the courts to have supported demands for transparency and accountability also arose from the government’s myopic approach to COVID-19 vaccines resulting in an almost total lack of public consultation and involvement of public interest and public health groups at every stage. Participation is a key tenet of the right to health where governments are required to consult with and ensure the participation of affected communities in decision-making. The documentation of policy lapses, violations of clinical trial norms, the exclusion of various marginalized groups from vaccination, attempts at vaccine price gouging in the private sector, and the recording of AEFIs have largely been done by health groups and community representatives on the ground. It is striking that in many cases, the courts almost acted like a post-box for public interest submissions and grievances and had to repeatedly ask the government to consider petitions as representations and provide responses in writing, in a time-bound manner. In a Constitutional democracy, this should have been a matter of course and hardly something for constitutional courts to continuously arbitrate and seek hearings for the people before the government.

In a rather poignant section of the April order in the *Distribution of Essential Supplies and Services During Pandemic, In re* case, the SC speaks of

²³² Sohini Chowdhury, ‘If Vaccine Mandates are not Proportionate to Personal Liberty, We will go into it : Supreme Court’ (*Livelaw*, 29 November 2021) <<https://www.livelaw.in/top-stories/supreme-court-covid-19-vaccination-mandates-imposed-implead-states-186563>> accessed 4 April 2023.

²³³ *Distribution of Essential Supplies and Services During Pandemic, In re*, 2021(n 7).

the role of courts in creating and preserving collective memory. The SC quotes the following passage from the book *History, Memory, and the Law*:

*“Because the litigated case creates a record, courts can become archives in which that record serves as the materialization of memory. Due process guarantees an opportunity to be heard by, and an opportunity to speak to, the future. It is the guarantee that legal institutions can be turned into museums of unnecessary, unjust, undeserved pain and death. The legal hearing provides lawyers and litigants an opportunity to write and record history by creating narratives of present injustices, and to insist on memory in the face of denial.”*²³⁴

Indeed, the perusal of court records along with news reports, civil society interventions, and records created by individuals on social media for this article, captured to some extent the pain and anguish of the pandemic and the injustices brought forth by legal responses to it. The SC went on to observe that through the proceedings, “we hope to not only initiate a dialogue so as to better tackle the current COVID-19 pandemic but also to preserve its memory in our public records, so that future generations may evaluate our efforts and learn from them.”²³⁵ There can be little disagreement with this sentiment. But learning from the pandemic is as much a responsibility of our generation as it might be for future generations. There is near global consensus that given the extent of environmental degradation, humanity will face many more pandemics in the coming years as viruses and other pathogens continue to spill over into the human population. The fraught exercise of law and policy-making and judicial oversight during the COVID-19 pandemic must be documented, analyzed, and reflected on as a matter of some urgency. This article presents the right to health and the AAAQ framework as an important and useful foundation for the government and the judiciary to reflect and review the decisions and actions of the past three years; as a possible basis to begin to understand the injustices and inequities of these pandemic years. The old and much-used adage that those who do not learn from history are bound to repeat it takes on a special urgency in our increasingly fragile world as the very real and direct impact of failing to learn these lessons is on the lives and health of millions - now and in the future.

ANNEX 1

COVID-19 Vaccines in India: A Brief Timeline	
January 2020	Genomic structure of the betacoronavirus, i.e., SARS-CoV2 is revealed.

²³⁴ *Distribution, In re case (n 7).*

²³⁵ *Distribution, In re case (n 7).*

April 2020	ICMR isolates SARS-COV-2 virus and announces public-private partnership with Bharat Biotech to develop a vaccine candidate.
April 2020	Serum Institute announces collaboration with Oxford University on a vaccine candidate.
June 2020	Serum Institute announces agreements with Astrazeneca to produce the Oxford vaccine and with Novovax for its vaccine (known as Covovax in India).
August 2020	Serum Institute announces agreements with CEPI (Coalition for Epidemic Preparedness Innovations), GAVI (Global Alliance for Vaccines) and BMGF (Bill and Melinda Gates Foundation) for global supplies.
September 2020	Nearly 30 vaccine candidates are at various stages of development right from pre-clinical, to Phase I, II, or III in India.
January 2021	Both Serum Institute and Bharat Biotech receive approvals from the DCGI. Serum received 'restricted use in emergency situation' approval. Bharat Biotech's vaccine, Covaxin, was given "restricted use in emergency situation under clinical trial mode" as Phase III trials were still ongoing.
January 2021	Vaccination is announced for healthcare workers and frontline workers. The Central government procures and distributes the vaccines to State governments.
February 2021	International supply of Indian COVID-19 vaccines begins.
March 2021	On completion of Phase III trials, Covaxin's approval is no longer in "clinical trial mode".
March 2021	The rollout is extended to those above the age of 65 and to those above the age of 45 who also had specified co-morbidities. The Central government ropes in the private sector for distribution while it continued to procure and distribute vaccines to the States as well as private hospitals. A cap of Rs. 250 was imposed for private hospitals to charge as fees for administering the vaccines.
March 2021	Serum and Bharat Biotech are asked to prioritise domestic supplies as the Deltawave worsens.
April 2021	All those above the age of 45 became eligible for vaccination.
May 2021	All those above the age of 18 become eligible for vaccination. Procurement is changed with the Central government continuing to procure and distribute vaccines only for 45+ age group leaving it to State governments to procure for the 18-44 age group. The private sector is allowed to independently procure and vaccinate all eligible age groups. Manufacturers are asked to reserve capacity of 50 : 25 : 25 for the Centre, States and private sector respectively.
April 2021	In the <i>Suo Moto</i> case, the SC finds the change in procurement likely to prima facie violate the right to health recognized as part of the right to life under Article 21 of the Indian Constitution.

May 2021	SC reiterates its finding of prima facie violation of the right to health with the new procurement policy.
July 2021	After the SC order, the Centre announced it would procure 75% of capacity and distribute to States while the private sector would procure 25%. The price for both vaccines to the government was Rs. 150. Prices in the private sector were capped at Rs. 780 for Covishield and Rs. 1410 for Covaxin per dose.
October 2021	Exports of Indian COVID-19 vaccines resume.
January 2022	All those between the ages of 15-18 become eligible for vaccination with Covaxin. "Precautionary" doses i.e. a third dose for healthcare and frontline workers and those above the age of 60 who had co-morbidities are also announced. The third dose could be taken 9 months after the second dose and could only be of the same vaccine as the primary series.
January 2022	Covishield and Covaxin receive 'conditional marketing authorization.'
March 2022	All those between the ages of 12-14 become eligible for vaccination with Corbevax (and later with Covavax). For the 12-17 age group, the government procures and provides Covavax and Corbevax while the 15-18 age group can also access Covaxin either from the government or in the private sector.
April 2022	Precautionary doses are opened to all persons above the age of 18 only on payment at private centers. Some States announced free precautionary doses at government centres.
May 2022	SC finds vaccine mandates unconstitutional in the <i>Jacob Puliyel</i> case subject to some conditions and orders the government to allow AEFI reporting by individuals and private doctors and for public access to such records while preserving privacy.
July 2022	Free precautionary doses for all age groups are announced at all government centres for a period of 75 days only. At the end of the 75 days, States with stocks remaining are allowed to continue free provision while stocks last.
August 2022	SC issues notice for reply to the Central government in the <i>Rachana Gangucase</i> on the deaths of two girls post-vaccination.
November 2022	AEFIs recorded: 92,114 AEFI cases had been reported from 219.86 crore vaccine doses (0.0042%) of which 2782 were serious and severe AEFIs (0.00013%)
December 2022	Number of vaccinations: Total vaccinations: 2,20,06,25,208; Dose 1: 1,02,71,66,278; Dose 2: 95,11,41,127; Precaution Dose: 22,23,17,803.
December 2022	Vaccines approved: 10 COVID-19 vaccines including 4 for use in children and adolescents, have received approvals in India for use as either primary doses or as boosters/precaution doses. Two vaccines, Covishield and Covaxin, have received 'conditional marketing authorization' while the others have received 'restricted use in emergency situation' use approval.

SOCIO-SPATIAL CONSEQUENCES OF DISTURBED AREAS ACT 1991 ON URBANIZING SPACES IN GUJARAT

—Devansh Shrivastava¹

Segregation on ethnic lines has often manifested in various forms of exclusion and group inequality. The spatial manifestations of violence in globalizing spaces of ‘divided cities’ also exhibit rigid patterns of community based ‘self-sorting’. The communalization of public and private housing with regard to demography has been a significantly pronounced exclusionary crisis in Indian divided cities. This paper, an abridged version of my MPhil thesis, concerns such a unique case. It assesses the impact of Disturbed Areas Act 1991 (‘The Act’) on ghettoisation in Ahmedabad city against the background of mass violence.

The paper thus concerns the dynamics of spatial segregation in cities of Gujarat around residential and commercial property disputes. It conducts a socio-legal examination of ten case laws (2002–2021) by responding to the literature on divided cities. It argues that informal zoning practices of community led self-sorting behavior at the ground level, coupled with the Act’s operation (and the demand for its extension as legal protection), disparately impact existing group inequalities pertaining to housing access, affordability and individual residential mobility in urbanizing spaces.

Keywords – *Disturbed AREAS Act 1991, spatial segregation, inequality, community self-sorting, property.*

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I. INTRODUCTION

Ethnic segregation often indicates a violent history of conflict and distrust between communities. It acquires a visible character through residential housing patterns which exhibit a general exclusionary and hostile environment towards ethnic minority groups. In Indian urbanizing and communally sensitive spaces, one of the significant policy challenges then is to prevent outmigration of minority identities from their respective areas in times of heightened ethnic tension (forced eviction).² It is also to prevent further descent of spatially segregated areas into ghettos.³

Newer trends in exclusionary housing, where dominant communities seek to consolidate community sentiment over individual residential mobility, have been recurrent in Indian cities. While geographical segregation based on caste has been an age-old but persistent feature of India's city population since pre-British times,⁴ collective forms of protest by dominant communities to keep out certain specific ethnic communities have emerged as a visible contemporary housing problem in recent times. For example, in Moradabad city, conflict over the sale of two immovable properties to Muslims in a predominantly Hindu neighbourhood came to light. This further led to every Hindu household putting up a poster which read "*Samuhik palayan. Yeh makaan bikau hai. Sampark karen* (Collective exit. This property is for sale. Please

² One of the recent instances is that of post-riot (Northeast) Delhi where many Muslim families have been forced to move, selling their property at lower prices (identified as "forced evictions") and the post-riot period significantly depreciating property values in the area. Flavia Lopes, 'A Year after Delhi Riots, Muslim Families are Selling Homes and Moving Out' (*The Wire*, 7 April 2021) <<https://thewire.in/communalism/a-year-after-delhi-riots-muslim-families-are-selling-homes-and-moving-out>> accessed 4 November 2022.

³ The paper follows Laliwala et al, (2021) who build upon Loïc Wacquant's definition of a 'ghetto' as 'a bounded, ethnically [or religiously] uniform socio-spatial formation born of the forcible relegation of a negatively typed population'. See Sharik Laliwala, Christophe Jaffrelot, Payal Thakkar and Abida Desai, *Paradoxes of Ghettoisation: Juhapura 'in' Ahmedabad*, [Research Report] (2021) India Exclusion Report 2019–2020 104, <<https://hal-sciencespo.archives-ouvertes.fr/hal-03385497/document>> accessed 4 November 2022.

⁴ Naveen Bharathi, Deepak Malghan and Andaleeb Rahman, 'Isolated by Caste: Neighbourhood-Scale Residential Segregation in Indian Metros' (2018) Indian Institute of Management Bangalore, <<https://www.iimb.ac.in/sites/default/files/2018-06/WP%20No.%20572.pdf>> accessed 4 November 2022.

contact).⁵ This collective form of protest implied that all neighbourhood residents were advertising their property collectively for sale in protest against the Muslim owners' entry to their vicinity. One of the residents mentioned a "mutual understanding" which implies self-segregation by the two communities and suggested that their mixing is not welcomed, demanding that the sale be reversed. In addition, the residents demanded that any such property transaction be held with "their consent". Most strikingly, after a probe by the District Magistrate and Police, the authorities concluded that "no one can stop anyone from selling their property to any individual" while "iterating the freedom of people to live anywhere".⁶ Similar instances have been reported in Agra,⁷ Meerut,⁸ and Mumbai⁹ among many other Indian cities.

Many of these instances closely mirror contemporary processes of exclusion and spatial segregation in different cities of Gujarat. In contrast to the authorities' response in Uttar Pradesh, the iteration of consent, freedom to sell property and to reside in any part of the country, may not be a ready and obvious response from authorities in the cities of Gujarat where the Disturbed Areas Act, 1991¹⁰ operates. The emerging nature of community-led sorting in the examples described above warrants acknowledgment of the sensitivity that exists in everyday life to prevent religious disturbances between communities. Simultaneously, it also calls for the development of a regulatory focus to protect individual residential choices, which the constitutionally granted funda-

⁵ Sukrita Baruah, 'Two Houses in Moradabad Locality Sold to Muslims, Residents Threaten Exodus' (*The Indian Express*, 5 August 2021) <<https://indianexpress.com/article/india/two-houses-in-moradabad-locality-sold-to-muslims-residents-threaten-exodus-7438901/#:~:text=Residents%20of%20a%20middle%2Dclass,issue%20at%20the%20heart%20of>> accessed 4 November 2022.

⁶ *ibid.*

⁷ This is where "this house is for sale" posters have come up in ethnically (mixed) sensitive areas where Hindu families residing in the area have wanted to sell their property and move to "safer localities" as they feel panic when instances of tensions suddenly flare up; See Anuja Jaiswal, 'Hindus Offer to Sell Houses in Muslim-Dominated Areas' (*Times of India*, 1 March 2020) <<https://timesofindia.indiatimes.com/city/agra/hindus-offer-to-sell-houses-in-muslim-dominated-areas/articleshow/74420293.cms>> accessed 4 November 2022.

⁸ It relates to a Muslim buying property in the *Chahashor mohalla* neighbourhood and the subsequent protest by right wing groups calling such an inter-faith transaction between two consenting individuals as "land jihad"; Abhishek Dey, 'How can we Share our Neighbourhood with a Muslim?: In Meerut, there's Now Fear of 'Land Jihad'' (*Scroll.in*, 21 December 2017) <<https://scroll.in/article/862216/how-can-we-share-our-neighbourhood-with-a-muslim-in-meerut-now-theres-talk-of-land-jihad>> accessed 4 November 2022.

⁹ It relates to members of a society objecting to an interfaith immovable property transaction "refusing to issue a No Objection Certificate to a Muslim man" on grounds of stereotypical ascriptions such as non-vegetarianism; Parth MN, 'Diluting Real Estate Bill will Further Marginalise Muslims, Women' (*The Quint*, 21 December 2016) <<https://www.thequint.com/voices/opinion/real-estate-bill-anti-discriminatory-clause-omitted-seclusion-on-gender-race-caste-class-in-mumbai-ncr-rera#read-more>> accessed 4 November 2022.

¹⁰ The law on disturbed areas in different cities of Gujarat prohibits the kinds of inter-faith property transfers (in conduct) which have been cited above in the cities of Agra, Meerut and Moradabad between two parties unless the Collector grants permission for the same. See Najmuddin Meghani, *The Gujarat Disturbed Areas Act and Rules (Along with Recent Notification Related to Various Disturbed Areas of Gujarat State)* (Punahal Law House 2021).

mental rights under Article 14, Article 15, and Article 19(1)(e) envision. This demands an examination into the divided and contested nature of urbanizing city spaces.

II. THE CASE OF DISTURBED AREAS IN GUJARAT

Social segregation and ghetto living has been a persistent problem in the rapidly urbanizing city of Ahmedabad. In the background of past episodes of mass violence in the city, the Act was enacted due to many factors which have contributed to ghettoised living: segregated living, forced eviction induced by bootlegging activities,¹¹ distress sales due to religious disturbances, and the constant need for living in ‘safer’ areas in accordance with their respective religious identities.¹² In contemporary Ahmedabad, ghettoised living in the city indicates the adverse impact of segregated living, particularly on the majority of the low-income Muslim population living in ghettoised areas.¹³ Moreover, informal borders acquire an important role in determining the ascription of ethnic identity to a border property through series of residential landmarks.¹⁴ Ahmedabad has been called the “most religiously segregated city of modern India”.¹⁵ Hence, the problem of ghetto living is further complicated by the operation of the Act, which was enacted to reduce ghettoisation. Although many studies have addressed the common theme of social segregation and a number of factors impacting ghettoised living from different approaches, very little scholarly attention has been given to the impact of the Act on its intent i.e., preventing ghettoisation¹⁶ in different cities of Gujarat.

¹¹ Bootlegging refers to forced eviction of residents belonging to a minority community in a certain area led by influential non-state actors where these residents have been forced to sell properties at lower rates (distress sale). Thus, the Act was initially passed as an ordinance in 1986 to stem bootlegging activities and ‘distress sales’ to prevent the dilution of mixed localities. Howard Spodek, *Ahmedabad: Shock City of Twentieth-Century India* (Orient Blackswan Private Limited 2012) 235–236.

¹² Raheel Dhattiwala, *Keeping the Peace: Spatial Differences in Hindu-Muslim Violence in Gujarat in 2002* (Cambridge University Press 2019) 137; Rubina Jasani, ‘A Potted History of Neighbours and Neighbourhoods in Ahmedabad’ in Edward Simpson and Aparna Kapadia (eds), *The Idea of Gujarat: History, Ethnography and Text* (Orient Blackswan Private Limited 2010) 163–164; and Indrajit Roy, ‘Representation and Development in Urban Peripheries: Reflections on Governance in Ahmedabad Suburbs’ (2006) 41 (14) *Economic and Political Weekly* 4365.

¹³ Tommaso Bobbio, *Urbanization, Citizenship and Conflict in India: Ahmedabad 1900-2000* (Routledge 2015) 131.

¹⁴ In the context of ghetto living in a former industrial area of East Ahmedabad (Bapunagar), Bobbio argues that the road dividing Hindu and Muslim communities now serves as a boundary representing the dynamics of economic and political competition among social groups. This boundary division “is activated mainly at times of increasing tension or violence between the two communities”. It becomes identifiable through a series of landmarks such as streets, housing colonies and walls. It is often used to delimit the boundaries of the area in times of increasing tension or violence (Bobbio (n 13) 131, 138).

¹⁵ Laliwala (n 3) 104.

¹⁶ The research gap this paper addresses is methodological i.e. sociolegal examination of case laws (residential and commercial) and theoretical i.e. reading case laws with divided city literature to examine the Act’s original intent i.e. preventing ghettoisation.

This paper examines the impact of the Gujarat Prohibition of Transfer of Immovable Property and Provision for Protection of Tenants from Eviction from Premises in Disturbed Areas Act, 1991 ('the Act') in Gujarat, which requires the Collector's sanction in immovable property transactions between communities in designated 'disturbed areas'.¹⁷ The main question this paper asks is – in the three decades of its operation, how has the Act impacted the problem of ghettoization in the city of Ahmedabad? It does so by examining the intent and 'unanticipated consequences' of the Act through a socio-legal interdisciplinary framework. The central argument of the paper is that informal zoning practices of community led self-sorting behavior at the ground level, coupled with the Act's operation (and the demand for its extension as legal protection), disparately impacts existing group inequalities pertaining to housing access, affordability and individual residential mobility in urbanizing spaces.

III. METHODOLOGY: SPATIALITY AT THE INTERFACE OF LAW AND POLICY

The intent of the socio-legal approach in this paper is to bring together the question of land as a property resource in the major processes of urban transformation in the city, and the judicial interpretations of the same through legal disputes.¹⁸ In this regard, land has been understood as a relational space which is a result of social construction, as "users relate to others in a struggle for impressing meaning on the land".¹⁹ Most importantly, the social construction of meanings of land are constitutive of "multi-party, multi-issue interactions between stakeholders, who assume alternating roles in dynamic social situations" and thus, the purpose of such interactions is to be able to understand the shaping of a social situation.²⁰

Conceptually, the relational understanding of land as social space is crucial to understanding the socio-legal method. 'Social' in socio-legal refers to several scholarly responses and actions by a range of actors and organisations on 'land', including how people relate to the concept of land as property through

¹⁷ A conflict arising in a disturbed area (or formal application regarding a proposed immovable property sale) is first dealt at the level of Collector who is responsible for ensuring the application of the Act. An appeal against the Collector's decision can be made to the Special Secretary (Appeals) Department of Revenue (SSRD), Government of Gujarat. If the aggrieved parties are dissatisfied, they can challenge the authorities' decision in Court.

¹⁸ The effort here is to base the socio-legal epistemology against the background of deep seated neighbourhood ethnic divisions and connect theoretical understanding of simultaneous processes which inform the larger ontology of segregation in the city.

¹⁹ The concept of social space comes from Henri Lefebvre who theorizes space as a social relationship entailing property relationships through which are tied with forces of production which reinforce a certain form on that land. See Benjamin Davy, *Land Policy: Planning and the Spatial Consequences of Property* (Ashgate Publishing Limited 2012) 62.

²⁰ *ibid* 63.

indicators of “wealth, social status, power, socio-cultural identity, land rights and land use”.²¹ It is to further see the interface within which the inter linkages between social factors, legal disputes and policy implications emerge. The socio-legal approach, in this sense, problematizes the interface between law and society and serves as a critique of positive law. Thus, spatiality and social, implying the “socially produced space” and socially produced practices, assumes significance in understanding how a policy gets shaped through its spatial dimensions, especially through interpretation by different State institutions.²² Theoretically, it is important to foreground intent and consequences to read social and spatial (socio-spatial) consequences of the Act.

From a sociological perspective, one needs to assess not only the extent to which the objectives of a piece of legislation have been achieved, but also its “non-intended” consequences— what Indra Deva terms as “possible dysfunctions”,²³ including the “latent functions” resulting from them.²⁴ It then becomes imperative to foreground the conceptual underpinnings of the intended and unanticipated outcomes of a certain policy aimed at public welfare. For sociologist Robert Merton, two factors are important in his formulation of consequences – causal imputation implying the problem of ascertaining the extent to which “consequences” may justifiably be attributed to certain actions, and of ascertaining the actual purposes of a given action. He emphasizes that the consequences of an intended action then are not restricted to the specific area which they were initially intended to be applied to, but also occur in the inter-related fields which was “explicitly ignored at the time of action”.²⁵ With regard to disputes pertaining to the Act in this paper, the purpose is to read Merton’s emphasis on interrelated fields and Deva’s emphasis on possible dysfunctions and latent functions resulting from the operation of the Act. The paper examines the social context of segregation and ghettoisation alongside various incidents and judgements to understand the development of the Act through the Court’s interpretation.

The relational understanding, meanings of land, and socially produced space are significant in understanding the occurrence of disputes in disturbed areas. The judgements discussed in this paper highlight the social context of a divided city where disputes in disturbed areas occur and brings to the fore the neighborhood as a microsite of spatial contestation. These disputes bring out multiple social meanings of community residence norms (self-sorting) which dictate residential patterns in neighborhood. The paper engages with twelve

²¹ Varsha Bhagat–Ganguly, ‘Introduction’, in Varsha Bhagat–Ganguly (ed), *The Land Question in Neoliberal India: Socio-Legal and Judicial Interpretations* (Routledge 2021) 1–2.

²² Davy (n 19) 62.

²³ Indra Deva, ‘Introduction’, in Indra Deva (ed), *Sociology of Law* (Oxford University Press 2005) 9.

²⁴ *ibid* 227.

²⁵ See Robert Merton, ‘The Unanticipated Consequences of Purposive Social Action’ (1936) 1(6) *American Sociological Review* 897, 903.

cases (2002-2021) under the Act relating to residential and commercial property disputes.²⁶ To understand the operation of the Act in the socio-legal framework, the social context of spatial segregation has been read with the particular nature of dispute in a given case. Cases which involve multistorey apartments, flats or individual housing have been categorised under residential property disputes, whereas disputes involving mortgaged properties with banks, construction on property for commercial purposes, market value and the property's location have been categorised under commercial property disputes.

As the paper elaborates, it is the socio-political context of spatial segregation which impacts the legal exemption of the Act on rehabilitation schemes and prevents prospects of social mixing between communities. Social mixing severs existing deep-seated social inequalities and ghettoisation in the divided city. The argument is presented through four main ideas – housing as a major site of spatial contestation in the urbanizing divided city (and in cases), informal zoning as an exclusionary community tactic in the divided city, rooting spatiality at the interface of law and policy and thinking 'ghetto' beyond territorial demarcations.

The structure of this paper is as follows: Section I discusses the socio-political context in which disputes pertaining to public and private housing in disturbed areas occur, where the Act either directly operates or is demanded as a legal measure by the dominant communities to prevent certain minorities from availing government schemes. Crucial features of disputes like protests and mass mobilisation at the neighborhood level are theorized in Section II, which revisits the fragility of the demographic ethnic composition of these neighborhoods in divided city literature and self-sorting behaviors of dominant communities. In the background of divided settings and simultaneous inflow of capital and urbanisation in the city, Section II further discusses the theoretical underpinnings of spatial segregation beyond spatial dimensions of ghetto demarcations. This lays down the framework to locate the socio-spatial consequences emerging from the disputes which form the legal disputes under the Act in Section III, followed by the socio-spatial consequences which indicate the socio-political considerations of community self-sorting (informal zoning) and the neighbourhood as a micro site of spatial contestation which intensifies spatial segregation in the city.

²⁶ In listing the twelve case laws from legal search engines, I have not been able to access disputes from 1991-2001. It is a limitation of this study. The study examines a range of legal disputes pertaining to the Disturbed Areas Act 1991 from 2002-2021. It is through the digital availability of the disputes on legal search engines that the list has been drawn. In this sense, the list is not exhaustive and the sample is not truly representative.

IV. THE ACT'S OPERATION, CASES AND THE CONTEXT OF DIVIDED CITY

A. The Act and public housing

This section looks at the operation of the Act through instances of public housing in the social context of a divided city. The Act was enacted by the state government to prevent ghettoisation in Ahmedabad.²⁷ However, in recent years, as an unforeseen consequence, several instances have been reported in which residents of an area have demanded collectively that their area be designated as a “disturbed area”. The purpose of this demand has been to prevent any potential change in demographic composition in the neighbourhood. The *de facto* modes of segregation are also reflected in collective forms of protest which seek a legal backing to resist relocation matters pertaining to public housing or rehabilitation schemes. The schemes are aimed at relocating or rehabilitating the displaced inhabitants of informal settlements. This collective public perception is rooted in two particular sections of the Act – ‘prohibition on inter-community property transfer unless sanctioned by the Collector’ (as mentioned in Section 5 of the Act)²⁸ and the “demography clause” in the Amendment Act 2019.

The 2019 Amendment to the Act, stayed at present by the Gujarat High Court,²⁹ introduces “demographic equilibrium”, “proper clustering” of communities as key determinants for the Collector to decide “if the sale of the property will lead to a likelihood of polarisation or an improper clustering of people” in designated disturbed areas. It is in addition to the previous determinants of past instances of rioting when the public order was in disarray. Section 3(ii) in particular, elaborates on the amended Act’s criteria for declaring a disturbed area where the Government is of the opinion that “polarisation of persons belonging to one community has taken place or is likely to take place disturbing the demographic equilibrium of the persons of different communities residing in that area or that improper clustering of persons of one community has taken place or is likely to take place where the mutual and peaceful coherence amongst different communities may go haywire in that area”.³⁰

For instance, the Bhayli area in Vadodara was included in the limits of Vadodara Municipal Corporation which also happened to be the potential site

²⁷ See footnote 12.

²⁸ The Gujarat Prohibition of Transfer of Immovable Property and Provision for Protection of Tenants from Eviction from Premises in Disturbed Areas Act, 1991.

²⁹ ‘Disturbed Areas Act: Gujarat HC Stays Fresh Notifications on Amended Sections’ (*The Indian Express*, 20 January 2021) <<https://indianexpress.com/article/cities/ahmedabad/disturbed-areas-act-gujarat-hc-stays-fresh-notifications-on-amended-sections-7154739/>> accessed 4 November 2022.

³⁰ Meghani (n 10) 10.

of beneficiaries of *Mukhyamantri Awas Yojana* housing scheme [affordable housing] by the Vadodara Urban Development Authority.³¹ This decision of the urban development authority was met by women-led protests which strongly opposed the municipal body's decision of submitting a memorandum to the Collector. They argued that such a decision would threaten the law-and-order situation in the area, adding that they would boycott the civic body polls unanimously. The bone of contention happened to be the relocation of minorities (also urban poor) to this area from the Tandalja area.³² These residents led by women had demanded that their area be included under the purview of the Act insisting that theirs was a "peace-loving Hindu neighbourhood".³³

In a different instance, a Hindu house owner had to cancel sale prospects to a Muslim buyer because of resistance from fellow society members. Two contentions raised by the residents deserve close attention – that the 'minority' buyer will buy a property at a higher price and then resell it to fellow coreligionists at a much lower price – which will eventually depreciate adjacent property rates in the market, followed by outmigration of Hindu residents from such area.³⁴ A similar instance of resistance can be seen in the extension of the Act to parts of Rajkot (including posh areas), in which the Chief Minister cited instances of "rioting" and "mob violence" while extending the Act.³⁵ The government's decision was followed by the Collector's report who had acted on applications from the residents of the respective societies demanding the imposition of the Act because of increase in inter-faith transactions.³⁶

³¹ This demand was about the cancellation of allotment of homes to the displaced minority community residents of slums in Vadodara under the scheme, which as per the allegation of the protestors would alter the 'law and order situation'. The implicit assumption here is that by extension of the Act to their area, each future property transaction would require the collector's sanction (Section 5 of the Act) and would prohibit inter-community property transfers; See 'Gujarat: Residents demand Bhayli under Disturbed Areas Act, threaten to boycott polls' (*The Indian Express*, 13 February 2021) <<https://indianexpress.com/article/india/gujarat-residents-demand-bhayli-under-disturbed-areas-act-threaten-to-boycott-polls-7186336/>> accessed 4 November 2022.

³² It needs to be noted that according to s 6-A(1) of the Amended Act 2019, Section 4 (Collector's declaration of certain transfers to be void) and s 5 (ii- free consent, iii- fair value, iv- likelihood of polarisation and v- likelihood of improper clustering of persons) of the Amended Act exempt transfers of immovable properties by the persons residing in rehabilitation schemes of the State Government in the disturbed areas. Also, s 6-A(2) states that none of the provisions under s 5 will be applicable where the State Government relocates the persons in any of its rehabilitation schemes in the disturbed area; See Meghani (n 10) 56.

³³ *ibid.*

³⁴ 'Vadodara: House Owner Cancels Sale to Muslim Buyer after Society Residents Protest' (*Scroll*, 25 November 2019) <<https://scroll.in/latest/944821/vadodara-house-owner-cancels-sale-to-muslim-buyer-after-society-residents1-protest>> accessed 4 November 2022.

³⁵ 'First Time in Rajkot: 28 Societies in CM Vijay Rupani's Constituency Brought under Disturbed Areas Act' (*The Indian Express*, 15 January 2021) <<https://indianexpress.com/article/india/first-time-in-rajkot-28-societies-in-cm-vijay-rupanis-constituency-brought-under-disturbed-areas-act-7147967/>> accessed 4 November 2022.

³⁶ *ibid.*

In Vadodara city, the beneficiaries of the slum rehabilitation scheme under the draw allotment of the Jawaharlal Nehru National Urban Renewal Mission (JNNURM) happened to be Muslims. The stubborn opposition of neighbouring housing societies inhabited mostly by Hindus led to allegations of Muslims being unhygienic, creating religious disturbances and so on. Due to pressure from intense mobilisation of non-state actors and local politicians, the Muslims were offered a different relocation site in Tandalja (described as a Muslim ghetto).³⁷ Adding to this, in Khambhat (Anand district), instances of religious disturbances between communities have been interpreted by the government as due to ‘changes in local demography’ leading to the imposition of the Act.³⁸

In the examples above, the relocation from a ghetto area to the neighbouring vicinity of the dominant community has been opposed whereas the relocation of displaced urban poor has been offered the same ghetto area under a government scheme due to public pressure. These examples direct our attention to the additional role of such external pressurizing demands in the government’s move to amend the Act in 2010 and 2019, and its subsequent extension in many districts of Gujarat. Similarly, it can be seen how public housing schemes, which rely on random selection of eligible residents, exhibit patterns of caste, religious or race-based segregation. Further, the relocation of public housing impacts the mobility prospects (meaning the freedom to relocate within the city) of residents coming from distressed neighbourhoods. It is so, since the private housing market and the manifest of capital in urban spaces reflects such discriminatory patterns in the form of gated communities or cluster-based community associations.

From these instances, it needs to be examined if the relocation of such public housing schemes, which are often located in a city’s peripheral areas, are encouraged by the demand for the Act’s imposition. From the above examples, the dominant community sentiment and modes of self-sorting appear to be at the forefront in pressurizing authorities while significantly impacting upward mobility prospects of urban poor. The reproduction of social divisions through instances of self-sorting behavior brings back the divided nature of the residential areas of the city.

B. Residential Property Disputes and the Act

To understand the institutional development of the Act through the Courts and locate its consequences, it is equally important to look at the circumstances under which private property disputes occur, nature of actors involved

³⁷ Lancy Lobo, ‘What Vadodara’s Slum Displacement Reveals: Case of Kalyannagar and Kamatipura’ (2015), 50 *Economic and Political Weekly* 36.

³⁸ ‘Riots: Guj to Impose Disturbed Areas Act in Parts of Khambhat’ (*Business Standard*, 25 February 2020) <https://www.business-standard.com/article/pti-stories/riots-guj-to-impose-disturbed-areas-act-in-parts-of-khambhat-120022501080_1.html> accessed 4 November 2022.

and the different levels of government officials involved in it. It is for this reason that this paper looks at case laws as a significant dataset to examine the intent and unanticipated consequences of the Act. The nature of disputes under residential property case laws revolves around private properties. These are flats in multistorey apartments owned by builders or individuals and single private houses located in cooperative housing societies.

The dispute of *Bankimbhai Jayantilal Shah v State of Gujarat*³⁹ shows how external considerations of future community tension in the procedural inquiries under the Act encourage acts of segregation by authorities. This dispute pertains to a joint family property situated in Kalupur (East Ahmedabad) in which the two parties, owing to the provisions of the Act, had sought permission for transfer of property from the concerned authority, which was then duly granted.⁴⁰ The dispute arose when the permission was cancelled and the sale deed was declared null and void after a month.⁴¹ The reason cited for such cancellation was that the property's location happened to be in a sensitive area like Kalupur and such a property transaction could result in "communal tension".⁴² It was to avoid such an "adverse effect" that the previously granted permission was cancelled.⁴³ In this case, Justice Mehta had quashed the cancellation of previously granted permission declaring such an action "without jurisdiction" and "illegal and void".⁴⁴

The case of *Nasim Banu Mehbub Bhai Kureshi v Shri Chandrakamal Coop. Housing Society Ltd.*⁴⁵ draws attention to religious identity becoming the sole criteria for cancellation of a sale deed, where an act of doing so could be an act of gaining upward mobility. In this case, the disputed property in question, was located in a mixed locality, where persons of various castes and religions resided.⁴⁶ The dispute highlighted in the case is the allegation that Nasim Banu had shown herself as a Hindu and bought property from a Hindu owner. She had then moved to a Cooperative Housing Society without applying for the Collector's permission.⁴⁷ The judge held that the property was indeed situated in a disturbed area and such a transfer of property was in violation of the 1991 Act.⁴⁸ Since the property was based in the disturbed area of Vatva (Eastern Ahmedabad) and the transaction was between a Hindu and Muslim (referred to as the 'minority community'), Justice Shah upheld the cancellation of sale deed

³⁹ 2002 SCC OnLine Guj 126 : (2002) 3 GLH 673.

⁴⁰ *ibid.*, 2.

⁴¹ *ibid.*

⁴² *ibid.*, 3.

⁴³ *Bankimbhai* (n 39) 3.

⁴⁴ *ibid.*, 8.

⁴⁵ 2009 SCC OnLine Guj 9222.

⁴⁶ *ibid.*, 3.

⁴⁷ *ibid.*, 9.

⁴⁸ *ibid.*, 12.

by authorities who had relied on the Government notification, declaring Vatva as disturbed and thus the transaction as null and void.⁴⁹

An interesting aspect of Act's conduct is seen in *Rais v Vijaysinh*.⁵⁰ It pertains to the inconsistent nature of the Disturbed Areas Act under which a sale deed can be challenged by a third party after years. Moreover, the abstract considerations of fair value and free consent do get complicated in the context in such property transfers. In this case, a third party, a family member having interest in the property,⁵¹ had made an application to the Collector in 2010 to cancel a series of sale deeds executed previously between two consenting parties in 2006 in Vejalpur (West Ahmedabad). It was alleged by the third party, that the respective sale deeds were executed without prior permission of the authority as the properties were situated in a disturbed area.⁵² On the base of this application, the Collector had cancelled all the sale deeds.⁵³ It was then contested that such an action was beyond the purview of Collector and such a power to cancel a registered sale deed was only vested in a civil court.⁵⁴ It was also argued that the "impugned order does not state under which provisions of the Disturbed Areas Act it was passed".⁵⁵ It was contended by the defendant that the Collector had acted in a "predetermined mind" and the decision was in haste as the authority had ignored the core aspects of the Act.⁵⁶

The *SNA Infraprojects (P) Ltd. v Sub-Registrar*⁵⁷ case brings the highly contested nature of urban housing as a prime site of contesting ethnic identities, limitations of multiple authorities in resisting segregating practices of informal zoning due to pressure from non-state actors and community mobilization to restrict residential mobility and pressurize residents of Muslim identity. In this case, the petitioner company (owned by a Muslim) had bought multiple flats located in 2010 in the Ellis bridge area of Ahmedabad. They had applied for registration with the Sub-Registrar in the same year. Initially, the concerned authority didn't reply and the documents were pending.⁵⁸ On the insistence of the company, the authority stated, citing the opinion of the Inspector of the area, that the property was situated in a disturbed area and the registration

⁴⁹ In another case, the passing of order by Collector without giving due notice to the stakeholders in a dispute pertaining to property located in disturbed area has been quashed in *Aminbhai Barkatali Panjvani v Collector (C/SCA/6559/2018)*. A similar finding is seen in the dispute pertaining to permission regarding sale of a commercial property in *Ali Enterprises v State of Gujarat*, (2020) 3 GLH 571 in which the Court had revoked the Collector's order where the Collector had permitted property's the sale first time and refused it the second time for resale in a disturbed area.

⁵⁰ 2011 (SCA/10087/2011).

⁵¹ *ibid*, 4 (c).

⁵² *ibid*, 2 (b).

⁵³ *Rais* (n 50).

⁵⁴ *ibid*, 2 (c).

⁵⁵ *ibid*, 2 (e).

⁵⁶ *ibid*.

⁵⁷ 2011 SCC OnLine Guj 2504 : (2011) 3 GLH 15.

⁵⁸ *ibid*, 3.

of their purchased property would happen post granting of permission by the Collector under the provisions of the Act.⁵⁹ The petitioners had contended that the Sub-Registrar had stated in a letter to the Collector, prior to the purchasing date, that the concerned property was not located in a disturbed area.⁶⁰ The Revenue Department had also replied that the State Government had noted a tendency in which due to religious disturbances, the landlords were selling properties to one community out of panic owing to the “fear of losing life and property”.⁶¹

The *SNA* case mentions the plight often applicants who had requested the Speaker of the Gujarat Legislative Assembly to intervene as there were attempts to sell properties to Muslims. Moreover, they refer to a letter drafted by the then Deputy Collector to the Chief Minister in 2006 indicating that such property transfers would force more than a thousand Hindus to leave the area in question.⁶² It is for preventing the defeating of the purpose of the Act that these applicants had argued that such a sale deed by the petitions be held illegal. This case involves a non-state actor “*Shree Kochrab Ellisbridge Hitrakshak Samiti*” which had insisted that the Speaker take note of the transactions happening in the sensitive area.⁶³ However, the petitioners had contended that the applicants suffered a misconception about the Act, and that its primary objective was to prevent entry of persons of a community into another.⁶⁴

In this case, Justice Waghela observed that the applicants’ contention was “suffering from communal prejudice” and they had a “misconception about the law”.⁶⁵ He criticized the state machinery for not imbibing the spirit of the Constitution, indicating the secular nature of the republic, fraternity, and dignity of the individual.⁶⁶ Moreover, in his reading of the Act, Justice Waghela noted the original intent of the Act and stated that it was not to divide “residents or citizens on communal lines”.⁶⁷ He further observed that no law in India could be interpreted in a manner to “exclude the members of one or the other community from carrying on legitimate business activities and entering into communal transactions”.⁶⁸

The case of *Manubhai v State of Gujarat*⁶⁹ brings out another facet of the aftermath of communal violence. This case is about the structural difficulties

⁵⁹ *ibid.*, 3.

⁶⁰ *ibid.*

⁶¹ *ibid.*, 5.

⁶² *ibid.*, 6.

⁶³ *SNA Infraprojects* (n 57), 10.

⁶⁴ *ibid.*, 9.

⁶⁵ *ibid.*, 22.

⁶⁶ *ibid.*, 23.

⁶⁷ *ibid.*

⁶⁸ *ibid.*

⁶⁹ (C/SCA/21312/2016).

and materialisation of violence, due to which many survivors of mass violence cannot return to their former residence. Further this case highlights the government's discretion in deciding the future owners of property. The case directs our attention to a rare aspect of the aftermath of mass violence and possession of property. The premise of this case is that the property had been destroyed during the communal riots and the petitioner wasn't able to live in said property in the post-riot period. In accordance with the provision of the Act (Section 17-D),⁷⁰ the Collector had ordered that the said property be transferred to the government.⁷¹ It is during this time that the petitioner stepped in to claim possession of the property.⁷² He approached the High Court to quash the order passed by the Collector. Justice Pardiwala observed that the Collector's order was "in accordance with the law" which implied that the petitioner could not claim ownership of such a property even as legal heir as per the provisions of the Act.⁷³

The case of *Feroze Falibhai Contractor v State of Gujarat*⁷⁴ brings forth the non-disclosure of religious identity for seeking sanction of sale of immovable property in Samparan Cooperative Housing Society, Vadodara (which comes under purview of the Act) leading to filing of a criminal complaint (First Information Report with charges of "forgery, supplying false information to authorities and for criminal breach of trust").⁷⁵ In this case, a Parsi man, Feroze Falibhai Contractor" was accused of suppressing his Parsi religious identity "in selling his property to a Muslim, Firoz Patel."⁷⁶ The housing society chairperson had alleged that "Contractor took disadvantage of his name Feroze, to paint his identity as a Muslim and escape detailed scrutiny under the Disturbed Areas Act".⁷⁷ The observation of Justice Trivedi (while granting anticipatory bail to the accused) that "prima facie, it appears that no law obliges to state his religion in the affidavit filed in support of application seeking previous sanction to transfer immovable property"⁷⁸ needs to be read in the wider context of spatial segregation and determinants of ghettoisation as elaborated through section on public housing, self-sorting and religious/ethnic identity becoming the prime reason for a dispute under the Act. Primacy of religious identity over individual autonomy in spatially segregated sensitive areas furthers a cognitive deterrence in housing choices one exercises.

⁷⁰ It refers to a post-riot condition that if the landlord fails to erect a new building within a specified period, then the concerned property shall be transferred to the State Government and that the landlord is liable for a compensation. Meghani (n 10) 32.

⁷¹ *Manubhai* (n 69), 3.

⁷² *ibid.*

⁷³ *ibid.*, 7.

⁷⁴ (R/CR.MA/16338/2020 ORDER) LQ/GujHC/2021/2225.

⁷⁵ Saeed Khan, 'Feroze Sells House to Firoz; Matter in Gujarat HC' (*The Times of India*, 21 October 2020) <<https://timesofindia.indiatimes.com/city/ahmedabad/feroze-sells-house-to-firoz-matter-in-gujarat-hc/articleshow/78779417.cms>> accessed 4 November 2022.

⁷⁶ *ibid.*

⁷⁷ *ibid.*

⁷⁸ *Feroze* (n 74) 7.

C. Commercial Property Disputes and the Act

The nature of disputes under this sub-section involves commercial properties in which the Act has been evoked under certain circumstances. These pertain to non-performing assets, bank mortgages, location of a commercial property in a disturbed area and its market value. These cases generate significant theoretical insights around conflicts in which the context of segregation and divided city informs the circumstances and conditions under which the Act is evoked by aggrieved parties.

With regard to commercial property located in a disturbed area, the case of *Network Engitech (P) Ltd. v State Bank of Patiala*⁷⁹ points towards the impact of the extension of the Act on market value. The petitioners had opted for a loan for the purpose of business expansion. Later, they were unable to pay it in due time and their account was thus declared as a “Non-Performing Account”, due to which the bank was liable to seize the property which it had previously accepted as security.⁸⁰ However, the bank refused to accept it as it was located in a disturbed area.⁸¹ It is not clear from the facts of the case as to whether at the time of applying for loan, whether the property was located in a designated disturbed area or not. Moreover, it was submitted by the petitioners that in the given circumstances, their “credit in the business community” had diminished.⁸² This case draws attention to the fluctuation of property value, particularly in banking, which could impact small to medium businesses in mixed or minority areas, impacting business networks and credibility.

An interesting insight about the location of property in disturbed areas is seen in an order passed by the Security and Exchange Board of India (SEBI) in the matter of *Vadodara Stock Exchange Ltd. (VSEL)*.⁸³ It pertains to the location of a commercial property in a disturbed area. The nature of the dispute pertained to the lack of transparency in the conduct of the firm.⁸⁴ Importantly, it was found that the location of said commercial property in a communally sensitive disturbed area had a “negative impact” on finding potential buyers.⁸⁵ Moreover, the lack of adequate facilities like lift, sanitation, water and so on added to the difficulty of getting fair property rates in market.⁸⁶ The SEBI order is reflective of market dynamics in which the value of commercial property value is said to have declined (negative impact). This case is reflective of diminishing business and networking prospects and also speaks to the dominant community’s sentiment of property value reduction.

⁷⁹ 2015 SCC OnLine Guj 5149.

⁸⁰ *Network Engitech* (n 79) 2.

⁸¹ *ibid*, 3.

⁸² *ibid*, 4.

⁸³ 2015 SCC OnLine SEBI 179.

⁸⁴ *ibid*, 1.

⁸⁵ *ibid*, 3(v).

⁸⁶ *ibid*, 3(vi).

A recent landmark case which involves a commercial property transfer by a Hindu to a Muslim trader is *Onali Ezazuddin Dholkawala v State of Gujarat*,⁸⁷ which addresses the gap between the institutional understanding of the Act and the Court's interpretation of segregation. In this case, a mutually consenting and fair value commercial property transfer took place between the two parties which was even supported by neighbours. The location of the property was in a disturbed area where the Muslims were in majority and Hindus in minority.⁸⁸ The Deputy Collector sought opinions of police officers and the Mamlatdar who had answered in the negative.⁸⁹ The Deputy Collector cancelled the sale deed. The petitioner had relied on the Court's previous decisions in *Rasiklal Mehta v State of Gujarat* and the *SNA Infra projects* case (discussed above), in which the Court had reiterated that only aspects of fair value and free consent be considered.⁹⁰ Justice Vaishnav observed that the "paramount consideration" for the concerned authorities is to verify whether the sale in question was a "distress sale" under fear for want of migration from the area, and not to see whether it would create a law-and-order problem.⁹¹ The equation of the law-and-order parameter in this case by the authorities, Justice Vaishnav noted, was "contrary to the provisions of the Act".⁹² The Collector's order was revoked.⁹³

The case of *Raees Ahmed Patel v State of Gujarat*⁹⁴, a habeas corpus petition, presents a complicated picture of the Act's operation in conjugation with the Gujarat Land Grabbing (Prohibition Act) 2020 in which a three-decade old land agreement was challenged under the Disturbed Areas Act. It pertains to the arrest of Ahmedbhai Allahrakhabhai Patel, a senior citizen, under the provisions of Gujarat Land Grabbing (Prohibition Act) 2020.⁹⁵ The allegation of land grabbing pertains to a land agreement between him and two other parties – Lakhubhai Ladhahbhai Patel and Rajendra Chunilal Tripathi in the year 1984⁹⁶ in Taluka Vejalpur (Ahmedabad) and further construction of 73 shades occupied by 120 occupants on the property.⁹⁷ The case mentions that after thirty-three years of continuous possession, proceedings under the Disturbed Areas Act 1991 were initiated against Ahmedbhai in 2018⁹⁸ on the allegation of non-transfer of the land, illegal occupation of land and absence of legally admissible documents.⁹⁹ The petitioner had submitted that the Disturbed Areas Act was enacted in 1991 and therefore its provisions wouldn't apply

⁸⁷ C/SCA/13041/2019.

⁸⁸ *ibid.*, 5.

⁸⁹ *ibid.*

⁹⁰ *Onali* (n 87) 8.

⁹¹ *ibid.*, 15.11.

⁹² *ibid.*, 16.

⁹³ *ibid.*, 17.

⁹⁴ R/SCR.A/733/2021.

⁹⁵ *ibid.*, 2.

⁹⁶ *ibid.*, 5.

⁹⁷ *ibid.*, 5.2.

⁹⁸ *ibid.*, 5.3.

⁹⁹ *ibid.*, 5.6.

to registered land transactions before this time period.¹⁰⁰ A Bench comprising Justice of Justice Gokani and Justice Vishen stayed orders of the Deputy Collector and Special Secretary (Appeals) Department of Revenue SSRD observing that these orders were “without jurisdiction and required to be stayed”.¹⁰¹

The examples of protests from the cities of Gujarat come from both, cases of public housing as well as of private housing. At this point, it is pertinent to theorise the nature of contemporary modes of spatial segregation (such as self-sorting behavior against urban poor rehabilitation), which is rooted in social divisions in the city.¹⁰² This demands revisiting scholarly literature which has addressed similar themes of social segregation and deep seated social divisions through competing group claims around land contestation and urban governance in divided city literature.

V. SELF-SORTING NEIGHBORHOODS AND GHETTO IN THE DIVIDED CITY

A. Divided City and Fragile Neighborhoods

The concept of a city, understood as a cosmopolitan site, is where the previous identities are superseded by the cosmopolitan anonymity.¹⁰³ The underlying logic of a newly acquired market identity in the urban setting emerges as a break from the traditional hierarchical social order.¹⁰⁴ In this view, the traditional barriers of social stratification such as ethnic difference is eroded through proximity of living and working.¹⁰⁵ With reference to the contestations over space in conflict cities, the contested city has been understood as a “major urban center in which two or more ethnically-conscious groups – divided by

¹⁰⁰ *ibid.*, 5.4.

¹⁰¹ ‘Disturbed Areas Act: HC Stays Proceedings against 72-yr-old Man’ (*The Indian Express*, 8 December 2021) <<https://indianexpress.com/article/cities/ahmedabad/disturbed-areas-act-hc-stays-proceedings-against-72-yr-old-man-7661579/>> accessed 4 November 2022.

¹⁰² One way to understand the socio-political context in which the politics of perception regarding the Act and demography change (as evident with instances of public housing and case laws in Section I) occur is through Ipsita Chatterjee’s ethnographic study in Ahmedabad on the resettlement of “class, caste and ethnic poor”. It shows the reproduction of Hindu and Muslim spaces as residents refused to “resettle” on a random statistical lottery basis which followed a mixed ethnic population. Class and Ethnic poor become significant in setting the socially divided and polarized environment in which the Act operates. See Ipsita Chatterjee, *Displacement, Revolution, and the New Urban Condition: Theories and Case Studies* (Sage Publications 2014) 86–87.

¹⁰³ Dyotana Banerjee and Mona G. Mehta, ‘Caste and Capital in the remaking of Ahmedabad’, (2017) 25 (2) *Contemporary South Asia* 182.

¹⁰⁴ *ibid.*

¹⁰⁵ A.C. Hepburn, *Contested Cities in the Modern West* (Palgrave Macmillan 2004) 1.

religion, language and or/culture and perceived history – coexist in a situation where neither group is willing to concede supremacy to the other.¹⁰⁶

The context of contested cities can be imported to “fragile cities”, which refers to micro-level neighbourhood spaces which are an important dimension of contention within the city. It is to ask – “how is fragility distributed within and between neighbourhoods?”¹⁰⁷ One of the most common focus of efforts of urban governance to mitigate fragility has been to treat symptoms and not structural factors of marginalisation, social disorganization, and inequality which has prioritized “cosmetic upgrades” and “social cleansing”(implying removal of informal settlements) in projects such as ‘Smart City’.¹⁰⁸ As is evident from self-sorting instances of public and private housing in the previous section, involving both residential and commercial properties, spatial contestations over housing and land in particular are examples of everyday conflicts which seek to maintain the status quo of a demographic area, and any proposed change is vehemently opposed by non-state actors.

Ahmedabad city has its own unique context where spatial segregation in residential patterns finds semblance with other cities. However, its persistent problem of religious disturbances at a micro level (alluding to the crucial role of religious and caste identities in everyday life) poses a tussle between the private market push as being the driving force of urban residential development and congested living as a given condition in many areas of the city. For instance, *Manubhai* (seeking to stay in one’s former residence in the aftermath of violence) speaks to the involvement of demography change in the aftermath of violence as the new status quo of demography and residential arrangement. Whereas *Feroze Falibhai Contractor* highlights the deep rooted “rehearsed divisions”¹⁰⁹ and the popular character of everyday communal connotations in which these disputes occur in disturbed areas of Ahmedabad. This is also evident from the discussion on spatial contestations around public and private housing in Section I.

In the ascription of a disturbed area in spatially segregated areas, fragility itself is a crucial feature of a contested city, where neighbourhoods as micro-sites uphold collective forms of segregated clusters of neighbourhoods and

¹⁰⁶ *ibid* 2.

¹⁰⁷ Fragility entails a social category which reflects primary sites of conflict within the city where urban governance arrangements exhibit the spatial manifestations of deteriorating governance. The previous section aptly reflects on the concept. See Robert Muggah, ‘Deconstructing the Fragile City: Exploring Insecurity, Violence and Resilience’ (2014) 26 (2) *Environment & Urbanization* 345, 346, 354.

¹⁰⁸ *ibid*, 347.

¹⁰⁹ By rehearsed divisions, Rubina Jasani implies the ethnic divisions between the two communities which operate in everyday life. Rubina Jasani, ‘A Potted History of Neighbours and Neighbourhoods in Ahmedabad’ in Edward Simpson and Aparna Kapadia (eds), *The Idea of Gujarat: History, Ethnography and Text* (Orient Blackswan Private Limited 2010) 165.

assume central importance in upholding the collective identity. The distribution of fragility in this sense does not rule out the operation of the housing market across spatially contested areas. As seen from case laws (private housing) and from the protests (public housing) in Section I, these disturbances occur in the socially rooted context of community self-sorting across neighborhoods in Ahmedabad. Thus, it is pertinent to foreground the fragility of community relations to further address the complicated question of housing as a “public good” to examine housing outcomes.

As a public good in the divided city of Ahmedabad, housing becomes a prime site of spatial segregation in the fragile city, as it thrives with the likes of the private housing market which caters to the socio-political realities of spatial segregation. This is owed more to the fact that during the 1980s, land speculators gained from the recurring riots. This reflects a causal link between violence and the land market as the makers have been re-organised in terms of their social composition along religious lines.¹¹⁰ A segregated private housing market is a visible character of Ahmedabad, reflected in forms of “clustered based living” which have forms of “gated communities” along communal lines.¹¹¹ It is where the question of governance is confronted with the fragile nature of neighbourhoods and privatizing urban spaces where residential and commercial spaces are increasingly contested in the existing dynamics of spatial segregation in the city. This simultaneous operation of capital and segregation through micro-fragile neighbourhoods questions the highly contested nature of “what constitutes public goods” within a sanctioned framework.¹¹² Such micro-fragile neighbourhoods and group contestations which originate outside conventional understanding of ghetto as bounded territory invite us to reexamine theoretical underpinnings of segregation and ghettoisation in which the Act operates.

B. Revisiting spatial segregation and ‘ghetto’ beyond territorial demarcations

Spatial segregation as a concept carries with it dual meanings and need not always imply negative effects. From a solidarity perspective, segregation implies social cohesion between communities through spatial concentration. It is vital to maintaining the threshold size through which proximity to members of the groups allows language and respective norms of the groups to be

¹¹⁰ See Bobbio (n 13) 77.

¹¹¹ See Devansh Shrivastava, ‘Mobility as a Prohibited Act: Thinking De-Segregation Through Clustered Neighborhoods and Gendered Property Ownership in *Ashant Ahmedabad*’ in A. Srivathsan, Seema Khanwalkar and Kaiwan Mehta (eds), *CEPT Essay Prize 2020* (CEPT University Press 2021) 67, 69.

¹¹² Scott A Bollens, ‘On Narrow Ground: Planning in Ethnically Polarized Cities’(1996) 13(2) *Journal of Architectural and Planning Research* 121.

maintained.¹¹³ In this sense, segregation evokes a self-sorting phenomenon as a community led social regulation in spatial terms by members of an ethnic group. In contrast, segregation implies the “attempts to keep underprivileged ethnic population out of the residential areas of the dominant group” as in the case of Apartheid South Africa where the prohibition was legislated and legally enforced.¹¹⁴

The scholarly debate on conceptualizing spatial segregation then poses the following challenge. Self-segregation in line with one’s ethnic and caste identity has been a predominant mode of making a housing choice. Self-segregation poses interesting questions for the impact of ghetto and residential mobility as the concept of ghetto broadly evokes indirect forced living. The question of how self-segregation impacts the problem of the ghetto and where the Act features in it becomes important when communities choose to self-segregate.

Here, the conceptual links between spatial sorting, indicators of polarisation and modes of residential choice by dominant communities become important. When social groups dictate residential norms and expand geographically in a communally sensitive city, it becomes pertinent to examine spatial sorting as a natural phenomenon and locating the anti-urban poor sentiment (say, beneficiaries of public housing in Section I) in the larger dynamics of polarisation in the city. As an addition to this, the factors of social exclusion and fear of violence which are shaped by collective experiences of “communal disturbances” are crucial in shaping residential preferences.¹¹⁵ From case law, one way to read instances of self-segregation between communities and groups protests, involvement of third parties and community self-sorting attempts at inter-faith property transfers is through a conceptual insight of the “ghetto effect”. It comprises of other sites within a city where the effect of the ghetto is visible in its nearby areas (in terms of pervasive mentality of suspicion and antagonism towards certain groups) where the effects of socio-geographical delimited space of a ghetto also spill beyond its territorial boundaries as a more generalized effect. This effect also structures everyday interactions with residents inhabiting the ghetto (the ‘other’).¹¹⁶ In this sense, housing options for Muslims in mixed settlements are shrinking and ghetto formation is voluntary where people choose to move to areas of their co-religionists which serves not only as a security incentive but also as a way of preserving one’s identity.¹¹⁷

¹¹³ Frederick W Boal, ‘Introduction’, in Frederick W Boal (ed), *Ethnicity and Housing: Accommodating Differences* (Ashgate Publishing Ltd 2000), 3.

¹¹⁴ *ibid* 18.

¹¹⁵ Anasua Chatterjee, ‘Narratives of Exclusion: Space, Insecurity and Identity in a Muslim Neighbourhood’ (2015) 50(52) *Economic and Political Weekly* 92.

¹¹⁶ Radhika Gupta, ‘There Must be Some Way Out of here: Beyond a Spatial Conception of Muslim Ghettoisation in Mumbai?’ (2015) 16(3) *Ethnography* 354, 356.

¹¹⁷ *ibid*.

Reading Gupta's "ghetto effect" with Waquant's emphasis on territorially bounded and forcibly relegated groups "negatively typed population"¹¹⁸ helps us situate ghetto as an effect produced through the disputes. It helps retain the tension between the cognitive dimension which dominates the community self-sorting behaviour and negative ascriptions which prevent specific communities from moving to different areas of the city. This is where the impact of disturbed areas as a regulatory measure to check growth of ghetto-like conditions assumes utmost importance in communally sensitive areas.

The patterns of residence could thus be understood as markers of conscious choices of its residents to either live in clusters or area-wise. Theoretically, social sorting can then either manifest in furthering the geographic inequality or consolidate class-based solidarity structures which severely restricts the mobility of residents. Taking the background of mutual distrust between communities as a result of multiple episodes of mass violence, social sorting itself can be seen as mediated through premediated 'choices' informing the patterns of migration intertwined with particular areas where people of one community move in. This emerges as a contemporary urban and peri-urban exclusionary problem in the rapidly urbanizing city of Ahmedabad with private market-led housing development.

Simultaneously, the city is also an emerging sight of consistent government efforts to project the city as world class in terms of infrastructural development. Efforts to do this has led to more contestation around the collective meanings of places seeking this status.¹¹⁹ For instance, in the context of Delhi, slums and squatter settlements have been "inevitable outcomes" and not the violation of the city's Master Plan. The mismatch between the plan and outcome has been referred to as "unintended cities" in which people outside the ambit of the plan (often termed as "illegal") strive to arrange basic amenities for themselves informally.¹²⁰ To foreground this mismatch in the context of disturbed areas and ghettoisation in Ahmedabad, Nandini Sundar's 'legal geography', which denotes the coming of slums as an "essential accompaniment" to the development plan of Delhi implying the criminalisation of a vast proportion of the city's proletariat class and adding the barrier of legality to their existence is important.¹²¹ Second, "the line between consent and coercion is always blurred by the structural violence that implicitly shapes 'choice'". In this sense, in the absence of legal affordable housing close to one's livelihood options, can such a move at all be voluntary?¹²²

¹¹⁸ See Laliwala (n 3) 104.

¹¹⁹ Amita Baviskar, *Uncivil City: Ecology, Equity and the Commons in Delhi* (Sage Publications 2020) 25–26.

¹²⁰ Jai Singh, 'The Left Front and the 'Unintended City': Is a Civilised Transition Possible?' *Economic and Political Weekly* (1996) (31) (45–46): 2977–2982 cited in Amita Baviskar, *Uncivil City: Ecology, Equity and the Commons in Delhi* (Sage Publications 2020), 18–25.

¹²¹ *ibid.*, 40–41.

¹²² *ibid.*, 52–53.

In the background of scholarly concepts on divided cities and its contested spaces, Sundar's legal geography and choice as a constant negotiation between consent and coercion while underscoring livelihood and safety provides a conceptual direction. It is to ask whether social segregation can cause polarization between communities irrespective of conscious decisions by residents to segregate. The tussle of residential choice between community self-sorting and the "voluntary" move to self-segregate in the context of disturbed areas speaks to the spatial development of the regulatory policy, here, evident in the operation of the Act, and a cognitive misperception.

VI. LOCATING SOCIO-SPATIAL CONSEQUENCES

The demand for the Act's imposition defeats the purpose of the Act when communities demand so, as it leads to a two-fold unintended impact. First, in the face of expanding urbanism and city limits, it reduces the prospects of better upward modes of residential mobility for the urban poor. Second, it raises questions on what constitutes a "fair" market price of land¹²³ in the absence of conflict between communities.

A. Upward mobility and the 'ghetto effect'

While thinking of the urban poor and the question of highly [spatially] contested cities, it becomes imperative to think of how distributive and redistributive policies targeting basic amenities would impact residential choices. A pressing concern with regard to the need for an ethnically sensitive housing policy, which targets parts of urban areas generally neglected by the private market, has been highlighted by scholars arguing for accommodating ethnic differences in housing. In doing so, the often-sought response has been through state intervention.¹²⁴ The question of social sorting, residential arrangements and segregation then, in accordance with specific caste, ethnic, religious or racial identity, has become pressing in urbanizing spaces of Ahmedabad for two primary reasons.

One, self-sorting (informal zoning tactic) by communities also operates through segregated housing markets. It also shapes demand from dominant communities seeking legal means (such as the demand of the Act's imposition in Section I) to negotiate with the state's relocation of the urban poor. In

¹²³ As per the Act, in principle, fair value in a consenting transaction implies the absence of conditions which signify a distress sale. However, as the case laws under commercial property disputes suggest, many external factors too impact the value of a property in market because of the ascription of disturbed area.

¹²⁴ Richard Tomlins, 'Addressing the Housing Needs of Minority Ethnic Communities: Towards a Pluralistic Ethnic Housing Policy', in Frederick W Boal (ed), *Ethnicity and Housing: Accommodating Differences* (Ashgate Publishing Ltd 2000), 163.

addition, it seeks to prohibit prospects of upward residential mobility as evident in the *SNA Infraprojects* case and the *Onali Ezazuddin case*. Two, social sorting as a crucial feature of stratification in residential living in India too needs to be examined against the impact of private market. This could well be thought of as informal factors (say community self-sorting) conditioning the dynamics of market which impacts not only public housing but also private housing.

It is in this sense, informal zoning tactics by dominant communities and the Act's operation is evocative of restricted choices for ethnic minorities, who do not have the freedom to relocate to areas with better services and quality of life, resulting in self-segregation. It is so since the class dominance of different competing groups in the form of spatial contestation in residential and commercial market is a visible feature of many highlighted mixed areas of Ahmedabad. A significant policy issue to be considered here is that of disparate consequences of the Act and its tussle with other policies which advocate inclusivity.¹²⁵

B. Property value and fairness

Property value emerges as a common significant factor from the case laws. It applies to both residential and commercial properties. An important question is – how can a fair market value of commercial property to be mortgaged be assessed when it is compromised by declaration of an area as disturbed, following which a financial institution too devalues it? When imported to the context of infrastructure in ghetto area, the knowledge that a particular commercial property is located in a designated disturbed area lowers its market value. This brings back our focus on one of the main objectives of the Act – ‘fair value’.¹²⁶

The non-grant of permission by the Collector in a proposed sale gives sufficient insight as to how external considerations of population increment of one community and its equation with future communal tension features into

¹²⁵ One such example is the introduction of the anti-discrimination clause in Real Estate (Regulation and Development Act), 2016. The clause prohibits builders from refusing to sell their apartments based on buyer's caste ethnicity, gender, religion, or dietary preferences (See Vithayathil T, Singh G and CK Pradhan, ‘Only ‘Good People’, Please: Residential Segregation in Urbanising India’, in Sujata Patel and Omita Goyal (eds), *India's Contemporary Urban Conundrum* (Oxon 2019) 50). Reading the operation of RERA anti-discrimination clause in disturbed areas of Gujarat demands a thorough empirical investigation to juxtapose the question of property prohibitions and anti-segregation policy move under the RERA amendment.

¹²⁶ In the context of residential property, it finds semblance with Kulshrestha's argument on the “anti-informal settlement sentiment” where residents of neighbouring areas have protested on grounds of property value reduction and lowering of rents. See SK Kulshrestha, *Urban Renewal in India: Theory, Initiatives and Spatial Planning Strategies* (Sage Publications 2018) 12.

the depreciation of property values. Also, while considering such depreciation, prior to and after the allocation of public housing to the urban poor situated in a disturbed area, close attention should be paid to the dynamics of property transfer through public and private housing, the nature of disputes under the Act in these circumstances, and the role of residents in neighbouring areas in dictating self-sorting terms.

The example of Juhapura (ghetto, situated in west Ahmedabad) is telling in this case. Laliwala et al. inform us that banking services have come to the area from 2005 onwards and public banks in particular have come in the recent decade.¹²⁷ If one negotiates the delayed arrival of banking and financing servicing services to Juhapura against the description of depreciation in property values in disturbed areas as seen in the *Vadodara Stock Exchange Ltd (VSEL) and Network Engitech (P) Ltd.* case, then there is a greater need to rethink the intended objectives of the Act as it frustrates the support of state's institutions due to market based fluctuations in property values.

Juhapura's credit and mortgaging system opens up an important avenue to explore on how segregation and the extension of the Act impacts financial situations in such areas.

However, it is not causality or correlation of delayed public services that is being linked to the Act's imposition in the area. Rather, it is the reading together of a larger property devaluation sentiment (the Act as a legal cover by dominant communities to prevent people from preventing from public housing), to that of most basic banking functions such as mortgaging, loans and property valuations which sustain several small and medium businesses in these areas. It is worth importing the facts around ethnic identity, collective mobilisation and the demand for the Act's imposition from the *SNA* case, the *Firozibhai* case and others, to the arguments in Section I on going beyond the spatial dimensions of thinking about ghettos (Radhika Gupta's "ghetto effect"). It is to arrive at the importance of social construction of disturbance and its disproportionate impact on residential choice, property value and fairness. It helps us examine how property value variations (fluctuations) occur in areas which witness such collective forms of protest in which thousands mobilise to prevent one ongoing immovable property transaction between consenting parties.

VII. CONCLUSION

In the context of the divided and globalizing city, this paper contributes to the emerging scholarly literature on spatial segregation and ghetto-like conditions in light of the spatial development of the Disturbed Areas Act, 1991. It

¹²⁷ Kulshrestha (n 126).

has engaged with case laws pertaining to disturbed areas and their institutional interpretation by drawing attention to the spatial implications of the Act. The socio-legal examination has drawn attention to the disproportionate impact of the Act, ranging from its institutional interpretation to informal tactics of zoning by dominant communities, which exacerbate existing inequalities pertaining to housing access, affordability, and individual residential mobility in urbanizing spaces.

The social inequalities of the limited freedom to move in the city, as seen from examples in various cities of Gujarat, is eventually perpetuated in the process, as an “unintended consequence” of the Act, and tends to further ghettoise the minority groups with limited options of residential choice. In arguing so, the operation of the Act echoes the phrase “unintended consequence to an explicit goal”, from Huse’s study on gentrification in Norway.¹²⁸ The blanket application of the Act raises more questions about its intent and conduct through State’s institutions, than it answers about the impact of the policy on ghettoisation. External socio-political considerations which inform practices of spatial segregation impact the operation of the Act, as is evident from public and private housing instances.

It raises several social concerns reinforcing manifestations of spatial segregation and inequality. This is where, in the background of spatially contested and communally demarcated areas, the onus of intervention and change through inclusive policy response comes back to the State. Also, it needs to be noted that a legal challenge to every dispute is not a feasible means for aggrieved parties in a general hostile environment for different religious individuals/communities who wish to move (relocate) to certain areas for gaining upward mobility in extremely limited residential options. A former Chief Minister’s statement, “A Muslim selling property to a Hindu is also not okay” produces long term ramifications when considering the impact of the Act particularly in the recent decade.¹²⁹ Arguably, it can be inferred that such a tussle does severe damage to rehabilitation prospects of Chatterjee’s “ethnic poor”, and definitely caters to dominant communities and segregated markets. The informal zoning tactics and the perception against the demography change clause in the Amended Act, dilute the possibilities of residential mixing by advocating separation between communities. As the cities, and subsequent intra-city migration patterns expand, any emerging community-led self-sorting sentiment should not override public housing schemes targeting the urban poor through the imposition of a law which was primarily enacted to prevent spatial segregation.

¹²⁸ Tone Huse, *Everyday Life in the Gentrifying City: On Displacement, Ethnic Privileging and the Right to Stay Put* (Routledge 2016) 54.

¹²⁹ See Laliwala (n 3) 104.

GENDER DATA GAPS IN AGRICULTURE AND LAND OWNERSHIP: UNCOVERING THE BLIND SIDE OF POLICYMAKING

—Mahiya Shah & Soumya S*

With the introduction of the Sustainable Development Goals in 2015, world leaders have pledged to gender equality by mainstreaming gender into national statistical strategies and prioritising data collection. This makes it evident that the role of data in society is enormous, despite its effects being seemingly invisible in plain sight. In a country like India, where more than half the population engages in the agricultural sector, most of whom are women, accurate data on gender inequality in land ownership is vital for gauging progress on women's economic empowerment. Despite this, a glaring gender-data gap is visible concerning women in agriculture. Studies have not been able to assess the full extent of this gap, primarily because the current estimates based on national-level data sets can be limited or severely misleading. The limitations of currently available data are reflected in inconsistent datasets and policies that neglect the contribution of women on farms and deprive them of land rights, which in effect, ignores their unique position in society and the economy. This paper, while exploring the intersections of gender and religion, discusses the importance of bridging the gender-data gap in policymaking and the ill effects of the same not being done by examining the plight of the invisible female farmers in India. It also briefly looks into the missing data on land owned by women whilst exploring the complexities caused due to personal laws, which deprive them of basic rights meant to be available to titleholders.

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I. INTRODUCTION

“There is no data available”. This is a common government response for a wide range of issues, be it the prevalence of female genital mutilation in India,¹ deaths due to oxygen shortage during the Covid-19 pandemic,² or manual scavenging.³ Behind this often-blatant assertion that no data exists lies a bigger problem. Governments and public bodies use this as a loophole to shirk responsibilities and dismiss real issues.

The role of data in society is enormous, even though its effects seem invisible. Data helps track social and developmental goals and provides insight into the success of policies. Most importantly, data highlights the challenges marginalised people face. Due to a lack of political agency and representation, the realities of marginalised people go unnoticed. It is this gap that data can attempt to fill.⁴ This implies that a lack of data may even lead to the denial of the basic rights of citizens.⁵ The demand by policymakers, researchers, and NGOs is not merely for data but comparable and reliable data that is available at reasonably frequent intervals. This paper will primarily deal with data and land ownership in the case of Indian women.

¹ Shalini Nair, ‘No Official Data on Existence of Female Genital Mutilation in India, Centre Tells SC’ *The Indian Express* (New Delhi, 28 December 2017) <[² Isha Sahai Bhatnagar, ‘No State Reported Deaths Due to O2 Shortage During Pandemic: Health Ministry’ \(*Hindustan Times*, 8 February 2022\) <<https://www.hindustantimes.com/india-news/no-state-reported-deaths-due-to-o2-shortage-during-second-covid-wave-says-union-minister-101644313026044.html>> accessed 5 March 2022.](https://indianexpress.com/article/india/no-official-data-on-existence-of-female-genital-mutilation-in-india-centre-tells-sc-5001780/#:~:text=In%20response%20to%20a%20writ,existence%20of%20FGM%20in%20India.> accessed 5 February 2022.</p>
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³ Malavika Murali, ‘No Manual Scavengers in Country anymore, Govt Tells Parliament’ (*Hindustan Times*, 12 August 2021) <<https://www.hindustantimes.com/india-news/no-manual-scavengers-in-india-anymore-govt-101628662829042.html>> accessed 5 March 2022.

⁴ Umar Serajuddin and others, ‘Data Deprivation, Another Deprivation to End’ (2015) World Bank Poverty Global Practice Group & Development Data Group Policy Research Working Paper 7252, <<http://hdl.handle.net/10986/21867>> accessed 5 October 2021.

⁵ Independent Expert Advisory Group on a Data Revolution for Sustainable Development (IEAG), ‘A world that counts: Mobilising the data revolution for sustainable development’ (IEAG 2014).

Land ownership, especially agricultural land ownership, is central to ensuring women's economic and social security and the well-being of families. Studies have discussed the role of women in agriculture as key to achieving sustainable and productive food systems and ensuring household food security.⁶ Globally, and in developing countries, women constitute 43% of the agricultural workforce.⁷ However, while women participate in 50% of farm labour, they only possess 15% of the farmland.⁸

Unfortunately, there is no conclusive evidence to establish why the gap in labour participation and land ownership exists even when our inheritance laws are, at first glance, gender-equal. This paper argues that a gender-data gap concerning women farmers is glaringly visible, leading to an improper understanding of the exact challenges they face in owning land. Inconsistent datasets and policies that neglect the contributions of women on farms reflect how gender data gaps deprive women of land rights. This, in effect, ignores their unique position in society and the economy.

This paper discusses the importance of bridging the gender-data gap in policymaking by analysing ownership of agricultural land by women farmers in India. Part II examines what gender data gaps are and how they affect policy by relying on examples from Indian policy. Part III analyses the invisible position of women in agriculture and explores how the lack of consistent data on women farmers deprives them of resources and beneficial government schemes. Part IV explores how the complexities of law deny women of ownership of property and how grossly inconsistent data sets compound this situation. This paper concludes by observing that, first, a large data gap in the ownership of agricultural land by women exists, cutting across intersections, and that data is one of the most crucial tools in understanding the extent of ownership. Second, progressive inheritance laws alone cannot answer the problems surrounding Indian women's land ownership. Policymakers must collect and use data carefully and efficiently to uncover loopholes in existing laws and envision truly equal laws.

II. GENDER DATA GAPS AND THE INDIAN SCENARIO

Data can reflect the needs of society and can be used to inform law and policy. Every step of the policymaking process, from agenda-setting to the identification of needs, and the search for solutions and implementation, is affected

⁶ Sonia Akter and others, 'Women's Empowerment and Gender Equity in Agriculture: A Different Perspective from Southeast Asia' (2017) *Food Policy* 270.

⁷ Chery Doss, 'If Women Hold Up Half the Sky, How Much of the World's Food do They Produce?' (2014) *Gender in Agriculture* 69.

⁸ Joint Secretariat of the UN Decade of Family Farming, 'Putting Family Farmers at the Centre to Achieve the SDGs' (FAO and IFAD 2019), <www.fao.org/3/ca4532en/ca4532en.pdf> accessed 5 October 2021.

and shaped by data.⁹ Governments face various complex challenges: global warming, rising violence, refugee crisis and growing inequality. These challenges stretch policymaking and governance capabilities beyond limits, necessitating new ways to arrive at the best possible solutions.¹⁰ Colossal data gaps remain everywhere, leaving thousands of people and groups uncounted and uncared for. These gaps limit the government's ability to act in the interests of the people.¹¹

Policy-making lags in harnessing the true power of data in policy creation, where data-driven decisions are the exception rather than the norm.¹² This, compounded by policymakers' limited knowledge of the potential of data, technical weakness, privacy concerns, and an overall lack of quality data, has weakened arguments for data-driven policymaking.¹³ The data sector has grown tremendously with concepts like big data, predicted to transform society on a scale comparable to the industrial revolution.¹⁴ Such developments in the technological arena are also changing the way policies are made and the way they affect citizens. While big data offers efficiency and expediency, there are concerns about ethics and privacy. Big data or any kind of data collection brings with itself ethical and privacy concerns that require specific attention. These issues are beyond the scope of this paper.

A. Data and Gender: What is the connection?

Besides the developments discussed so far, there is an aspect within data and data collection that reflects broader fault lines in societies. Data in most scenarios is understood and analysed as 'uniform', obfuscating the inherent gendered differences in the society it is sourced from.¹⁵ This is understood as a 'gender data gap'. The phrase 'gender data gap' conveys the idea that the majority of data available is based on the male body and male life patterns.¹⁶ It is a "phenomenon whereby the vast majority of information that we have collected globally and continue to collect – everything from economic data to

⁹ Stefaan G Verhulst, Zeynep Engin and Jon Crowcroft, 'Data and Policy: A New Venue to Study and Explore Policy-Data Interaction' (2019) 1 *Data & Policy* <www.cambridge.org/core/journals/data-and-policy/article/data-policy-a-new-venue-to-study-and-explore-policydata-interaction/11718D04E3BA94C7EB87891ACF96D519> accessed 27 September 2021.

¹⁰ *ibid.*

¹¹ IEAG (n 5).

¹² Verhulst (n 9).

¹³ *ibid.*

¹⁴ Neil M Richards and Jonathan King, 'Big Data Ethics' (2014) *Wake Forest Law Review* 393.

¹⁵ Sarah E Oerther, 'Gender Data Gaps: Structural Equation Modeling Offers an Alternative to Collecting More Data' (2015) *Humanitarian Technology* 494, 495.

¹⁶ Katie Goh, 'What is the Gender Data Gap – And How can We Tackle it? With Caroline Criado-Perez' (*Huck Magazine*, 8 March 2019) <www.huckmag.com/perspectives/activism-2/what-is-the-gender-data-gap-caroline-criado-perez/> accessed 28 September 2021.

urban planning data to medical data – have been collected on men.”¹⁷ Due to the under-representation of females, inferences are made about the data collected in male-dominated research to inform practice and policy for women.¹⁸

The reason gender data gaps exist is that gender biases have inhibited and affected data collection.¹⁹ Gender data gaps, when superimposed on the highest decision-making powers in the land, may lead to disastrous consequences where the needs and concerns of other genders are ignored or left out. This leads us to a critical point- data can reflect prevailing power structures and norms.²⁰ In short, data that does not consider women may not reflect whether policies for their development and advancement have any effect, making it difficult to measure progress towards gender equality.

By providing a numerical representation of realities, gender statistics in particular are important as they record data disaggregated by sex, laying bare the differences between men and women.²¹ Beyond a mere disaggregation by sex, gender-sensitive analysis of statistics helps question the underlying gender relations reflected in the data.²² In a situation where decision-making is outsourced to algorithms trained on data with biases and knowledge gaps, the disadvantage women face increases.²³

Policymakers may also be unable to see the relevance of the gender perspective as they lack reliable and unbiased data on the individual contributions of women to society and the economy.²⁴ Women’s labour tends to be excluded from economic accounts even though they are the pillars of subsistence economies and pivotal to food security.²⁵ Women make up most of the economy of unpaid care work, which is not accounted for or regarded as productive work that contributes to the economy. Gender statistics on unpaid labour are also

¹⁷ International Telecommunication Union News, ‘Bridging the AI gender gap: Why we Need Better Data for an Equal World’ (*ITU*, 25 September 2020) <www.itu.int/en/myitu/News/2020/09/25/07/06/AI-for-Good-Breakthrough-Days---gender-data-gap> accessed 5 October 2021.

¹⁸ Orlaith Curran, Aine MacNamara and David Passmore, ‘What about the Girls? Exploring the Gender Data Gap in Talent Development’ (2019) *Front. Sports Act. Living* <www.frontiersin.org/articles/10.3389/fspor.2019.00003/full> accessed 28 September 2021.

¹⁹ Sarah Oerther (n 15).

²⁰ Miriam Temin and Eva Roca, ‘Filling the Gender Data Gap’ (2016) *Studies in Family Planning* 264.

²¹ Sreerupa Sengupta and Sutanuka Dev Roy, ‘Data Equality to Gender Equality’ (2018) *ASCI Journal of Management* 111.

²² *ibid.*

²³ Caroline Criado Perez, ‘We Need to Close the Gender Data Gap by Including Women in Our Algorithms’ (*Time* 2020) <<https://time.com/collection/davos-2020/5764698/gender-data-gap/>> accessed 5 October 2021.

²⁴ FAO, *Agricultural Censuses and Gender Considerations - Concept and Methodology* (FAO 1999) <<https://www.fao.org/3/x2919e/x2919e03.htm#b3-1.3%20MEETING%20USERS'%20NEEDS>> accessed 28 March 2022.

²⁵ *ibid.*

critical for formulating and monitoring policies to increase women's involvement in paid work.²⁶ The lack of such data leads to the formulation of inefficient policies on employment and affects the already vulnerable workers of the economy of unpaid care work.

Women in rural sectors of developing countries like India are particularly impoverished. Sustainable development methods have been implemented in these areas to balance productivity and protection of natural resources, boost incomes, and increase food security.²⁷ However, these policies aimed at upliftment seem to have aggravated poverty and worsened the condition of women. An important reason is that development policies are generally formulated in terms of economic criteria overlooking social and human parameters.²⁸ Government surveys do not cover data on the forms of work women do, and consistent guidelines on sex-disaggregated data collection for these topics are unavailable.²⁹ As a result, agricultural statistics frequently under represent or even remove elements critical to understanding rural sector operations and development.³⁰ This drastically limits planners' understanding of the real situation in rural economies and inhibits their ability to respond to gendered issues effectively.

1. *Sustainable Development Goals and the Data Revolution in the Context of Agriculture*

The United Nations Sustainable Development Goals ('SDGs') and its predecessor, the Millennium Development Goals, are effective examples of how data gaps are addressed and tackled. These programmes emphasise the importance of data gaps as a focus area internationally. The SDGs were introduced in 2015, charting out a plan for the growth and development of world society by 2030. The 2030 Agenda specifically calls for a *data revolution* for sustainable development. It calls on governments, policymakers and the international community to improve data collection and dissemination, and modernise and innovate national statistics systems.³¹ The agenda promotes partnerships of multiple stakeholders to mobilise resources and effort for capacity building,

²⁶ *ibid.*

²⁷ OECD, *Gender and the Environment: Building Evidence and Policies to Achieve the SDGs* (OECD 2021) 145-158.

²⁸ Food and Agriculture Organization, 'The Importance of Sex-Disaggregated Data for Agricultural and Rural Development' (Rome, FAO 2002).

²⁹ Anon, 'Gender Data: Sources, Gaps, and Measurement Opportunities' (Data2X, 2017) <<https://www.data4sdgs.org/sites/default/files/2017-09/Gender%20Data%20-%20Data4SDGs%20Toolbox%20Module.pdf>> accessed 19 June 2022.

³⁰ The paper, in s IV(E), will discuss how lack of gender-disaggregated data on agricultural land, and on joint-ownership provide an incomplete picture of how India's agricultural sector operates.

³¹ United Nations, 'Implementing 2030 Agenda Requires 'Data Revolution' to Address Gaps in Collection, Quality, Secretary-General Tells Development Committee, Urging New

while emphasising the importance of data for sound decision-making.³² Thus, the data revolution is an opportunity to harness the power of data in decision making, accountability, and to close the gaps in the access and use of data.³³ Data gaps that exist among the more developed and under-developed countries, private and public sectors, and even citizens and their governments can be bridged.

The SDGs were preceded by the Millennium Development Goals ('MDGs') (2000-2015), stressing the importance of bringing gender perspectives to developmental activities.³⁴ An essential emphasis of the MDGs was to promote the collection of gender-disaggregated data and other gender-based indicators in analysing whether or not inequalities had varied over time.³⁵ India's final report on MDGs expressed the need for creating better approaches to surveying and expanding data sources to identify more vulnerable sections of society.³⁶

SDG5, which deals with the achievement of gender equality and women empowerment, requires data inclusivity and collection of data in all areas of women's activities. This contributes to mainstreaming gender in all development goals. In the context of agriculture, there are two important indicators under SDG5 - Indicators 5.a.1 and 5.a.2. Indicator 5.a.1 deals with the proportion of the total agricultural population with ownership or secure rights over agricultural land by sex. Indicator 5.a.2. deals with the share of women among owners or rights-bearers of agricultural land by type of tenure and proportion of countries where the legal framework (including customary law) guarantees women's equal rights to land ownership and/or control. These indicators, especially 5.a.2., stress the need to collect data disaggregated by sex to specifically understand how gender equality has progressed in relation to legal systems that govern land.

The SDGs and their call for data revolution are undoubtedly positive steps toward tackling gender-data gaps, but it is limited by the fact that these are not legally binding³⁷ on any country. This means that countries must voluntarily establish frameworks, strive towards these goals, and bring together all the stakeholders to work in tandem.

Partnerships' (UN Meetings Coverage and Press Releases, 2015) <<http://www.un.org/press/en/2015/sgsm17208.doc.htm>> accessed September 29 2021.

³² UN Women, 'Gender Equality and Big Data: Making Gender Data Visible' (UN Women 2018).

³³ IEAG (n 5).

³⁴ Sreerupa and Sutanuka (n 21).

³⁵ *ibid.*

³⁶ Ministry of Statistics and Programme Implementation, Government of India, 'Millennium Development Goals-Final Country Report of India' (MOSPI 2017) <http://mospi.nic.in/sites/default/files/publication_reports/MDG_Final_Country_report_of_India_27nov17.pdf> accessed 5 October 2021.

³⁷ United Nations, 'The Sustainable Development Agenda' <<https://www.un.org/sustainabledevelopment/development-agenda-retired/>> accessed 28 March 2022.

B. Data in Policymaking: Examples from India

The Mewar Angithi in the state of Rajasthan illustrates the importance of gender-specific data collection in India. The Mewar Angithi is a basic metal device created to be installed in a traditional *chulha* (brick or earthen stove) to give the same airflow mechanism as traditional *Angithi* (fireplace) and High-Efficiency Cook stoves ('HECs'). Despite the heavy promotion and the supposed 'high efficiency' of HECs, the government failed to persuade the women in Rajasthan to make the switch. HECs, as it turned out, required more maintenance and could not accommodate the many cooking styles practised in the region, which women who generally run the kitchen would know more about. The design of the product to be used by women did not even attempt to take into account the requirements and concerns of women. Climate Healers, an NGO based in Phoenix, looked into this data gap and decided to ask women what they expected from a *chulha*, leading to the birth of a 3-stone hearth – the Mewar Angithi. This new device was cheap, safe, and accommodated a Rajasthani household's cooking requirements.³⁸

The Mewar Angithi achieved the HEC's goals of reducing smoke production and the health hazards caused by a traditional *chulha*. The only difference between the government's HEC distribution program and the Mewar Angithi distribution program was that the latter paid heed to women's views in the data collection process, and the scheme they designed using that data proved to be more efficient.

Unlike the home building scheme after the Gujarat earthquake of 2001, where homes were built without kitchens due to the lack of women in the planning process, the Mewar Angithi illustrates the ease with which policymakers can ensure effective planning and implementation by taking into account the issues that concern women.

Not all policies have made this positive shift. For instance, the Mahatma Gandhi National Rural Employment Guarantee Act, the country's largest employment policy, only collects sex-disaggregated data on the total person-days worked. There is no gender-specific data on supportive services, salary, or employment length. While the program provides gender-disaggregated statistics on training sessions completed and the beneficiaries trained, it misses out on the types of training provided to males and females. The availability of such data could aid in assessing whether skill mismatches amongst women

³⁸ Sailesh Rao, 'The Mewar Angithi: A \$1 Device that Transforms a Traditional Chula into a High Efficiency Cook Stove' (*Climate healers*, 2015) <<https://climatehealers.org/blog/2015-8-9-the-mewar-angithi-a-1-device-that-transforms-a-traditional-chula-into-a-high-efficiency-cook-stove/>> accessed 5 October 2021.

workers are shrinking their employment opportunities. This can then help design targeted, skill-specific programmes to fix this mismatch.³⁹

In another instance, the National Rural Livelihood Mission aims to reach out to 89 million rural poor households to organise one woman per home into Self Help Groups to commence organic farming activities. According to the Ministry of Rural Development's circular, "a total of 57,270 Mahila Kisan have been registered for organic farming through 5816 Local Groups."⁴⁰ Under the State Rural Livelihoods Mission and Mahila Kisan Sashaktikaran Pariyojana (MKSP), the same circular names almost 14.03 lakh women farmers. As can be seen, women are leading the efforts to achieve the government's organic farming goals.

In the fiscal year 2018-19, however, the overall budgetary allocation for MKSP was just Rs 1,000 crore.⁴¹ The trends since 2014 reveal that not only does the policy framework suffer from low levels of allocation and spending, but that the government's priorities in the agrarian sector, particularly concerning women farmers, remain misguided. The overall allocation for women farmers in 2018-19 under the initiatives mentioned above accounted for 2% of the Ministry of Agriculture and Farmers' Welfare's total expenditure that year.⁴²

The income guarantee program of Rs 6,000 per annum under the Pradhan Mantri Kisan Samman Nidhi Yojana introduced in the Interim Budget for farmers holding less than 2 hectares of land falls outside the framework because most women in agriculture do not own land.⁴³ Without dedicated programs for women farmers, the government has been unable to bridge gaps in land and asset ownership, wage disparities, supportive infrastructure, access to financing, subsidised fertilisers, and recognition of entitlements, among other issues.

III. INVISIBLE WORKERS IN AGRICULTURE

According to the United Nations Food and Agriculture Organization ('FAO'), "if women had the same access to productive resources as men, they

³⁹ Surbhi Singh and others, 'Women and Work: How India Fared in 2020' (IWWAGE, 2021) <<https://iwwage.org/wp-content/uploads/2021/01/Women-and-Work.pdf>> accessed 5 October 2021.

⁴⁰ Ministry of Rural Development (2012), Press Release: Year End Review of Deen Dayal Antyodaya Yojana - National Rural Livelihoods Mission at: <<https://pib.gov.in/PressReleasePage.aspx?PRID=1558460>>.

⁴¹ Sakshi Rai, 'Missing: The Woman Farmer' (CBGA, 14 February 2019) <<https://www.cbgaindia.org/blog/missing-woman-farmer/>> accessed 28 January 2022.

⁴² Department of Agriculture, Cooperation & Farmers Welfare, *Annual Report 2018-19* (Ministry of Agriculture & Farmers Welfare Government of India, 2019).

⁴³ Ministry of Finance (2019), Press Release: Highlights of Interim Budget 2019-20 at: <<https://pib.gov.in/Pressreleaseshare.aspx?PRID=1562187>>.

could increase yields on their farms by 20-30%.⁴⁴ This could, in turn, lead to an increase in agricultural output in developing countries by up to 4%, which would, in turn, lower the number of hungry people in the world by approximately 17% or 150 million people globally.⁴⁵

The National Commission of Farmers in The National Policy for Farmers defined the term “farmer” as

*a person actively engaged in the economic and livelihood activity of growing crops and producing other primary agricultural commodities and will include all operational agricultural holders, cultivators, agricultural labourers, sharecroppers, tenants, poultry and livestock rearers, fishers, beekeepers, gardeners, pastoralists, non-corporate planters and planting labourers, as well as persons engaged in various farming-related occupations such as sericulture, vermiculture and agro-forestry. The term will also include tribal families/persons engaged in shifting cultivation, and in the collection, use and sale of minor and non-timber forest produce.*⁴⁶

However, in India, people usually picture a man in the field holding a sickle or hoe when they think of ‘farmers’. Politicians, such as Prime Minister Narendra Modi himself, in their public rallies too, refer to farmers as ‘*bhaiyo*’, which has further contributed to the depiction of this profession as a male-dominated one when the agricultural sector employs nearly 80% women workers.⁴⁷

This significant participation of women in agriculture is due to a growing trend towards urbanization, which has seen men from rural areas migrating to cities in search of better-paying jobs. This has left women, who remain in villages, to take care of the land and engage in agrarian labour, including producing seedlings, sowing, weeding, transplanting, threshing and harvesting.⁴⁸ This growing shift of the male work force towards non-agricultural jobs places the entire burden of farm management on women’s shoulders, and in most cases, women in agriculture are disadvantaged workers. They may be casual

⁴⁴ Food and Agriculture Organization, ‘The State of Food and Agriculture 2010-2011’ (Rome, FAO 2011).

⁴⁵ *ibid.*

⁴⁶ Department of Agriculture & Cooperation, ‘National Policy for Farmers’ (Minister of Agriculture & Consumer Affairs Food and Public Distribution Government of India, 2007) 4.

⁴⁷ Government of India (2012), ‘Press Note: Key Indicators of Employment and Unemployment 2011-2012’, Delhi: Press Information Bureau, <<http://pib.nic.in/newsite/erelease.aspx?relid=96641>> accessed on 5 October 2021.

⁴⁸ Bina Agarwal, ‘Gender and Land Rights Revisited: Exploring New Prospects via the State, Family and Market’ (2003) 3(1-2) *Journal of Agrarian Change* 184.

labourers or self-employed workers, who, in contrast to self-employed men, are mostly unwaged workers on family farms owned by men. In most cases, women do not own or control farmland.⁴⁹ The following section will examine how the contribution of women in the agriculture sector is also not accounted for by government datasets, and the consequences of such exclusions.

A. Consequences of the Exclusion of Women Farmers' from Datasets

The data collected by the government does not appropriately account for the contribution of female workers to the agriculture sector, which amounts to a significant 15.4% of the national economy.⁵⁰ This has led to an invisible 'gendered' problem in agriculture. National sample surveys that the government carries out often tend to categorise women farmers or entrepreneurs as mere housewives, whereas men in the same occupations are considered employed.⁵¹ The classification of these women as 'housewives' reflects an underlying perception that they do not work or contribute to the nation's economy.

Thus, even when women effectively operate the farms, they face a significant male-bias in accessing loans, information on new technology and techniques, irrigation, inputs, and markets. This has consequences for farm productivity, as according to a 2019 study in *Science*,⁵² agricultural information delivered via cellphones increased the odds of farmers adopting recommended inputs by 22% and yields by 4% across countries, including India. However, women are less likely to gain from such developments as fewer women than men own mobile phones, and even fewer have internet access.⁵³ This is merely an example of how there are consequences for farm productivity when a farmer has inadequate access to information and resources, and as a result, women are likely to be affected negatively.

This lack of recognition of female farmers is also why, for example, suicides by female farmers in India are also under-reported. In several states, including the agriculture-based states of Punjab and Haryana, the National Crime

⁴⁹ *ibid.*

⁵⁰ Neeta Lal, 'India's Invisible Women Farmers' (*The Diplomat*, 14 January 2021) <<https://thediplomat.com/2021/01/indias-invisible-women-farmers/>> accessed 30 September 2021.

⁵¹ Neerad Deshmukh and others, 'Improving the Measurement of Women's Work: Sensitivity of Work Participation Rates to Survey Design' (NCAER, 2020).

⁵² R Fabregas and others, 'Realizing the Potential of Digital Development: The Case of Agricultural Advice' (2019) *Science* 366 <<https://pubmed.ncbi.nlm.nih.gov/31831641/>> accessed 29 January 2022.

⁵³ Purvi Mehta, 'Empowering India's Women Farmers: Bridge the Gap' (*Hindustan Times*, 28 March 2022) <<https://www.hindustantimes.com/ht-insight/economy/empowering-india-s-women-farmers-bridge-the-gap-101647511783243.html>>; Anoo Bhuyan, '4 in 5 Bihar Women Have Never Used the Internet' (IndiaSpend, 17 December 2020) <<https://www.indiaspend.com/gendercheck/4-in-5-bihar-women-have-never-used-the-internet-702855>> accessed March 25, 2022.

Records Bureau ('NCRB') recorded zero women farmer suicides even though they are agricultural states with thousands of female farmers. Despite the fact that women comprise well more than half the agricultural workforce, in 2019, out of 5,957 farmer suicides, a total of 5,563 were male, and 394 were reported to be female. Among agricultural labourers,⁵⁴ NCRB reported 4,324 suicides in 2019, of which 3,749 were male, and 575 were female.⁵⁵ The NCRB is the only government agency that collects and analyses crime data, which includes death by suicide. However, its statistics are not an accurate representation of the reality in this area, due to which this data is unreliable.

Since women lack recognition as farmers, widows also face difficulty obtaining the rights to the land they have cultivated. According to a survey conducted by the Mahila Kisan Adhikar Manch, approximately only 35% of widowed women had tied down the rights to their family house, and 33% of these widows were not even aware that they qualified for a pension.⁵⁶ Such figures further corroborate that women are prevented from accessing institutional rights and the land they are entitled to, since they are not conventionally 13igitel3d as farmers.⁵⁷

Additionally, a lack of data and recognition also prevents the formation of new gender-specific policies to aid female agricultural workers. For instance, in 2011, M.S. Swaminathan introduced the Women Farmers Entitlement Bill to provide for the gender-specific needs of women farmers. It aimed to protect their entitlements, and empower them with rights over agricultural land and water resources and access to credit, among other things.⁵⁸ The bill, however, lapsed in 2013 due to the absence of sufficient government support. The National Policy on Farmers 2007,⁵⁹ along with improving the economic viability of farming, also sought to pledge high priority to the "recognition and mainstreaming of women's role in agriculture" and incorporate "gender issues" in agriculture. Unfortunately, its implementation has been very abysmal as the conditions of female farmers are still below par.

These conditions seem to have worsened due to the pandemic, which has left women workers more economically vulnerable than their male

⁵⁴ Farmer/cultivator are those whose profession is farming and include those who cultivate on their own land as well as those who cultivate on leased land/other's land with or without the assistance of agricultural labourers. On the other hand, 'agricultural labourers' are those who primarily work in the farming sector agriculture/horticulture) whose main source of income is from agriculture labour activities.

⁵⁵ National Crime Records Bureau, 'Farmer Suicides in India' (NCRB 2020).

⁵⁶ Mahila Kisan Adhikaar Manch, 'Social Security of Women Farmers from Suicide Affected Households: A Situational Analysis' (MAKAAM, 2018) <<http://www.soppecom.org/pdf/Farmer-suicide-survey-makaam-survey-english.pdf>> accessed 12 October 2021.

⁵⁷ *ibid.*

⁵⁸ The Women Farmers' Entitlements RJ Bill (2011) Bill No. LV of 2011.

⁵⁹ National Policy (n 46).

counterparts. The Centre for Monitoring Indian Economy (CMIE) reported that women accounted for 10.7% of the workforce in 2019-20 but suffered 13.9% of the job losses in April 2020, the first month of the lockdown.⁶⁰ By November 2020, while most men recovered their lost jobs, women were less fortunate. 49% of the job losses by November were of women.⁶¹ The economy's recovery seemed to have benefitted all, but it benefitted women less than it did for men. These statistics led most people to believe that the pandemic caused women to 'disappear' from India's labour sector, when this is in reality a fallacy caused by inefficient data collection.

IV. MISSING DATA ON LAND OWNED BY WOMEN

Land is regarded as the primary factor of production. Even though it possesses no productive ability on its own, it is not only a vital agent of production but also the key to women's economic and social empowerment. In India, nearly 98 million Indian women have agricultural jobs, but around 63% of them, or 61.6 million women, work as agricultural labourers dependent on the farms of others, according to the 2011 Census.⁶² Only 13.9% of landholdings in India are owned by women, as recorded by the agricultural census of 2015-16. The Women's Land Rights ('WLR') index by the Centre for Land Governance⁶³ put India's average WLR at a mere 12.9%. This is among the land that the government surveys. According to data compiled in 2020 by the National Council for Applied Economic Research, around eight Indian states and two Union Territories (including Delhi) have not surveyed major areas of their geographical territory, ranging from 2% in Rajasthan to 75% in Delhi.⁶⁴ The Digital India Land Records Modernization Programme, which aims to offer states financial and technical assistance to update and 14 digitise land records, has only been able to survey 3% of the country's total geographical area in over a decade.⁶⁵ Land left un-surveyed leaves people vulnerable to eviction without compensation as they do not legally hold the title of the land. This is especially true for women whose lack of title over land will make them vulnerable to

⁶⁰ Mahesh Vyas, 'The Bitter Truth of Female Labour Participation' (CMIE, 2018) <<https://www.cmie.com/kommon/bin/sr.php?kall=warticle&dt=2018-10-09%2009:49:57&msec=456>> accessed 10 October 2021.

⁶¹ *ibid.*

⁶² Ministry of Home Affairs, '2011 Census Data' (Office of the Registrar General & Census Commissioner, India 2011).

⁶³ Cadasta Foundation, Foundation for Ecological Security, National Risk Management Center, 'Effective Mapping Protocol for Forest Rights Mapping in India' (*Center for Land Governance*, 2018).

⁶⁴ National Council of Applied Economic Research, 'The NCAER Land Records and Services Index' (NCAER 2020) <<https://www.omidyarnetwork.in/wp-content/uploads/2020/02/Overall-Report.pdf>> accessed 28 January 2022.

⁶⁵ Department of Land Resources Ministry of Rural Development, Government of India, 'Survey/ Resurvey- Physical Progress' <<https://dilrmp.gov.in/faces/rptstatewisephysical/rptSurveyresurveyStatus.xhtml>> accessed 28 January 2022.

being evicted and dispossessed. Women's economic dependence on men makes relocation more difficult and could be worsened by social isolation.

A. Complexities of the Law

The unavailability of women-centric data despite the active participation of women in agricultural activities inevitably leads to ineffective policies. In India, about 90% of agricultural land is transferred only through inheritance.⁶⁶ However, less than 10% of women in agriculture have ownership or control over land in India.⁶⁷ Even with women constituting a significant majority of small-scale farmers and food producers, they have limited ownership of the property they cultivate.⁶⁸

A reason for the ambiguity surrounding ownership of land stems from the conflicting provisions of India's laws and the legislating powers of the Centre and State legislatures. This section examines Hindu and Muslim personal law and the respective laws enacted regarding inheritance. The discussion will help analyse how the lack of data affects policymakers' ability to identify a wide gamut of problems that complicate the inheritance of agricultural land for women.

1. *Hindu personal law*

All Hindu individuals are entitled to give their separate property to the desired beneficiary by will, but in the absence of a will, the laws of succession are applicable and govern the inheritance of property. The Hindu Succession Act, 1956 ('HSA') governs such inheritance of land for approximately 79.8% of the population in India.⁶⁹ In the case of self-acquired property, the Hindu father enjoys unfettered discretion to will it to anyone he wishes. Earlier, the father and his male lineal descendants made up the coparcenary for the joint property. Female heirs, daughters, and widows were not regarded coparceners and did not get a share or have the right to demand partition in Mitakshara joint family property before a landmark amendment in 2005.⁷⁰ In most states' traditional Mitakshara system, rights to ancestral or joint family property

⁶⁶ Sheikh Saaliq, 'What's troubling the main (and unnoticed) driving force in India's farmlands?' (*News18*, 6 March 2018) <<https://www.news18.com/news/immersive/women-farmers-of-india.html>> accessed on 05 October 2021.

⁶⁷ Govind Kelkar, 'The Fog of Entitlement: Women's Inheritance and Land Rights' (2014) *Economic and Political Weekly* 51,51.

⁶⁸ *ibid.*

⁶⁹ Census (n 62).

⁷⁰ The authors in this paper have centered this discussion around coparcenary property as the HSA Amendment of 2005 deals primarily with coparcenary property and does not extensively deal with self-acquired property. It is not to be assumed that most agricultural property is coparcenary property. According to section 8 of the HSA, in case of a Hindu male dying intestate, his property devolves first upon the class I heirs which includes daughters too and

are limited to a group called the coparcenary, which includes only male relatives of a family. This had historically curtailed women's capacity to inherit equally with males in the event of intestate succession.⁷¹ Further, state land tenure regulations govern women's right to inherit agricultural land. Only male children were almost always allowed to inherit agricultural land under these restrictions.⁷²

The effect of the Hindu Succession (Amendment) Act, 2005:

In 2005, the Lok Sabha enacted the Hindu Succession (Amendment) Act ('HSAA'), which gave over 400 million Hindu women in India equal rights to the joint property in a Hindu Undivided Family.⁷³ The HSAA, aimed at being more sensitive toward women's rights, eliminated section 4(2) of HSA, a discriminatory section that granted states the power to determine the rules governing the inheritance of agricultural land. Section 4(2) gave precedence to specific local laws regarding the devolution of tenancy rights in agricultural holdings. Section 6 of the HSAA determined that the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son, including over agricultural land.⁷⁴ The amendment had also omitted Section 4(2), which gave precedence to certain local laws regarding devolution of tenancy rights in agricultural holdings. The Amendment also saw the removal of Section 24 of HSA, which had prevented certain widows, such as those of predeceased sons, from inheriting the deceased's property if they remarried, allowing them to inherit property, including land, from their marital families through succession. In the absence of a will, the property is now divided among the deceased's male and female offspring, grandchildren from predeceased children, and wife. The Amendment also sought to equalise Hindu sons' and daughters' rights to inherit agricultural land across the country.⁷⁵

However, despite the introduction of gender-positive laws, only 16% of women in rural landowning households possess any land, accounting for only 14% of all landowners and 11% of the land.⁷⁶ Hundreds of thousands of women still do not receive parental land since neither the HSA nor its Amendment is universally applied. Socially, this is because even when there is no will and the

mothers. We are also excluding the controversial provisions of Section 15 of the HSA that provides for succession for females dying intestate from the scope of this paper.

⁷¹ Bina Agarwal, *A Field of One's Own: Gender and Land Rights in South Asia* (Cambridge University Press, 1994).

⁷² The Punjab Tenancy Act, 1887, The Himachal Pradesh Tenancy and Land Reforms Act, 1972.

⁷³ Sourav Mishra, 'Agricultural Land Rights for Women' (*DowntoEarth* 2005) <<https://www.downtoearth.org.in/news/agricultural-land-rights-for-women-10149>> accessed March 28 2022.

⁷⁴ Hindu Succession (Amendment) Act 2005, s (6).

⁷⁵ Hindu Succession Act, 1956, s 6.

⁷⁶ Bina Agarwal, Pervesh Anthwal & Malvika Mahesh, 'How Many and Which Women Own Land in India? Inter-Gender and Intra-gender Gaps' (2021) 57(11) *The Journal of Development Studies* 1807.

HSA applies, women are frequently obliged to give up their portion in favour of their brothers due to the deep cultural biases and apprehension over severing familial ties. According to a report for the Twelfth Five Year Plan by a working group of the Planning Commission on Women's Agency and Child Rights, "laws like the HSA would have limited success unless the Right to Will is restricted and relinquishment of property in favour of male siblings is also curtailed."⁷⁷ However, from a legal perspective, the primary cause for poor implementation of the land rights given to women is the confusion caused by the elimination of Section 4(2). The amendment, instead of improving women's inheritance rights over agricultural land, has created further ambiguity because the HSA now does not provide for the explicit application of HSAA to agricultural land, superseding any state law that deals with the same, and conflicts can arise if there is no harmony between central and state legislations. The Concurrent List has entry number 5 for inheritance and succession,⁷⁸ but since agricultural land is a state subject,⁷⁹ it is doubtful whether Parliament can legislate on agricultural land in this regard.

The Constitutional Conundrum: Agricultural Land as a Subject of the State List:

The Constitution of India places succession and transfer of land in the Concurrent List, which means that both the Centre and the states can make laws on these subjects, while agricultural land falls under the state list. On the other hand, the HSA, which applies to about 80% of Indians, touches upon both agricultural and non-agricultural property. Article 254 of the Constitution provides that when a law is made on a subject in the Concurrent List, it is the central law that prevails over the law made by the state.⁸⁰ Since agricultural land is explicitly a state subject, the elimination of Section 4(2) in the HSA has stirred great confusion. This has led to a difference of opinion on the treatment of agricultural land - some claim it must be given the same treatment as other property, while others assert that it must remain under state laws.⁸¹

For instance, Uttar Pradesh (UP) legislation repealed outdated laws related to land tenures and revenue in the State laid down in the UP Zamindari Abolition and Land Reforms Act, 1950 and the UP Land Revenue Act, 1901 and enacted the UP Revenue Code, 2006. The UP Zamindari Abolition and Land Reforms Act, 1950 failed to recognise daughters as principal heirs of

⁷⁷ Ministry of Women and Child Development, XII Five Year Plan Report of the Working Group on Women's Agency and Empowerment (Government of India, 2011).

⁷⁸ The Constitution of India 1950, sch VII, list 3, entry 5.

⁷⁹ The Constitution of India 1950, sch VII list 2, entry 18.

⁸⁰ The Constitution of India 1950, art 254.

⁸¹ Rudroneel Ghosh, 'Empowerment Target: Ensure Gender Equality in Agricultural Land Inheritance' (*The Times of India*, 15 August 2020) <<https://timesofindia.indiatimes.com/blogs/talkingturkey/empowerment-target-ensure-gender-equality-in-agricultural-land-inheritance/>> accessed 30 January 2022.

agricultural land before the 2006 UP Revenue Code. At the time of independence in 1947, the idea of land reform was 'Land to the Tiller,' and a tiller was generally considered a man. According to the new enactment, an unmarried daughter has the same inheritance rights as a son, but a married daughter has fewer. As a result, daughters in Uttar Pradesh are forced to choose between marriage and inheritance. This contradicts the HSA, which provides that no distinction should be made between married and unmarried daughters.⁸²

Shipra Deo and Robert Mitchell's analysis shows how disagreement among the courts regarding the inheritance of rights of agricultural land has also contributed to the inconsistency in applying these laws, thus leading to incomplete land rights for women.⁸³ The Supreme Court has said explicitly that daughters, regardless of their marital status, shall have the same right to inherit family property as sons under the HSA have.⁸⁴ However, various High Courts differ in their opinion. The Delhi High Court in *Nirmala v State (NCT of Delhi)*,⁸⁵ ruled that the removal of Section 4(2) from the HSA allows the HSA to take precedence over any other legislation in place before the section's removal insofar as that law conflicts with HSA. It also stated that the repeal of Section 4(2) was a deliberate act of Parliament since it was apparent that Parliament did not want the unequal treatment of women enshrined in the Delhi Land Reforms Act, 1954 and other comparable statutes to remain. In contrast, in the case of *Archna v Director of Consolidation, Amroha*,⁸⁶ the Allahabad High Court upheld the view that with agriculture being a state subject, the revenue codes hold primacy over the Hindu Succession Act when it comes to succession and thus, the tenurial law of the State would prevail over HSA. The court justified that a Union law must take precedence over conflicting state legislation when the two laws deal with the same issue and are diametrically opposed. The court reasoned that the tenurial law of UP and HSA are not repugnant because they deal with different subjects, though the analysis⁸⁷ is admittedly a bit difficult to follow, and the President of India's assent to the UP Act allows that Act to prevail.

Consequently, different states seem to follow different laws for land inheritance leading to greater ambiguity in the data related to land ownership. For

⁸² Shipra Deo and Robert Mitchell, 'Inheritance of Agricultural Land by Women: There Is Distance Yet to Travel' (*Live Law*, 26 October 2021) <[www.livelaw.in/columns/the-hindu-succession-act-1956-hsa-hindu-womens-right-to-property-act-1937-the-hindu-law-of-inheritance-amendment-act-1929-184347#:~:text=Inheritance%20Of%20Agricultural%20Land%20By%20Women%3A%20There%20Is%20Distance%20Yet%20To%20Travel,-Shipra%20Deo%20and&text=A%202000%20report%20by%20Law,\(Amendment\)%20Act%2C%201929](http://www.livelaw.in/columns/the-hindu-succession-act-1956-hsa-hindu-womens-right-to-property-act-1937-the-hindu-law-of-inheritance-amendment-act-1929-184347#:~:text=Inheritance%20Of%20Agricultural%20Land%20By%20Women%3A%20There%20Is%20Distance%20Yet%20To%20Travel,-Shipra%20Deo%20and&text=A%202000%20report%20by%20Law,(Amendment)%20Act%2C%201929)> accessed 28 January 2022.

⁸³ *ibid.*

⁸⁴ *Vineeta Sharma v Rakesh Sharma* (2019) 6 SCC 164.

⁸⁵ 2010 SCC OnLine Del 2232 : (2010) 170 DLT 577.

⁸⁶ 2015 SCC OnLine All 262 : (2015) 4 ADJ 90.

⁸⁷ Shipra Deo (n 82).

instance, in Punjab and Haryana, the general rule of succession under the state tenancy law⁸⁸ is that succession goes first to the last owner's direct male lineal descendants to the exclusion of female descendants. Failing them, it then goes to the collaterals, among whom the right of representation exists, with all heirs sharing equally by degrees. The local custom bans females and their offspring with varying degrees of strictness. Near male collaterals usually exclude daughters and their sons and sisters and their sons. In Delhi, while widows are given inheritance rights over agricultural land, daughters are deprived of the same. The state law prescribes that in case of the death of a landowner, his interest in his holding shall first lie with the male lineal descendants, and if none are alive, only then would a female relative be considered for the inheritance of said land.⁸⁹

Similarly, in Himachal Pradesh, succession tenancy rights in case of death of a tenant lie with the male lineal descendants first, then the tenant's widow, then the tenant's widowed mother and finally his male collateral relatives in the male line of descent from the common ancestor of the deceased tenant and those relatives. The enactment does not mention tenancy rights for the tenant's daughter.⁹⁰ Thus, these separate rules of succession for agricultural land in individual states are a reason why most women are denied the right to ownership of land prescribed in the HSA.

In some patriarchal communities, local officials actively deprive women of ancestral property that they are legally entitled to. For instance, the Gram Panchayat in Haryana's Jind district forbade married women from claiming a share of their parent's property in May 2012. The Gram Panchayat declared that every married woman would have to part with her share of parental land and hand it over to her brothers, and any villager who purchased land from married women would be ostracised.⁹¹

Are progressive laws all we need to positively impact female land ownership?

Years before the 2005 amendment that gave women the right to a share by survivorship in joint family property, equal with their brothers', several Southern states (and Maharashtra) have provided for progressive amendments in the HSA.⁹² Kerala, for instance, abolished the Joint Hindu Family system in

⁸⁸ The Punjab Tenancy Act, 1887.

⁸⁹ The Delhi Land Reforms Act, 1954, s 50.

⁹⁰ The Himachal Pradesh Tenancy and Land Reforms Act, 1972.

⁹¹ Seema Sindhu, 'Denying Women their Due Share in Family Property', <<http://archive.dailypioneer.com/columnists/item/51662-denying-women-their-due-share-in-family-property.html?tmpl=component&print=1>> accessed 24 December 2021.

⁹² These amendments were affected through the following Acts: The Hindu Succession (Andhra Pradesh Amendment) Act, 1986, The Hindu Succession (Tamil Nadu Amendment) Act, 1989,

1976⁹³ and recognised all members of the family having an interest in the joint family property as independent and full owners of their respective shares.⁹⁴ Unfortunately, the problem of indeterminacy of the inheritance of agricultural land is still present. When it comes to states in southern, central and north-eastern India, the situation is such that state laws are silent on the inheritance of agricultural land.⁹⁵ Scholars interpret this to mean that, by default, the inheritance of agricultural lands will be governed by personal laws.⁹⁶ These realities further add to the argument that laws surrounding the inheritance of agricultural land have let down women by the lack of congruence between the central and state laws.

The proof of progressive laws leading to better rates of female landownership lies in the example of Andhra Pradesh, wherein land inheritance rates for women were much higher after the enactment of a reformative state law that gave them equal inheritance rights about 20 years ago.⁹⁷ According to a study, 34% of women in Andhra Pradesh had inherited or expected to inherit parental land, compared to 8% in Bihar and 7% in Madhya Pradesh.⁹⁸

While better laws alone have not always solved the problems of Indian women's land ownership, the seemingly favourable findings from Andhra Pradesh mask an important fact. Despite a significantly higher number of women receiving land, they are not receiving the same quantity of land under inheritance to which they are entitled. With fewer widows obtaining land through inheritance in Andhra Pradesh, it is not possible to say whether the legislation is being strictly implemented or if existing societal practices are coming into play. Andhra Pradesh had a substantially more positive image among women who did inherit land, with more women inheriting land from their parents than widows from their deceased husbands. In Madhya Pradesh and Bihar, on the other hand, widows receive far more land from their deceased spouses than women who inherited land from their parents.⁹⁹

The Hindu Succession (Karnataka Amendment) Act, 1994 and the The Hindu Succession (Maharashtra Amendment) Act, 1994.

⁹³ The Kerala Joint Hindu Family System (Abolition) Act, 1975.

⁹⁴ Sanchari Roy, 'Female Empowerment through Inheritance Rights: Evidence from India', (Department of Economics London School of Economics, 6 September 2008) <www.dagliano.unmi.it/media/roy.pdf> accessed 28 January 2022.

⁹⁵ Shipra Deo and Akansha Dubey, 'Gender Inequality in Inheritance Laws: The Case of Agricultural Land in India' (Landesa, 29 October 2019) <<https://cdn.landesia.org/wp-content/uploads/Gender-Inequality-in-Inheritance-Laws-The-case-of-agricultural-land-in-India-1.pdf>> accessed 28 January 2022.

⁹⁶ Bina Agarwal, "Gender and Legal Rights in Agricultural Land in India" (1995) *Economic Political Weekly*, A39.

⁹⁷ The Hindu Succession (Andhra Pradesh Amendment) Act, 1986.

⁹⁸ Ashok Sircar and Diana Fletschner, 'Cultural Barriers in India Impede Women's Legal Right to Inherit Land' (Landesa, 4 March 2014) <www.landesia.org/the-right-to-inherit-isnt-working-for-indian-women/> accessed 24 December, 2021.

⁹⁹ Ashok K Sircar and Sohini Pal, 'What is Preventing Women from Inheriting Land? A Study of the Implementation of the Hindu Succession (Amendment) Act 2005 in Three States

Such barriers to land ownership for women have contributed to the lack of representation of female farmers in government data. The 2020 report by FAO tracking the progress on food and agriculture indicators noted that in countries where formal laws and customary laws co-exist, women's land rights are less protected. In countries where some aspects of customary laws override constitutional provisions, women's rights (especially inheritance/ matrimonial rights) are less safeguarded. Where customary laws are recognised, women's rights are very often not protected if it conflicts with formal law.¹⁰⁰ It is thus necessary to study and address the extent to which the intersection of customary and formal laws creates many challenges for women to own property. Bridging the gender-data gap can assist policymakers in tackling the disconnect between the law and socio-cultural diversities that affect how women obtain land ownership.

The Hindu Succession Amendment Act came into force over 15 years ago, but there is little clarity on whether this landmark shift in the law has had the intended results. The discussion in the previous sections has shown divergence in the laws that are not visible at first glance. What gender-disaggregated data can do in this scenario is present a clear picture of who gets the property and who does not, and how these situations differ across regions. Gender data can quantify the differential impact this amendment has had on women. This is crucial in the case of agricultural land, from which a significant majority of women eke their livelihood. Defining these gaps can accelerate the rate at which policymakers and the public understand the multitude of reasons for this phenomenon and encourage them to push for change.

2. *Muslim Personal Law*

Ownership of land for Indian Muslim women operates in a framework of laws, customary norms, and other social and religious norms. In reality, customary norms prevail in most cases even if they contravene the principles of equality that the Constitution guarantees.¹⁰¹ Muslim women in India face several intersectional disadvantages - their gender, status as a religious minority, and social and economic disadvantages. Shia and Sunni laws of succession differ in various effects but in general, Muslim women have inheritance rights to ancestral immovable property, even though it is unequal to those of men. A vast majority of Muslims in India belong to the Sunni sect and are governed

in India' (2014) Landesa, India, Paper Prepared for Presentation at the 2014 World Bank Conference on Land and Poverty.

¹⁰⁰ Pietro Gennari, 'Tracking Progress on Food and Agriculture-Related SDG Indicators 2021' (FAO 2021).

¹⁰¹ Niti Saxena and Soma K Parthasarathy, 'Claiming Space, Claiming Rights: Inheritance and Land Rights for Muslim Women in Uttar Pradesh, India' in Bina Fernandez, Meena Gopal and Orlanda Ruthven (eds), *Land, Labour and Livelihoods: Indian Women's Perspectives* (Palgrave Macmillan 2016).

by the Hanafi school of Islamic Law, while others in the Shia sect come under the Itna Ashari School. The Muslim Personal Law (Shariat) Application Act ('Shariat Act'), enacted in 1937, governs Muslims in India.

Despite the Quran's recognition of women's property rights, most women are not, in reality, able to exercise these rights due to "male-oriented and protectionist interpretations of customary provisions".¹⁰² Under Muslim personal law, men get two-thirds of the share in the property while women only get one-third of the share. A 2013 Bharatiya Muslim Mahila Andolan survey reported that 82% of the women surveyed did not own any property in their name.¹⁰³

However, when it comes to agricultural land, this provision is not applicable. Under Section 2 of the Shariat Act, women get no share of the agricultural land¹⁰⁴ (both tenanted and owned) except in a few states where the law has been amended. This express exclusion occurred since agricultural land was a state subject, and the impetus has fallen on the states to enact such laws. Several states, including Tamil Nadu¹⁰⁵ and parts of Andhra Pradesh¹⁰⁶ and Kerala,¹⁰⁷ have omitted the words "save questions relating to agricultural lands", and the Shariat Act has been made applicable to all land owned by Muslims, including agricultural lands.

While these efforts have resulted in greater land ownership for Muslim women, there is not enough data or academic work that can point to the extent to which reform is required. For example, data collected by the International Crops Research Institute for the Semi-arid Tropics ('ICRISAT') from 2010 to 2014 had an overwhelming sample size of 95% of Hindu households and only 1.1% of Muslim sample households.¹⁰⁸ The result of this exclusion is an inability to even suggest changes to improve Muslim women's rights with respect to Muslim men. It also makes it challenging to make insightful comparisons with the status of women in other communities, and Indians as a whole.

The availability of quality data might have enabled us to answer how many women own land (including agricultural land). It will help reflect if amendments in the Shariat Act as enacted by Kerala and Tamil Nadu have ensured women their rightful share over agricultural land and if customs have changed. Have these amendments brought agricultural land out of the limbo between central and state laws? The overarching theme that has been visible in both the

¹⁰² *ibid.*

¹⁰³ *ibid.*

¹⁰⁴ The Muslim Personal Law (Shariat) Application Act, 1937, s 2.

¹⁰⁵ Muslim Personal Law (Shariat) Application (Tamil Nadu Amendment) Act, 1949.

¹⁰⁶ Muslim Personal Law (Shariat) Application (Andhra Pradesh) (Andhra Area) Amendment Act, 1949.

¹⁰⁷ The Muslim Personal Law (Shariat) Application (Kerala Amendment) Act, 1963.

¹⁰⁸ Agarwal, Anthwal & Mahesh (n 76).

situation of women with regard to Muslim Personal law and Hindu Personal law is the lack of harmony between the central and state laws. While such a situation arises from the placement of agricultural land as a state subject in the Constitution, the initiative to change disadvantageous provisions for women is long overdue. Agricultural land, especially in rural areas, is the most essential and, at times, the only form of property.¹⁰⁹ The alarming data gap observed here regarding the land ownership rates of Muslim women points to the lack of attention given to their unique position in society.

3. *Bridging the gender-data gap to realign the approaches of law*

In the preceding sections, the paper has made the following crucial observations. First, since agricultural land is a state subject under the Constitution, states across India have enacted varying provisions or not addressed the inheritance of agricultural land under Hindu and Muslim personal laws. Second, amendments in the HSA that aimed to provide equal inheritance of land for sons and daughters have failed to achieve the same due to conflicts with state legislation. Third, policies have not accounted for the socio-cultural and customary causes that lead to the denial of agricultural property to women. Thus, there is a lacuna in the implementation of laws. Finally, there is not enough data to thoroughly assess the status of women's ownership of agricultural land and determine the exact reasons for the denial of their land rights.

These observations all point to the need for legal policy to quantify the impact of laws and precisely define the limitations of existing laws. Policymakers will require data from every state that are consistent and comparable to observe and correct inconsistencies. Granted, judicial precedents and activism drive forward laws, but these operate slowly and gradually and cannot immediately reflect trends in society like data can. Publicly available data can also create urgency for legal reform by converging information from across the country. Data can also pave the way to hold governments and policymakers accountable, presenting the bigger picture that may not always be clear. Data that reflects the gendered dimensions of society, alongside religion, caste, and other social factors are necessary to bring effective change in the system. Thus, the push must be for evidence-based policies that take into consideration data over several years to track and understand changes and suggest corrective action.

Consistent gender-disaggregated data, in the context of this paper, can be crucial in aiding policymakers in identifying the target population that requires a change in laws. For instance, when women are not even identified as farmers by official datasets, it becomes impossible for policymakers to locate their

¹⁰⁹ Jennifer Brown and others, 'Addressing Legal Rights in Karnataka' in Prem Chowdhry (ed), *Gender Discrimination in Land Ownership* (Sage Publications 2009).

struggles or devise solutions. Gendered data also plays a vital role in gender-mainstreaming policies and ensuring that each step of the policymaking process is responsive to the needs of all genders.¹¹⁰ The upcoming section illustrates how a few of India's prominent datasets have fallen short in collecting this gendered data and how inconsistencies in the data make them incomparable and ineffective.

B. Data collection of title-holders

Lack of data and gender gaps in datasets are significant barriers to tracing the gap between law and practice. To date, no existing study in India has provided assessments that look at multiple facets of landownership and can be used for conclusively determining gender gaps in land ownership.¹¹¹ Current estimates on national datasets can be seriously misleading and restrictive in terms of data collected. India's state-level land revenue surveys consider operational holdings at the household level as the primary unit. When the Agricultural Census in India compiles data from these state land revenue surveys, there is no sex-disaggregated data for titleholders within a household. The lack of appropriate data on land ownership by women can also be ascribed to the fact that the method of data collection is lacking. The National Family Health Survey (NFHS) 2015-16 has been collecting information from only 15% of sample households, which is women in the 15-49 years age group and men in the 15-54 years age group. It clubs together all lands, agricultural and non-agricultural. The significant differences in survey data and the data in land records worsen ambiguity in available data. The numbers in the NFHS-4 carried out in 2015-2016 appeared to be quite inflated, so much so that they were almost four times those of the India Human Development Survey (IHDS) of 2011-12.¹¹² While these and other national analyses¹¹³ show more land ownership among women in the southern states, NFHS-4 figures show that 50% of women in Bihar and 23% in Kerala own land. Such inconsistencies in available data are lamentable.

¹¹⁰ Gender mainstreaming has been defined in the 1997 agreed conclusions of ECOSOC as: "The process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality." Economic and Social Council, "Gender Mainstreaming: Report of the Economic and Social Council" (A/52/3, 18 September 1997).

¹¹¹ Jennifer Brown (n 109).

¹¹² *ibid.*

¹¹³ Pranab Ranjan Choudhury, Manoj Kumar Behera, Saumya Sharma, Tajamul Haque, 'Administrative and Open-Source Data for Monitoring Land Governance' (National Resource Management Centre, 2017).

Data collected in the India Human Development Survey (IHDS) also misses crucial figures. First, this survey also does not track the size of landholdings by gender, which would aid in determining the extent of gender inequality in the region. Second, instances of shared ownership are not recorded, which significantly narrows the scope of data analysis. Information on joint ownership is necessary to understand intra-household gender dynamics and the effectiveness of implementing laws providing women coparcenary rights. Third, the IHDS-II overlooks the additional landowners in families with more than three landowners. Although the effect may be minor, because only a small percentage of families report three landowners, what is collected may be skewed.¹¹⁴ Women are more likely to be left out since their rights are less recognised socially. It also creates uncertainty when more than three individuals own a plot of land.

In most cases, a woman co-owner tends to get excluded by the respondents of the survey. In this scenario, tracking joint-ownership can be important for assessing women's land rights. Joint ownership has been argued as a beneficial way to improve women's access to land,¹¹⁵ especially since social norms remain against women's single ownership of land and dissuade them from transferring titles to daughters.¹¹⁶ Unfortunately, joint ownership with husbands may give women little control over land use and make it difficult for them to claim individual shares in case of divorce or domestic violence.¹¹⁷ Data on how different kinds of ownership operate in reality can help align policy measures and ensure women can control land and use it according to their needs.

All the datasets that review and approach women's right to land ownership in India seem to have wide variations in numbers at the district and state levels.¹¹⁸ Pranab R Choudhury connects these variations to the differences in regions, historical backgrounds, social and cultural diversity and the fact that state succession laws determine the inheritance of agricultural lands.¹¹⁹ The family is treated as a unit, and land is registered for the benefit of the family's head, who is most often a male.¹²⁰ While some datasets focus on property and estate land, others collect data on rural land only, and some combine the

¹¹⁴ Agarwal, Anthwal & Mahesh (n 76).

¹¹⁵ Jeemol Unni, 'Property Rights for Women: Case for Joint Titles to Agricultural Land and Urban Housing' (1999) *Economic and Political Weekly* 1281.

¹¹⁶ Oxfam India, 'When Women Farm India's Land: How to Increase Ownership?' (Oxfam India, 2013) <<https://oxfamilibrary.openrepository.com/bitstream/handle/10546/304918/bn-when-women-farm-india%27s-land-increasing-ownership-301013-en.pdf>> accessed 28 January 2022.

¹¹⁷ Dr Naresh C Saxena, 'Women, Land and Agriculture in Rural India' (UN Women, 2012) <www2.unwomen.org/-/media/field%20office%20eseasia/docs/publications/2015/southasia/reportstudies/06_economic%20empowerment/un_women_land_agriculture_in_rural_india%20pdf.ashx?la=en> accessed 28 January 2022.

¹¹⁸ Pranab R Choudhury, 'Why We Don't Know How Much Land Women Own' (*Indiaspend 2021*) <www.indiaspend.com/land-rights/why-we-dont-know-how-much-land-women-own-734247> accessed 6 October 2021.

¹¹⁹ *ibid.*

¹²⁰ *ibid.*

two. For example, the Land and Livestock Holdings Surveys provide data on operational land holding only in rural areas, while IHDS is conducted in villages and urban areas. These stark discrepancies result in a glaring gender data gap, which means that despite favourable policy intentions, women are not frequently recognised as landowners and much less as farmers.

At this point, it is essential to acknowledge how it is crucial to study the variations of land rights among women of different religions. Data that is merely disaggregated on the basis of sex will disregard important social realities; for instance, how caste identities of women affect ownership of land. Regarding caste-based disaggregated data on land rights, the Agriculture Census, IHDS, Population census and The Socio-Economic Caste Census (SECC) are the major databases.¹²¹ The SECC is noted for covering the whole of India and for its disaggregation across the lines of caste and education. Unfortunately, land ownership data collected in the SECC is not disaggregated by sex. SECC was only done once in 2011, and the caste data¹²² has still not been made public. The government sought to mend the flaws found in the data by forming a committee that would convert the data into publishable findings. However, the committee took no action since it never met.¹²³ Now, the Centre has ruled out the possibility of conducting another SECC along with the Population Census, citing the previous SECC experience, administrative, operational and logistical reasons, including an inability to reconcile different caste categories in different lists.¹²⁴ This implies that policymakers are unable to visualise the specific challenges women from disadvantaged castes face, leaving out an entire section of women from their purview.

Coming around to the SDGs, these indicators reflect how databases surrounding agriculture and ownership of women of agricultural land suffer from gender-data gaps. India's 2020-2021 SDG Index and Dashboard¹²⁵ has recorded that only 13.96% of operational landowners are female. This data is from the Agricultural Census (2015-16). This figure was 12.79% in 2011, which is far from desirable. India's reporting on SDG indicators also falls short of the standard set by UNSTAT's metadata, the information repository on data relating to SDG Indicators. For Indicator 5.a.1, as discussed in Part II of this paper,

¹²¹ Pranab R Choudhury and Shipra Deo, 'Women's Land Ownership and SDGs in India' (Landesa, 2017) <<https://www.ncaer.org/ILF2020/Presentations/Day3Session4/ShipraandPranab.pdf>> accessed 28 January 2022.

¹²² Ajachi Chakrabarti, 'Losing Count: The Discredited Excuses for Dodging a Caste Census' (*The Caravan*, 1 November 2021) <<https://caravanmagazine.in/commentary/caste-census-2021-secc-obc>> accessed 28 January 2022.

¹²³ G Sampath, 'Why is the Government Against Caste Census?' (*The Hindu*, 28 September 2021) <www.thehindu.com/news/national/explained-what-are-the-governments-objections-to-a-caste-census/article36713236.ece> accessed 28 January 2022.

¹²⁴ *ibid.*

¹²⁵ NITI Aayog, 'SDG India Index & Dashboard 2020-21' (NITI Aayog 2021) <www.niti.gov.in/writereaddata/files/SDG_3.0_Final_04.03.2021_Web_Spreads.pdf> accessed 06 October 2021.

the data must be reported gender-disaggregated as the proportion of the total agricultural population that owns agricultural land using periodic and reliable datasets. However, in India, this is reported as the ‘percentage of female operated holdings’ using Agriculture Census data.¹²⁶ The Agriculture Census data does not fit the prescribed standards; it does not consider agricultural labourers and only cites the gender of the head of the household. Most importantly, operational landholding is considered instead of land ownership.¹²⁷ The basic statistical unit of data collection in the Agriculture Census is operational holding that includes “all land which is used wholly or partly for agricultural production and is operated as one technical unit by one person alone or with others without regard to title, legal form, size or location”.¹²⁸ This evidently does not fit the standards set and, in extension, does not help advance the SDGs as it ought to. The 2021 Sustainable Development report reveals that India has a long way to go in keeping up with the SDGs. Ranking 120 out of 165 countries participating, the country score is far below the regional average (India’s country score; 60, Regional Average; 65.7). SDG 5 achievements are stagnating, with significant challenges remaining.¹²⁹

1. *What kind of data must be collected?*

Throughout this paper, the authors have observed how gaps in the law are often imperceptible due to the lack of discussion around how such laws actually impact various stakeholders, in this case, the women. The authors have endeavoured to show how data can help improve the implementation of laws by providing an accurate representation of the ground realities. What is required is not large quantities of data but quality data that is consistent. The collection of quality data would throw light on the prevalent issues, bringing them to lawmakers’ and policymakers’ attention. This will be a crucial step toward rectifying the existing situation for women in the agricultural sector. For example, the paper has observed how it is possible to reconcile the extent of ambiguities in Hindu personal law resulting from the conflict between central and state laws if the impact of legal amendments is studied and quantified. A Data2X study¹³⁰ on gender data gaps and methods to collect data for policy design offers important insights on the kind of data required to close such gender data

¹²⁶ Pranab R Choudhury, ‘Why We Don’t Know How Much Land Women Own’ (*Indiaspend 2021*) <www.indiaspend.com/land-rights/why-we-dont-know-how-much-land-women-own-734247> accessed 6 October 2021.

¹²⁷ *ibid.*

¹²⁸ Department of Agriculture and Farmers Welfare, ‘Need of Data by Operational Holding’ <<https://agcensus.nic.in/acindianeedoph.html> Department of Agriculture & Farmers Welfare> accessed 28 January 2022.

¹²⁹ ‘India SDG Dashboard, Sustainable Development Report 2021’ (UNSTATS 2021) <<https://dashboards.sdgindex.org/static/profiles/pdfs/SDR-2021-india.pdf>> accessed 5 October 2021.

¹³⁰ Data2X, Gender Data: Sources, Gaps, and Measurement Opportunities (Data2X 2017) <<https://www.data4sdgs.org/sites/default/files/2017-09/Gender%20Data%20-%20Data4SDGs%20Toolbox%20Module.pdf>> accessed March 28 2022.

gaps. Individual-level data disaggregated not only by sex but by age, income, education, residence, and other socioeconomic and demographic characteristics are extremely important for well-targeted policy design. Data that is representative of the population is important, particularly to understand outcomes of often-marginalised and un-surveyed groups such as women.¹³¹

An example of the collection of individual-level sex-disaggregated data bringing substantial change in policy making is the case of Nepal. In Nepal, the policymakers attempted to address gender gaps in asset ownership by including questions on land, livestock, and property owned by women in the national census. Two constitutional amendments passed in 2002 and 2007 helped significantly improve Nepali women's land ownership rights, stating that sons and daughters had equal rights to inheritance regardless of their age or marital status.¹³² In addition, Nepal introduced a 10% tax exemption for land registered in a woman's name in 2008 to encourage the adoption of property and inheritance rules. The exemption, designed to encourage families to share their land with their daughters, sisters, and brides, was later raised to 25% in cities and 30% in rural regions.¹³³ As a result, women's land ownership grew threefold between 2001 and 2009.¹³⁴ While cross-country comparisons may not be viable, the case of Nepal is an example of how the collection of sex-disaggregated data helped recognise issues and led to an attempt to rectify the same by policymakers.

V. SUGGESTIONS AND CONCLUSION

How do women fare in terms of land inheritance, especially in the case of agricultural land? This paper has examined this question by looking at it from a variety of angles. Unfortunately, no large-scale surveys collect gender-disaggregated data on land ownership and use. There is a dearth of academic studies, especially in the case of Muslim women's rights, which again reinforces the problems that arise from not having data.

One way to bridge the data gap is to collect more data disaggregated by gender and sex. Even before that, it is crucial to acknowledge that a gender-data gap exists in all datasets presently employed in India. Merely collecting data without considering the implications or presenting sex-disaggregated data without understanding the context and root of the problem is not the solution. The biggest requirement is to recognise how most studies still concentrate

¹³¹ *ibid.*

¹³² International Organization for Migration, 'Barriers to Women's Land and Property Access and Ownership in Nepal' (IOM 2016) <https://www.iom.int/sites/g/files/tmzbd1486/files/our_work/DOE/LPR/Barriers-to-Womens-Land-Property-Access-Ownership-in-Nepal.pdf> accessed on 28 March 2022.

¹³³ Data 2X (n 130).

¹³⁴ *ibid.*

on households as a unit of analysis and neglect intra household gender dimensions.¹³⁵ It is not enough for laws and policies to consider gender as an additive category that has to be superimposed onto other existing categories and treat women as a special target group.¹³⁶ Addressing existing problems through a gendered lens is necessary for any substantial change. This paper used basic statistical data to convey how the lack of data makes policies gender-blind. It also reflected how data could expose inherent problems in the law. It is high time to implement methodologies that reflect the effectiveness of laws, and data can play a fundamental role in this effort.

The absence of uniform data impacts the quality of life for women in agriculture despite notable progress in inheritance laws toward gender equality. The majority of landowning women obtained their land via their married families, notably as widows, and not through their paternal families, despite being allowed equal coparcenary rights with brothers in the joint family property.¹³⁷ Much more still needs to be done in terms of data collection and policy implementation, and the immediate demand should be to make data as gender-disaggregated as possible. In terms of policy, there is a long way to go to improve women's property position if India is to move towards gender equality in land ownership, as targeted in SDG 5. The first step is to align India's statistical methodology with the SDGs' design, and to make data collection gender-sensitive. Consistency is key to ensuring that the data collected is used most effectively and efficiently.

All stakeholders, including gender equality activists and other civil society groups, must join the gender data revolution, not just as data users and producers but also as advocates for more and better gender data. Such long-term collaborative coalitions may help address data gaps and guarantee that the data obtained helps accomplish the SDGs, eventually making women and girls visible and counted in all their variety.

The issues that occur when gaps form between the central government's policy directives and how states shape such directions must be given a particular focus.¹³⁸ It also must be kept in mind that a Uniform Civil Code may not be the complete solution to ensuring equality of ownership of land among women from all sections of the society keeping in mind the diversity and divergent backgrounds among Indian women. As observed in the paper, the challenges facing women across India are different and require careful, pointed approaches for correction. A blanket law will only worsen the differences.

¹³⁵ Bina Agarwal, 'Who Sows? Who Reaps? Women and Land Rights in India' (1998) *The Journal of Peasant Studies* 531.

¹³⁶ Bina Agarwal, 'Gender and Command Over Property: A Critical Gap in Economic Analysis and Policy in South Asia' (1994) *World Development* 1455.

¹³⁷ Agarwal, Anthwal & Mahesh (n 76).

¹³⁸ Bina Agarwal (n 135).

When amendments are brought to inheritance laws, there must be a special emphasis on agricultural land. Making laws merely gender-equal does not translate into equality in all categories of lands, especially with the Shariat Act excluding women from taking a share in agricultural land. Thus, there needs to be a centralised approach to ensure amendments at State and Central levels give weight to agricultural land. Most importantly, it is vital to ensure that women are aware of their rights and are afforded the autonomy to navigate the social and political barriers that prevent them from owning land.

LEGISLATING MANDATORY REPORTING OF CHILD ABUSE IN INDIA AND CHINA: A DIVERGENCE OF LEGISLATIVE CHOICE¹

—Wenjuan Zhang* & Avaantika Chawla**

Mandatory reporting is used as a tool for early identification of child abuse by countries around the world. However, there is variation in terms of the legislative models followed. The two models most commonly followed are universal mandatory reporting and stakeholder specific mandatory reporting. India and China joined the bandwagon and introduced legislation on mandatory reporting over a decade ago. While India has adopted the ambitious model of universal mandatory reporting, China has taken a more incremental and experimental approach with stakeholder-specific mandatory reporting. The paper aims to differentiate the legislative approaches taken by the two countries for introducing mandatory reporting for child abuse, by delving into the legislative history, legislative provisions, and implementation challenges for mandatory reporting in both jurisdictions. The paper does not comment on the sanctity of mandatory reporting, but is limited to a comparative analysis of the legislative strategies taken by India and China.

Keywords: *Mandatory Reporting, Child abuse, Legislative History, Divergence, China and India*

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I. INTRODUCTION

In 1962, Dr. C. Henry Kempe and his co-authors published an influential journal article titled ‘The Battered-Child Syndrome.’ They pointed out that “Battered-child syndrome, a clinical condition in young children who have received serious physical abuse, is a frequent cause of permanent injury or death,” and suggested that “physicians have a duty and responsibility to the child to require a full evaluation of the problem and to guarantee that no expected repetition of trauma will be permitted to occur.”² Inspired by medical research, U.S. states started passing laws on mandatory reporting of child abuse cases from 1963 onwards.³ This marked the beginning of legislative efforts for mandatory reporting.

Nowadays, legislation for mandatory reporting of child abuse⁴ is widespread across the world.⁵ Legislations related to mandatory reporting vary in their form and substance – while some cast a statutory reporting duty only on certain professionals, others place the same duty on all persons in the form of universal mandatory reporting (‘UMR’). The variation in legislative models depends on the legislative consideration of factors such as which instances to

² C Henry Kempe and others, ‘The Battered-Child Syndrome’ (1962) 181 JAMA 17.
³ Leonard G Brown III and Kevin Gallagher, ‘Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States’ Current Mandatory Reporting Laws with a Review of the Laws in the Commonwealth of Pennsylvania’ (2013) 59 Vill. L. Rev. Tolle Lege 37.
⁴ Child abuse here is a broad term, including physical, emotional or sexual hurt or risk toward a child.
⁵ Ben Mathews and Maureen C Kenny, ‘Mandatory Reporting Legislation in the United States, Canada, and Australia: A Cross-Jurisdictional Review of Key Features, Differences, and Issues’ (2008) 13 Child Maltreatment 50; Children’s Bureau, ‘Mandatory Reporters of Child Abuse and Neglect’, (*Child Welfare Information Gateway*, April 2019) <<https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/manda/>> accessed 24 January 2022, 2-6; Ali Mohammed Al Matrooshi, Syed Raza Shah Gilani, and Bahaudin G. Mujtaba, ‘Assessment of Mandatory Reporting Laws to Break the Silence of Child Sexual Abuse: a Case Study in the United Arab Emirates’ (2021) 1 SN Social Sciences 1.

report, who is mandated to report, whom should one report to, and the consequences of non-reporting and false reporting.

The enforcement of mandatory reporting legislation faces a tremendous challenge in nearly all jurisdictions which have passed such laws, either due to the large percentage of unsubstantiated reports, or a reluctance in reporting. Empirical research shows that universal mandatory reporting could, on the one hand, help boost reporting by non-professionals, but could also significantly increase the rate of unsubstantiated reports, especially by non-professionals.⁶ In 2019, among the 4.4 million referrals for maltreatment of children in the USA, 56.5% of them were unsubstantiated.⁷

Compliance with such legislation is perhaps more challenging for developing nations with longstanding practices unfriendly to mandatory reporting procedures, such as lack of infrastructure and trained personnel, combined with unfavourable cultural nuances. A delicate balance is needed when choosing the requisite legislative model. In the last ten years, India and China have made tremendous legislative efforts in introducing mandatory reporting for child abuse. However, the legislative models of the two countries vary significantly. Parts II and III of the paper detail the legislative history of mandatory reporting of child sexual abuse in the two countries, their legislative provisions, and their implementation challenges. Part IV of the paper delves into a comparative analysis of the divergence in the legislative models based on their legislative provisions and their implementation challenges. It also distinguishes their legislative models through the lens of rule change versus cultural change, since the success of mandatory reporting is deeply rooted in the willingness of people to report.

II. LEGISLATIVE EVOLUTION AND ITS IMPLEMENTATION FOR MANDATORY REPORTING IN CHINA

The institutionalisation of mandatory reporting for child abuse in China has taken place through careful and conscious step-by-step efforts. This part of

⁶ Grace WK Ho, Deborah A Gross and Amie Bettencourt, 'Universal Mandatory Reporting Policies and the Odds of Identifying Child Physical Abuse' (2017) 107 *American Journal of Public Health* 709. "Results: Rates of total and confirmed physical abuse reports did not differ by UMR status. Non-professionals were more likely to make reports in UMR states compared with states without UMR. Probability of making a confirmed report was significantly lower under UMR; this effect almost doubled for non-professionals compared with professional reporters."

⁷ Children's Bureau, 'Child Maltreatment 2019: Summary of Key Findings' (*Child Welfare Information Gateway*, April 2021) <<https://www.childwelfare.gov/pubs/factsheets/canstats/>> accessed 19 January 2022, 2.

the paper discusses the legislative evolution and implementation of mandatory reporting in China through five sections: (A) the early stage of raising cultural awareness for intervening in child maltreatment in the family and beyond; (B) the transitional stage of differentiating Actors with Duties to Children (‘ADC’) and Ordinary Actors (‘OA’) through abstract judicial interpretation; (C) the legislative formalization of mandatory reporting with mild legal sanctions; (D) the implementation efforts driven by the Supreme People’s Procuratorate; and (E) the challenges ahead in the implementation of mandatory reporting. It is worthy of note that the legislative process of mandatory reporting in China is through policy experiments and a practice-driven process, so challenges in implementation arise at every stage, and have paved the way for development of legislation.

A. Resetting the Public Role for Parent-Child Relationships by Giving Rights (1990-2012)

After signing the United Nations Convention on the Rights of the Child 1989 (‘CRC’) in 1990, China passed the PRC Law on Protection of Minors (‘LPM’) to implement the CRC. There was no mention of mandatory reporting in the LPM. However, the legislature did realize the important role of the public in child protection, and the LPM gave society some rights to intervene in instances of child rights violations. This is reflected in Article 5(3) in the LPM, “*For behaviours violating the rights of a minor, any unit or individual has the right to discourage, stop or file a report with competent authorities.*”⁸ The rationale for taking this approach was the almost absolute authority that parents have over their children in Chinese traditional culture, which remains an entrenched perception in modern society. Although this provision did not create a law on mandatory reporting, it did act as a basis for cultural change. Amendments were made to the LPM in both 2004 and 2006, but there was no amendment to Article 5(3).

B. Differentiating ADC and OA for Mandatory Reporting through Abstract Judicial Interpretation (2013-2015)

The formal rules for mandatory reporting were first institutionalized for child sexual abuse cases by an abstract judicial interpretation titled ‘Opinion on Punishing Sexual Abuse of Minors’⁹ (‘OPSAM’) on October 23, 2013. The

⁸ Full text in Chinese is available here <<https://www.cecc.gov/resources/legal-provisions/law-on-the-protection-of-minors-chinese-text>> accessed 11 November 2022. (Competent authority here is not defined. In practice, people may report to any organization or agency with public power or public function such as Women’s Federation, Youth League, Village Committee or to the education authority, policy authority or other public authority.)

⁹ Full document available at Supreme People’s Procuratorate, <https://www.spp.gov.cn/zd gz/201310/t20131025_63797.shtml> accessed 24 January 2022.

Supreme People's Court ('SPC') has the power of issuing abstract judicial interpretation, which is in the nature of rule-making.¹⁰ In addition to the SPC, another body of judicial nature, called the Supreme People's Procuratorate¹¹ ('SPP') also possesses the power of issuing abstract judicial interpretations. These abstract judicial interpretations are binding on lower courts and lower procuratorate bodies. To enhance the implementation of the law, the SPC and SPP usually invite other agencies to join them in the promulgation of abstract judicial interpretations.

The key actors for effective implementation of OPSAM are judges, prosecutors, lawyers, and police. Accordingly, it was issued by the SPC along with the SPP, the Ministry of Public Security ('MPS', which supervises the police), and the Ministry of Justice ('MOJ', which supervises lawyers). The idea and the draft of the OPSAM is led by the SPC, which also takes the lead in juvenile justice policy experiments. Article 9 of OPSAM provides that:

"For personnel bearing special responsibilities to minors, such as supervision, education, training, assistance, care or medical treatment, as well as other citizens and entities, if finding that a minor has been sexually abused, they have the right and the duty to make a report to the authority of public security, or people's procuratorate or people's court. (Emphasis added)"

Article 10 (1) further prescribes the duties of authorities who receive reports, which include documenting the case and initiating the investigation. This is the first time formal rules were used to differentiate ADC and OA. However, the differentiation of ADC and OA was superficial, as there was no difference in the consequences for non-reporting.

On December 18, 2014, the SPC took a further step in mandatory reporting by issuing another abstract judicial interpretation titled 'Opinion on Several Issues in Handling Guardians' Violations of Rights and Interests of Minors' ('OSIH-GVRIM')¹² jointly with the SPP, MPS and Ministry of Civil

¹⁰ Abstract judicial interpretation is different from case based judicial interpretation. In China, the SPC's role is not constitutional interpretation, but rather, to interpret the law through case-based interpretation, letters and replies, or formal abstract judicial interpretation with detailed rules to apply certain laws. So the SPC has actively used the abstract judicial interpretation power to create new rules and to constrain other powers in a delicate way. For more details, please refer to Jianlong Liu, 'Judicial Interpretation in China' in Mahendra Pal Singh and Niraj Kumar (eds), *The Indian Yearbook of Comparative Law 2018* (Springer 2019), 214; or EC Ip, 'Judicial Review in China: a Positive Political Economy Analysis' (2012) 8(2) *Review of Law & Economics* 331.

¹¹ An institution transplanted from the Soviet model, with the constitutional power of legal supervision.

¹² The full text of the judicial interpretation is available at <<https://www.court.gov.cn/fabu-xiangqing-13398.html>> accessed 24 January 2022.

Affairs ('MCA') to deal with the challenges of family dysfunction and child maltreatment. Through this opinion, SPC expanded the scope of mandatory reporting beyond sexual abuse cases to other violations by parents and other guardians. Article 3(1) of OSIH-GVRIM re-emphasizes the contents of Article 5(3) of LPM. Article 6(1) further provides that "*Where organizations such as schools, hospitals, village (residents) committees, social work establishments, and their staffs, find that minors have suffered violations by parents or other guardians, they shall promptly report the case or file a complaint to the authority of public security.*" Article 6(2) adds that "*Where other units and their staffs, or other individuals find that minors have suffered violations by parents and other guardians, they shall also promptly report the case to police, or file a complaint.*"

OSIH-GVRIM shares some common characteristics with OPSAM. It provides for a nominal universal mandatory reporting rule without punishment, but also names a list of certain ADCs as aforementioned in Article 6(1). The slight difference between the two is that OPSAM puts ADC and OA in one section, while OSIH-GVRIM separates them into two sections of one article each which makes the differentiation more explicit. There is however no consequence for non-reporting in the prescribed cases. The purpose of the two abstract judicial interpretations is to change the perception of actors working closely with children and to lay a solid foundation for later legislative efforts. This incremental strategy is influenced by cultural concerns and institutional constraints. From the cultural perspective, in the inter-agency discussion of the drafts, stakeholders, especially law enforcement agencies, raised concerns of implementation without cultural preparation. From the institutional perspective, the abstract judicial interpretation has no power to create new legal obligations beyond laws made by the National People's Congress ('NPC') and Standing Committee of National People's Congress ('NPCSC').

C. Legislating Mandatory Reporting with Legal Consequence (2015 till now)

The first law to legislate mandatory reporting was the Anti-Domestic Violence Law¹³ ('ADV Law') passed in 2015 which expanded the application of mandatory reporting to all victims of domestic violence who are without civil capacity or with limited civil capacity.¹⁴ Article 14 of the ADV Law provides that:

¹³ The full text of the law is available through the link <http://www.gov.cn/zhengce/2015-12/28/content_5029898.htm> accessed 3 January 2023.

¹⁴ The concept of capacity in civil law jurisprudence defines three degrees of civil capacity which a natural person can have: no civil capacity, limited civil capacity and full civil capacity. This in turn decides to what extent they can take responsibility for their actions related to contract, tort and other areas of civil law. Children and people with mental problems are either without civil capacity or have limited civil capacity.

“Where primary or secondary schools, kindergartens, medical establishments, villagers’ committees, urban neighbourhood committees, social service organizations, social assistance and protection organizations, welfare institutes and their employees discover in the course of their work that a person lacking civil capacity or with limited civil capacity has suffered domestic violence or might have suffered domestic violence; they shall promptly report it to the authority of public security. The authority of public security shall keep the reporter’s information confidential.”

Unlike the two abstract judicial interpretations, the ADV Law provides legal consequences for non-reporting. Article 35 provides that if the ADC, as prescribed by Article 14, fails to report the case, the competent authority shall impose disciplinary sanctions on the person who possesses primary responsibility or leadership responsibility. Article 36 also prescribes that criminal sanctions may be imposed on civil servants of state agencies if child rights violations are caused by dereliction of duty, abuse of power or favouritism. However, there are no criminal sanctions for other professionals’ reporting failure. The consequences are in the form of disciplinary sanctions, such as warnings, salary reductions, firing from the job etc.

Another progressive aspect of the ADV Law is that it prescribes the measures to be taken in dealing with the reports of domestic violence and the placement of the victims. The two sections of Article 15 of the Law prescribe the duties of authorities who receive the report. Article 15(1) provides for the timely filing of the case, investigation of the case, collecting evidence, injury assessment and timely placement for medical treatment. Article 15(2) provides that if domestic violence victims without civil capacity or with limited civil capacity are facing a threat to their life or lack of care, the police shall notify the Authority of Civil Affairs to place them in a shelter centre, assistance centre or welfare institute.

In the 2020 Revision of LPM¹⁵ (based on previous legislation), Article 11 uses three sections to prescribe actors responsible for mandatory reporting of child abuse cases. Article 11(1) is identical to Article 5(3) of LPM (1990). Article 11(2) adds governmental institutions and their staff to the existing list of ADCs as prescribed by the Anti-Domestic Violence Law. It also prescribes the following circumstances under which they are obligated to report — if they: (1) find a child is being hurt, (2) suspect a child of being hurt, or (3) find a child in a dangerous situation while performing duties. Hurt includes instances of child sexual abuse. Section 2 provides for the authorities who

¹⁵ The full text of the LPM after the 2020 revision can be accessed through the Xinhua Net publication, ‘PRC Law on Protection of Minors (2020 Revision)’ (*Xinhua Net*, 18 October 2020) <http://www.xinhuanet.com/2020-10/18/c_1126624505.htm> accessed 3 February 2022.

may receive the report, such as the police, civil affairs, or education and other proper authorities. Article 11(3) provides the duties of the receiving authority, which are similar to the duties stated previously. Additionally, Article 117 provides legal consequences for report failures by an ADC: *“If anyone doesn’t report under Article 11(2) and if non-reporting causes serious consequences, the relevant institution, organization or individual shall face disciplinary sanctions by the competent authorities.”* Article 128 provides the same content as Article 36 of the ADV Law.

The LPM (2020 Revision) and ADV Law (2015) share some commonalities, such as i) differentiating ADC and OA in reporting duties, ii) only punishing ADC for non-reporting (‘punishable mandatory reporting’), iii) mainly turning to disciplinary sanctions as sanctions for non-reporting, and iv) prescribing receiving authorities to create incentives for reporting, by ensuring that reports are taken seriously. However, the LPM (2020 Revision) differentiates ADC and OA in terms of who should report and what to report. As to who should report, LPM (2020 Revision) expands ADC to all state institutions and their staff. For what to report, LPM (2020 Revision) provides for an OA to report only on what he or she has encountered. An ADC on the other hand must report instances wherein they encounter an offence taking place, suspect that an offence has taken place or is going to take place, or in which children are suspected of being in danger.

D. Experimenting with Enforcement Measures (2018-present)

The incremental approach taken by China has been guided by the concern of implementation. In an interview regarding the feasibility of introducing mandatory reporting in the ADV Law, Tong Lihua, who is a leading Chinese child rights activist, a CPC Congress Representative and also a Deputy of Beijing People’s Congress, mentioned that *“It is very necessary to have mandatory reporting for the early identification of child abuse. But it is also important to prescribe the right scope of mandatory reporters by neither neglecting the necessary actors nor creating dilemmas of implementation for being too ambitious.”*¹⁶

Even though the law is incremental in nature and conscious of cultural preparation, it still faces challenges as child abuse reporting is not usually a priority for enforcement agencies while facing multiple tasks. This makes it necessary to ensure some additional effort at the implementation stage. Usually, after a legislation is passed in China, the provincial government needs to enact local acts, or the SPC and SPP need to enact abstract judicial

¹⁶ People’s Daily, ‘Calling Upon the Introduction of Mandatory Report to Anti-Domestic Violence Law’ (15 April 2015) <<http://politics.people.com.cn/n/2015/0415/c70731-26846707.html>> accessed 27 January 2022.

interpretations for implementation of the law. On December 24, 2018, Yunnan Provincial Government issued 'Implementation Measures for Mandatory reporting in the Anti-domestic Violence Law,' thereby becoming the first provincial government to enact a regulation on how to enforce mandatory reporting. However, the institutionalization of regulations across the country remains scant.

As a result, SPP becomes the national leading agency to promote the implementation of mandatory reporting across the country. In early 2019, SPP started pilot programmes in some cities of Zhejiang, Jiangsu, Hubei, and Jiangxi Provinces to prepare for the national policy on implementation of mandatory reporting for child abuse.¹⁷ At the end of 2019, the SPP organized experts to evaluate the pilot programs, and decided to issue an abstract judicial interpretation to institutionalise pilot implementation efforts. On May 29, 2020, after efforts made by the SPP, eight other national agencies joined the SPP to issue 'Opinions on Mandatory reporting for Child Cases (For Trial Implementation)' ('OMRCC').¹⁸ Since OMRCC was enacted before the passing of the LPM (2020 Revision), it acted as a guideline for nationalising the implementation measures for ADC's mandatory reporting and also as a driving force for pushing mandatory reporting to be written into the LPM 2020 Revision.

Article 3 of the OMRCC lists the actors punishable for non-reporting under mandatory reporting requirements. These actors are: (1) state institutions and organizations, their employees authorized to exercise power by laws; (2) rural or urban neighbourhood committees; (3) educational institutions including primary and secondary schools, kindergarten and other education training institutions, organizations for outdoor child services and school bus service providers; (4) child day care centres; (5) medical units including hospitals, maternal and child health hospitals, emergency centres, medical clinics; (6) child social welfare entities including child welfare institutions, child assistance institutions, child protection institutions, social workers' institutions; and (7) hotels and guest houses.

Further, Article 4 of the OMRCC illustrates nine circumstances in which reporting is mandatory: (1) finding an injury to sex organs or other private parts of a child; (2) girls under the age of 14 suspected of having been sexually abused or of undergoing a pregnancy or an abortion;¹⁹ (3) girls aged 14

¹⁷ People's Daily, 'Nine Types of Child Rights Violations are under Mandatory Reporting' (29 May 2020) <<https://wap.peopleapp.com/article/5544631/546451>> accessed 23 February 2022.

¹⁸ Supreme People's Procuratorate <https://www.spp.gov.cn/spp/xwfbh/wsfbt/202005/t20200529_463482.shtml#1> accessed 27 January 2022.

¹⁹ The age of sexual consent in China is 14. If a girl under the age of 14 has sex it would be presumed she has been raped. Then it needs state intervention. Girls who have been sexually abused can still get access to reproductive services but the state must know. There is only one exception: when girls between the age of 12 and 14 have sex consensually with boys between the age of 14 and 16 their relationship might not be defined as a rape. China's age of consent

or above undergoing pregnancy or abortion; (4) finding a child suffering from multiple physical injuries, serious undernutrition, or mental problems; (5) abnormal disability or death of a child; (6) a child being abandoned or lacking due care for long; (7) finding an unidentified child, child disappearance, or child being trafficked or bought; (8) finding a child engaged in begging; (9) other circumstances of a child being hurt seriously or in immediate danger. Article 5 and 6 provide the procedure for communication between organisational actors responsible for punishable lapses in mandatory reporting and their employees. Article 7-14 prescribe the detailed procedure for authorities to receive such reports. It is pertinent to note that those reporters are not held liable for reports that are found to be false, while anyone preventing or discouraging reporting by actors mandated to do so, is liable to be punished according to Article 15. Article 16 provides that punishment for report failure could be either disciplinary sanctions or even criminal sanctions if the act violates other criminal law. Other provisions of the OMRCC focus on measures for improving inter-agency collaboration for mandatory reporting, changing the attitude of bureaucrats towards mandatory reporting, and efforts for capacity building for better implementation of mandatory reporting.

In addition to the issuing of OMRCC, the SPP has made additional efforts for improving implementation of the law, such as publishing case studies on mandatory reporting for three consecutive years from 2020 to 2022. In the publication of the first report on May 29th 2020, it highlighted one failed case and four successful cases.²⁰ A girl was molested by a school security guard. Her relative reported the case to the school, which asked the security guard to pay 30,000 RMB (approximately 3,50,000 Indian Rupees) and settled the case. The girl was not satisfied with the settlement and filed a complaint with the police. The case showed that the school knew about the commission of an offence but did not report the crime to the police. The local Procuratorate actively engaged in the prosecution process, which resulted in the perpetrator being sentenced to imprisonment of two years and three months. In addition, the local Procuratorate sent judicial recommendations to the local education authority, which included: expanding background check of new employees including supportive staff, increasing the school's capacity of early identification of child abuse cases, conducting trainings of teachers for mandatory reporting, disciplinary sanctions for teachers and administrators for non-reporting. The remaining four cases demonstrated successful reporting of offences by doctors and teachers, and successfully helped identify child abuse committed by family members and others. For example, a couple meted out corporal punishment to their 10 year old child by means of physical abuse which

is very low, and has been criticized for the weak protection it offers to children. But the Indian one at the age of 18 might be too high.

²⁰ Supreme People's Procuratorate, 'Typical Cases for Mandatory Report related to Child Rights Violations' (29 May 2020) <http://www.nwccw.gov.cn/2020-06/03/content_284771.htm> accessed 24 January 2022.

left the girl critically injured. When they sent the girl to hospital, the doctor suspected that the injuries had been intentionally inflicted and reported it to the police. The police started a criminal investigation and found the parents had frequently abused the girl. This led to the parents being sentenced for the habitual child abuse meted to their child.

On May 31, 2021, the SPP published its second case study, featuring a single case in which report failure was punished.²¹ The case dealt with non-reporting of sexual abuse by the Principal and Vice-Principal of a school, who faced criminal sanctions for non-reporting. The case study is similar to the case study from the 2020 Report but the principal and vice-principal in the 2020 case study only got disciplinary sanctions. This sent a strong signal to stakeholders and employees responsible for mandatory reporting that the law must be taken seriously.

On May 27, 2022 the SPP launched another case study of instances where criminal sanctions were imposed for non-reporting. This included a case in which the hotel failed to verify guests' ID which led to a girl under the age of 14 years being sexually abused in the hotel, a case in which medical clinics failed to report a teenage girl's pregnancy, and a case in which school administrators didn't report a teacher's sexual abuse of a student.²² In the case involving the hotel, the punishment was a fine of 20,000 RMB (2,00,000 Indian Rupees) and suspension of business for one month. In addition, the local Procuratorate also sent judicial recommendations to the local police authority. As a response, the local policy authority organized 200 hotel managers and owners of the county (similar to an Indian "district") for a training programme on the mandatory reporting law.

The publication of typical cases by the SPP is very strategic. Firstly, it chooses the best time of the year to get media attention, which is mostly the week before the "National Children's Day" (June 1st). Secondly, it usually publishes case studies depicting both mandatory reporting best practices and failures of non-reporting, which enables stakeholders to understand the dos and don'ts of mandatory reporting clearly. Thirdly, through the case studies we see that the SPP does not just care about the handling of the case, but also about issuing comprehensive judicial recommendations for preventive measures such as mandatory trainings for the relevant stakeholders, suggesting that schools incorporate criminal background checks in the hiring process etc.

²¹ Supreme People's Procuratorate, *SPP: Every Violation of Mandatory Reporting Would be Investigated* <http://www.xinhuanet.com/2021-05/31/c_1127514771.htm> accessed 26 October 2022.

²² Supreme People's Procuratorate, *Typical Cases for Punishing Report Failures* (27 May 2022) <https://www.spp.gov.cn/spp/xwfbh/wsfbt/202205/t20220527_557995.shtml#2> accessed 26 October 2022.

In addition to the publication of case studies centred around the public and ADCs, the SPP has also tried to document and promote innovative pilot programs. For example, the Huangdao District of Qingdao City opened a special helpline for mandatory reporting to the police department with specialized personnel to answer incoming calls.²³ The specialists in turn issue recommendations to relevant stakeholders based on the case pattern analysis. For example, when they found that the reports were mainly around cases where young girls were taken to hotels by strangers or familiar persons to have sex, the authority of public security in Huangdao District suggested that the Qingdao City Authority of Public Security should send a city-wide policy recommendation to more than a thousand hotels for training on the mandatory reporting.²⁴ Jiulong District of Chongqing developed a mandatory reporting application, which enables the reporter to upload evidence to the police authority; it also enables the local procuratorate to supervise the police's handling of the report.²⁵

Furthermore, the SPP also uses its institutional power to mobilize other stakeholders to join the efforts of raising the public's awareness for mandatory reporting. In September 2020, SPP collaborated with China Central Television, (the most popular nationwide Chinese TV broadcaster) to make an informational TV series on mandatory reporting.²⁶ During the National People's Congress Session in 2022, enforcement of mandatory reporting was one of the highlighted parts of the SPP's annual report to the National People's Congress.²⁷ Further, it also allocated its existing national call number 12309 as the one to receive complaints under mandatory reporting.²⁸

²³ Lu Jinzeng, Dong Huizhu, and Yu Hongyan, *Qingdao Opens 110 Special Line for Child Mandatory Report* (*Procuratorate Daily*, 3 December 2021) <http://newspaper.jcrb.com/2021/20211203/20211203_001/20211203_001_7.htm> accessed 3 February 2022.

²⁴ *ibid.*

²⁵ Chen Guozhou, 'Mandatory Report App for Better Child Protection' (Xinhua Net, 3 August 2020) <http://www.xinhuanet.com/legal/2020_08/03/c_1126316362.htm#:~:text=%E5%B6%E6%8A%A5%E5%91%8AApp%E6%98%AF%E4%B8%80%E4%B8%AA%E8%BF%99%E4%B8%80%E8%BF%87%E7%A8%8B%E5%85%A8%E7%A8%8B%E7%B%91%E7%9D%A3%E3%80%82> accessed 3 February 2022.

²⁶ *Law In-depth Program on Mandatory Reporting for Strong Child Protection (I)* (6 September 2020) <https://www.spp.gov.cn/spp/qzbg/202009/t20200906_519483.shtml> accessed 9 March 2022; <<https://tv.cctv.com/2020/09/12/VIDEOPRHQ4pW1XHhnj9JwEV0200912.shtml>>; *Law In-depth Program on Mandatory Reporting for Strong Child Protection (II)* (13 September 2020), <https://www.spp.gov.cn/spp/qzbg/202009/t20200913_519482.shtml> accessed 9 March 2022; "'Deep Rule of Law" Mandatory Reporting System: Strong Protection of Minors (Part 2)' <<https://tv.cctv.com/2020/09/12/VIDEOPRHQ4pW1XHhnj9JwEV0200912.shtml>> accessed 9 March 2022.

²⁷ *SPP Chief Delivered Annual Report to National People's Congress*, March 8, 2022, <https://www.12309.gov.cn/llzw/yw/202103/t20210308_511686.shtml> accessed 9 March 2022.

²⁸ SPP, *Protecting Every China Around Us*, 9 March 2022, <http://www.chinapeace.gov.cn/chinapeace/c100007/2022-03/09/content_12604513.shtml#:~:text=%E6%A3%80%E5%AF%9F%E5%AE%98%E6%8F%90%E7%A4%BA%E6%82%A8%EF%BC%8C%E5%BC%BA%E5%88%B6,%E6%8B%A8%E6%89%9312309%E6%A3%80%E5%AF%9F%E6%9C%8D%E5%8A%A1%E7%83%AD%E7%BA%BF%E3%80%82> accessed 9 March 2022.

The efforts led by the SPP have garnered immense attention on mandatory reporting law within a short period of time. Within three months after the effective implementation of OMRCC, 500 cases were filed across the country under mandatory reporting.²⁹ In 2021, there were 1657 child rights violation cases identified through mandatory reporting, and in 459 cases, ADCs were punished for non-reporting. The graph below³⁰ shows the sharp increase in awareness of mandatory reporting by the law enforcement agencies such as authorities of public security, education, civil affairs and procuratorate, based on Baidu Search. The table below shows that the sharp increase in awareness started in 2019 when the SPP started the mandatory reporting enforcement pilots. Instead the awareness was very low in 2016 when the first law mandating child abuse reporting with legal sanctions took effect. It shows that the law itself is not necessarily effective for increasing awareness among law enforcement agencies, but dedicated law enforcement efforts matter more.

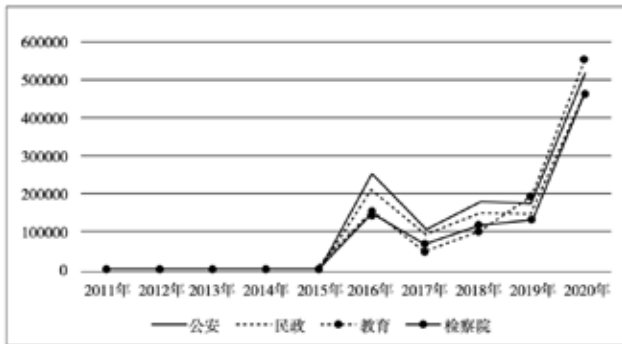


图2 未成年人保护强制报告关注程度

资料来源：根据百度搜索结果整理所得。

E. Implementation Challenges Ahead

In terms of legislative content, the legislation is well developed but there is minuscule attention to the problem of child pornography; legislation does not highlight the role of media, film industry or even high-tech companies as important mandatory reporting actors.

In addition, there are also other direct implementational challenges ahead. Even though concern around implementation has been the driving force for

²⁹ Wei Xi, *More Supportive Measures in Need for Mandatory Report* (*China Youth Daily*, 13 October 2021) <http://zqb.cyol.com/html/2021-10/13/nw.D110000zgqnb_20211013_1-07.htm> accessed 3 February 2022.

³⁰ Fuhai Xu, *Mandatory Reporting for Child Protection: Practice and Future Choice* (2021) 5(3) *Chinese Social Security Review* 102.

the legislative process, there are still evident implementational challenges ahead. Firstly, awareness on mandatory reporting even among professionals is still low. According to a survey conducted in Beijing in December 2020, about 45% social workers and 30% of “Child Ombudsmen”³¹ in villages and urban neighbourhood committees were not aware of mandatory reporting law.³² Even among teachers and doctors, the percentage of those aware of mandatory reporting was lower than expected, given that these professionals interact with children on a regular basis.³³ Empirical data shows that the cases identified through mandatory reporting are still low in China, at just around 2.97% during the period from June to September 2020.³⁴

Cultural factors are also reflected in views involving mandatory reporting. Among the persons aware of the mandatory reporting law, there are some who are reluctant to report since they are not sure if reporting is beneficial for child victims.³⁵ Empirical research also highlights that the public is more tolerant of parents’ violence towards children, compared to violence perpetrated by a stranger; people prefer reporting violent behaviour toward children rather than non-violent behaviour; parents comprise the main reporting body while reports from strangers are still low.³⁶

In addition to awareness, there are also institutional barriers preventing the effective implementation of the law. For example, even though the police department and the SPP have separate national hotlines which receive mandatory reporting complaints, these hotlines run either by police departments or procuratorates at different levels are not integrated and also lack professionals to answer, screen and make referrals for cases.³⁷ The coordination among different institutions for investigation, provision of supportive services to child victims and their families, and the shelter placement of child victims is also weak.³⁸ There are multiple authorities charged with receiving reports, which causes confusion for reporting actors.³⁹

³¹ Child Ombudsmen are persons appointed in the urban or village community to take care of the welfare and rights of children, in a practice that was developed through pilot programmes.

³² Guo Hongping, ‘What Are the Pains to Enforce Mandatory Reporting?’ (2021) 17 *Fang Yuan* 36.

³³ *ibid.*

³⁴ Lan Yuejun and Li Xinyu, *The Challenges and Possible Solutions for the Law Enforcement of Mandatory Report* (2021) 6 *China Youth Social Science* 128, 130.

³⁵ *ibid.* For example, if the case was handled by non-professionals the child victim might be retraumatized in the judicial process.

³⁶ Du Yaqiong and Cao Yueyue, ‘Probing the Child Protection Practice through Mandatory Report in China’ (2022) 1 *Child and Juvenile Studies* 22.

³⁷ Gu Jin, ‘Mandatory Report: Judicial Practice and Future Choice’ (2021) 12 *Theory Studies*, 67.

³⁸ *ibid.*

³⁹ Yuejun and Xinyu, (n 34) 131.

In summary, the Chinese implementational challenges ahead mainly deal with the fragmentation of different pilots, sustaining the current commitment of implementation innovations and making the law of mandatory reporting mainstream across the general public and law enforcement actors.

III. MANDATORY REPORTING IN INDIA: LEGISLATIVE HISTORY AND IMPLEMENTATION

Mandatory reporting under Indian law dates back to 1882, when it was incorporated into the Code of Criminal Procedure, 1882 ('CrPc 1882') under Section 44.⁴⁰ Section 44 of the CrPc 1882 made it mandatory for the public to report certain offences under the Indian Penal Code, 1860 ('IPC') such as offences against the state, illegal gratification, robbery, and murder. This provision was also carried into the Code of Criminal Procedure, 1973 ('CrPC') as Section 39.⁴¹ Intentional non-reporting of such offences was made punishable under Section 202 of the IPC. The punishment extends to a maximum of six months or a fine or both. This, however, did not include offences pertaining to sexual assault, or any other offences pertaining to children/child abuse. Mandatory reporting for child abuse, specifically child sexual abuse, was introduced nationally in 2012 via the Protection of Children from Sexual Offences Act, 2012 ('POCSO'). The POCSO mandated reporting of instances of child sexual abuse to relevant authorities by all members of the public. This also extends to consensual sexual activity between minors, as the age of sexual consent under the POCSO is 18 years. Further, in 2013, an amendment was made to the CrPc which mandated reporting of sexual offences and acid attacks by hospitals (both public and private) to the police.⁴² The Juvenile Justice (Care and Protection of Children) Act, 2015 also extended mandatory reporting to children found without their guardians to the police, the child welfare committee etc.⁴³ This section of the paper will discuss the legislative history of mandatory reporting with regard to child sexual abuse in India, how it stands today and the practical applicability of the provision, including its limitations.

A. Mandatory reporting for child sexual abuse before POCSO

Mandatory reporting for child sexual abuse was incorporated in Indian law for the first time in 2003 by the state of Goa via the Goa Children's Act, 2003 ('Goa Act'). The Goa Act, under Section 8(14), mandates developers of photographs or films to report to the Officer-in-Charge of the nearest police station

⁴⁰ Code of Criminal Procedure 1882.

⁴¹ Code of Criminal Procedure 1973, s 39.

⁴² Code of Criminal Procedure 1973, s 357-C.

⁴³ Juvenile Justice (Care and Protection of Children) Act, 2015, s 32.

if they find that the photos/films developed by them contain sexual/obscene depictions of children. Failure to report such a discovery carries a maximum punishment of three years and/or a minimum penalty of INR 50,000.⁴⁴ Further in 2005, the Goa Act was amended to also include mandatory reporting of (a) child abuse or (b) an adult travelling with or keeping a child under suspicious circumstances or (c) sale of children or (d) sexual offence with a child or (e) child trafficking by the district police, airport authorities, border police, railway police and traffic police, to the Officer in-charge of the nearest police station under Section 8(15).⁴⁵ However, non-reporting under Section 8(15) is not an offence and does not attract a penalty.

The mandatory provisions under the Goa Act criminalized the non-reporting of pornographic film content and mandated reporting of other child abuse incidents without criminalisation. However, both the mandatory provisions under the Goa Act cast the responsibility only on certain groups of people and public servants, and excluded the public.

In the year 2012, mandatory reporting for child sexual abuse was introduced centrally via the Protection of Children from Sexual Offences Act, 2012 ('POCSO'). POCSO engendered a formal legal framework specifically for the protection of children against sexual offences. The primary object of the legislation was to criminalise offences of sexual assault, sexual harassment, and pornography against children⁴⁶ and fill gaps in the IPC with regard to provisions relating to sexual abuse of children, which was not specifically defined in the IPC at the time.

B. Mandatory reporting under POCSO

Prior to the POCSO being passed by the Parliament, the POCSO bill was analysed by the Parliamentary Standing Committee on Human Resource Development ("Committee"). The Committee, after duly noting the considerable academic debates on mandatory reporting and concerns of various stakeholders, stated in bold that such a provision "cannot be considered practical."⁴⁷ The Committee received suggestions to make mandatory reporting specific to stakeholders, such as childcare custodians; health or medical practitioners; employees of child protection agencies such as Childline; Juvenile Justice Functionaries; commercial film and photographic print processors; any establishment employing persons below 18 years of age, which it found

⁴⁴ Goa Children's Act, 2003, s 8(14).

⁴⁵ Goa Children's Act, 2003, s 8(15).

⁴⁶ The Protection of Children from Sexual Offences Act, 2012, Preamble.

⁴⁷ Department-related Parliamentary Standing Committee, *240th Report on The Prohibition of Child Sexual Offences Act, 2012* (December 2011) 22. <https://prsindia.org/files/bills_acts/bills_parliament/2011/SCR_Protection_of_Children_from_Sexual_Offences_Bill_2011.pdf> accessed 9 January 2022.

to be justified.⁴⁸ This suggestion was similar to laws prevalent in other jurisdictions which restricted mandatory reporting only to those professionals who regularly interact with children, such as in China. The committee thereafter recommended the deletion of clause 21(1) from the bill and the redrafting of clause 21(2),⁴⁹ both of which related to criminal punishment (imprisonment) for non-reporting by the public and heads of institutions respectively. The clauses were however retained, and a rationale for it was visible in the model guidelines framed by the Ministry of Women and Child Development, which states that the purpose of mandatory reporting is twofold: 1) prevent children from suffering further harm without reporting⁵⁰ and 2) without intervention, children may remain victims forever and may never be able to disclose or stop their abuse by themselves.⁵¹

The POCSO differs from statutes in other countries since it extends mandatory reporting to all persons, unlike many jurisdictions such as Australia⁵² and the USA (in most states) wherein such mandatory reporting is only limited to certain groups of persons who work with children, or are in a position of authority/trust, such as teachers, social workers and doctors.⁵³ This, coupled with the fact that non-reporting is a punishable offence, makes it one of the heavier provisions among its international counterparts.

The POCSO contains many guidelines relating to protection of child victims during reporting and trial, such as provision of free emergency medical care, appointment of support persons for child victims and setting up of special POCSO courts. One such protection is mandatory reporting under Sections 19, 20 and 21. Section 19 mandates any person who has apprehension that an offence under POCSO may be committed or has been committed to inform the Special Juvenile Police Unit⁵⁴ or the local police.⁵⁵ Section 20 further puts the onus on media, studio, and photographic facilities to report cases. It states that any media personnel or employee of a hotel, lodge, hospital, club, studio or

⁴⁸ *ibid.*, 23.

⁴⁹ *ibid.*

⁵⁰ Ministry of Women and Child Development, Model Guidelines under Section 39 of The Protection of Children from Sexual Offences Act, 2012 (September 2013) 73. <<https://wcd.nic.in/sites/default/files/POCSO-ModelGuidelines.pdf>> accessed 8 January 2022.

⁵¹ *ibid.*

⁵² Western Australian Government, 'Mandatory reporting of Child Sexual Abuse in WA' (Western Australia Government, 2 February 2023) <<https://www.wa.gov.au/service/community-services/community-support/mandatory-reporting-of-child-sexual-abuse-wa>> accessed 21 February 2023.

⁵³ Children's Bureau, *Mandatory Reporters of Child Abuse and Neglect* (Child Welfare Information Gateway, April 2019) 2. <<https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/manda/>> accessed 24 January 2022.

⁵⁴ The Special Juvenile Police Unit must be formed in each district under s 107 of the Juvenile Justice (Care & Protection of Children) Act, 2015 to coordinate all functions of police related to children amongst various stakeholders within the system.

⁵⁵ The Protection of Children from Sexual Offences Act 2012, s 19.

photographic facility who comes across any material or object which is sexually exploitative of a child (including pornographic, sexually-related or obscene representations of a child or children) through any medium must report the same to the Special Juvenile Police Unit, or to the local police.⁵⁶ POCSO also goes on to criminalise non-reporting of an offence by adults and provides the punishment for non-reporting under Section 21. The punishment is a maximum of six months imprisonment and/or fine for citizens, but the same extends up to one year and fine in cases where non-reporting is by the person in-charge of any company or an institution.⁵⁷ It is pertinent to mention that as per Section 21(3), the punishment does not apply to children.⁵⁸ Lastly, POCSO does not criminalise reports that may turn out to be “false” if the same has been made in good faith.⁵⁹ However, if a false report: 1) is made for offences of sexual assault, aggravated sexual assault, penetrative sexual assault or aggravated penetrative sexual assault solely with the intention to humiliate, extort or threaten or defame, the reporter shall be punished with imprisonment for a maximum of six months and/or with fine⁶⁰ and; 2) provides false information against a child, knowing it to be false, thereby victimizing such child, the reporter is punishable with imprisonment, which may extend to one year and/or with fine.⁶¹

C. Implementation of mandatory reporting

Studies have shown that not many cases have been reported through mandatory reporting. This conclusion can be drawn from data concerning the complainants in POCSO cases. Studies conducted by CCL-NLSIU on the Working of Special Courts under the POCSO Act, 2012 in Maharashtra, Assam and Andhra Pradesh show that most reporting has been done by parents and the child victim in cases under POCSO.⁶² Cases have rarely been reported to the police by professionals or persons who are not related to the child victim.⁶³ Below are some statistics from the CCL-NLSIU⁶⁴ study:

⁵⁶ The Protection of Children from Sexual Offences Act 2012, s 20.

⁵⁷ The Protection of Children from Sexual Offences Act, 2012, s 21.

⁵⁸ *ibid.*

⁵⁹ The Protection of Children from Sexual Offences Act 2012, s 19(7).

⁶⁰ The Protection of Children from Sexual Offences Act 2012, s 22(1).

⁶¹ The Protection of Children from Sexual Offences Act 2012, s 22(3).

⁶² Centre for Child and the Law, ‘An Analysis of Mandatory Reporting under the POCSO Act and its Implications on the Rights of Children’ (National Law School of India University, 15 June 2018).

⁶³ *ibid.*

⁶⁴ *ibid.*

Table 1

	Parent	Victim	Relatives	Others
Assam	80%	11%	8%	1%
Maharashtra	48%	41%	7%	2%
Andhra Pradesh	48%	43%	6%	3%

Further, a study conducted in the state of Maharashtra by a non-governmental organisation called Aarambh⁶⁵ has also shown that not many persons have been charged for non-reporting under Section 21 by police personnel. Only 5% of police respondents stated that they have booked persons under POCSO for non-reporting and only 3% have heard of anyone being booked under POCSO for non-reporting.⁶⁶ However, most government personnel such as police officers, public prosecutors and Child Welfare Committees⁶⁷ ('CWCs'), District Child Protection Units⁶⁸ were in favour of the mandatory reporting provision.⁶⁹ It is also pertinent to note that ten out of 16 (62%) CWCs felt that all POCSO cases should be reported to police, while six did not respond.⁷⁰ In contrast, most hospital personnel were not in favour of mandatory reporting.⁷¹ Some of the reasons they stated ranged from stigmatisation of the female child involved, mandatory reporting acting as an obstruction for providing medical services such as abortion, especially in cases where sexual acts were consensual, the unwillingness of families to report, children reaching sexual maturity earlier and lack of awareness about the law.⁷²

D. Implementation Challenges

1. *Lack of Guidelines on the Application of Mandatory Reporting*

During drafting, civil society organisations were in favour of mandatory reporting. However, they "emphasised a need for mandatory reporting to be qualified."⁷³ They stated that there is a need for guidelines in cases wherein

⁶⁵ Praveen Patkar and Pooja Kandula, '4 Years Since POCSO: Unfolding of the POCSO Act In the State of Maharashtra' (*AarambhIndia*, 7 March 2018) <<http://aarambhindia.org/4-years-since-pocso-maharashtra/>> accessed 9 February 2022.

⁶⁶ *ibid.*, 74-75.

⁶⁷ Child Welfare Committees must be formed in each district under s 27 of the Juvenile Justice (Care & Protection of Children) Act, 2015. Their role is to pass orders and hold enquiries for children in need of care and protection such as child sexual abuse victims.

⁶⁸ District Child Protection Units must be formed in each district under s 27 of the Juvenile Justice (Care & Protection of Children) Act, 2015. They are the focal points to ensure the implementation of the Act and other child protection measures in the district. See CCL (n 62).

⁶⁹ *ibid.* 76, 110, 164.

⁷⁰ *ibid.* 165.

⁷¹ *ibid.* 227.

⁷² *ibid.* 227-228.

⁷³ *ibid.* 245.

parents are not willing to report, a need for awareness and system strengthening, limitation of reporting to heinous crimes only, and a system for rewarding schools for reporting instead of punishing them. India's cultural and family norms may also create hurdles for mandatory reporting.

The POCSO does not provide guidelines on mandatory reporting either in the Act itself or the Protection of Children from Sexual Offences Rules, 2020 (or the erstwhile rules of 2012) and the legislature/government bodies have been unable to provide clarity on the nuances and the allied challenges of mandatory reporting. It has been left to the judiciary to interpret the sections and create guidelines for mandatory reporting. The Supreme Court in the case of *Shankar Kisanrao Khade v State of Maharashtra*⁷⁴ laid down directions for stakeholders for compliance with Sections 19, 20 and 21 of the POCSO. The case was registered prior to POCSO, when no mandatory reporting provisions were in place, but it dealt with an instance of non-reporting of child sexual abuse by a person who witnessed the abuse. The guidelines gave directions to persons in close contact with children and the media.⁷⁵ The directions urge stakeholders to report all instances of child sexual abuse to either the Police or the Special Juvenile Police Unit in accordance with Sections 19, 20 and 21 of the POCSO.⁷⁶ The directions also mention that the best interest of the child should be of paramount consideration. Lastly, incest cases are specifically mentioned, and the directions state that if the perpetrator is a family member, then utmost care must be taken and the future course of action should be taken in consultation with the mother or other female members of the family of the child, bearing in mind the fact that best interest of the child is of paramount consideration.⁷⁷ Additionally, the Supreme Court in the recent case of *State of Maharashtra v Maroti*,⁷⁸ rejected a medical professional's plea for the quashing of an FIR that had been registered against him for non-reporting, and further emphasised the need for mandatory reporting to help police investigate an offence under POCSO swiftly and also collect medical evidence in a timely manner.⁷⁹

High Courts across the country have been firm in the application of mandatory reporting with regards to police personnel and doctors. In the case of

⁷⁴ *Shankar Kisanrao Khade v State of Maharashtra* (2013) 5 SCC 546.

⁷⁵ *ibid*, [77] (J. Radhakrishnan).

(1) persons in-charge of the schools/educational institutions, special homes, children homes, shelter homes, hostels, remand homes, jails etc, or wherever children are housed (2) Media personals, persons in charge of Hotel, lodge, hospital, clubs, studios, photograph facilities (compliance with s 20 POCSO), (3) Institutions which house children with intellectual disability or persons in care and protection (4) Government or privately owned or medical institutions (5) NCPCR, S.C.P.C.R. Child Welfare Committee (CWC) and Child Helpline, NGOs or Women's Organizations.

⁷⁶ *ibid*.

⁷⁷ *ibid*.

⁷⁸ *State of Maharashtra v Maroti* (2023) 4 SCC 298.

⁷⁹ *ibid*, [15]

Prahlad Sharma v State of Rajasthan,⁸⁰ both the police and hospital failed to register a complaint and treat the child respectively. The High Court of Rajasthan held both police officials and doctors liable for non-reporting despite both officials being investigated through departmental enquiries. The court further stated that “When Parliament by amendment has purposely introduced Sections 166A⁸¹ and 166B⁸² in the IPC and made this inaction/omission as provided for by Section 19 of the Act of 2012 as the offences under Section 21, there is no reason why the guilty officials should not be proceeded against for determination of their criminal liability.”⁸³

Similarly in the case of *Ajitha v State of Kerala*,⁸⁴ in which a doctor in private practice failed to report the instance of child abuse after the victim and her mother had disclosed the abuse to her, the High Court of Kerala held the doctor liable and further stated that doctors, being public servants, are more liable than others to report under Section 19(1) of POCSO.⁸⁵ Similarly, in the aforementioned case of *Maroti*,⁸⁶ the Supreme Court set aside the Bombay High Court’s decision to quash an FIR against a doctor to whom children had disclosed systematic abuse in an institution, which was not reported.

The courts have also tried to lend some clarity to Section 19(1) of POCSO with regards to mandatory reporting when there is an apprehension that an offence has been committed. In the case of *Bineeta Chakraborty v State of Karnataka*,⁸⁷ the High Court of Karnataka held that “An analytical reading of Section 19 of the Act makes it clear that any person who has apprehension about commission of the offence or the possibility of such offence, is duty bound to furnish information to the concerned as enunciated at Subsection (1) of Section 19.”⁸⁸ The court also stated that to charge persons under Section 21 in case of apprehension requires factual evidence. Further, in the case of *Tessy Jose v State of Kerala*.⁸⁹ The Supreme Court, while acquitting two doctors on the charge of mandatory reporting, held that mere likelihood of suspicion of the accused having knowledge of an offence under POCSO is insufficient to make out a charge under Section 21 and evidence must indicate at least grave suspicion of the accused having knowledge of the offence.⁹⁰

⁸⁰ *Prahlad Sharma v State of Rajasthan* (2016) 3 CDR 1089 (Raj).

⁸¹ Public servant disobeying direction under law.

⁸² Punishment for non-treatment of acid/sexual assault victim by a hospital.

⁸³ *Prahlad Sharma* (n 80).

⁸⁴ *Ajitha v State of Kerala* 2016 SCC OnLine Ker 26690.

⁸⁵ *ibid.*

⁸⁶ *Maroti* (n 78).

⁸⁷ *Bineeta Chakraborty v State of Karnataka* 2017 SCC OnLine Kar 3467.

⁸⁸ *ibid.*

⁸⁹ *Tessy Jose v State of Kerala* (2018) 18 SCC 292.

⁹⁰ *ibid.*

On the other hand, High Courts have actively overturned convictions and/or suspended the sentence under Section 21. In the case of *Pragya Prateek Shukla and Ors. v. State of Rajasthan*,⁹¹ wherein two persons were convicted under Section 21 for not reporting an instance of sexual abuse (which eventually resulted in the victim's suicide) and forcing the victim to write a confession letter, the High Court of Rajasthan overturned the conviction. The court further stated that "Incidents are not uncommon where after deliberations, it is decided in a bona fide manner not to report such matters to the police, lest the reputation of the girl is tarnished."⁹² Such a judgment entirely defeats the purpose of mandatory reporting as it goes back to archaic beliefs around women's sexuality and honour. Such reasoning is problematic and the attitude of the judiciary in this regard must be reconsidered. In another case, *Sridevi v. State*,⁹³ the victim had been sexually assaulted by her mother's boyfriend in the mother's presence; the High Court of Madras reversed the conviction of the mother of the victim under Section 21 and Section 17⁹⁴ of the POCSO by stating that "it is highly doubtful that the petitioner, being the mother, had been involved in this offence, as alleged by the prosecution."⁹⁵ In incest cases, there are more nuances involved. However, the court has been dismissive of even the idea of the involvement of the victim's mother whereas in one author's⁹⁶ experience, mothers are often aware of the abuse but may be afraid to report owing to the effects of reporting, the consequent arrest and trial. These effects range from loss of household income, societal stigma relating to sexual abuse to the struggles of being a single parent such as lack of child care and ostracization by other family members.

The judiciary has made attempts to bridge the gap between the provision and its implementation. However, without clear guidelines, the interpretation is inconsistent and insufficient and in many instances furthers stereotypes and archaic beliefs such as in the case of *Pragya Prateek Shukla*.⁹⁷ The legislature needs to provide clarity and guidance on the application of mandatory reporting while keeping in mind the ground reality and the issues being faced by stakeholders in implementation.

2. *Lack of capacity building for stakeholders*

There is a lot of stigma surrounding sex and sexual assault in the Indian context. Disclosing assault often leads to ostracization. This includes

⁹¹ *Pragya Prateek Shukla v State of Rajasthan* 2022 SCC OnLine Raj 71 .

⁹² *ibid.*

⁹³ *Sridevi v State* 2021 SCC OnLine Mad 2168.

⁹⁴ Punishment for abetment.

⁹⁵ *ibid.*

⁹⁶ One of the authors of the paper provided legal representation to child sexual abuse victims in courts in Delhi from 2017-2019. During this period, she gave/attended multiple trainings on POCSO/mandatory reporting.

⁹⁷ *Pragya Prateek Shukla* (n 91).

obstruction in the education of children and shaming of the family which leads to the family even having to move homes in certain circumstances. The Aarambh study is a testament to this stigma, wherein one of the arguments by stakeholders against mandatory reporting provisions was the stigmatization of the female child involved and the unwillingness of the family to report.⁹⁸ There is a need for age-appropriate sex education in schools and homes alike, better social awareness and normalising conversations surrounding sex and sexuality to break through this barrier. The Parliamentary committee had also mentioned both social stigma and difficulty in navigating the criminal justice system as objections to mandatory reporting.⁹⁹ While this is being taken up by civil society, concerted efforts need to be made in tandem by the government to bring awareness around sex and sex education.

Further, stakeholders are mostly unaware of the provision as seen from the Aarambh Study.¹⁰⁰ This is further exacerbated by the lack of trained personnel. There has been a concerted effort by both civil society organisations and state bodies to conduct POCSO training for police personnel, judges, teachers, medical professionals, CWC members, children and other stakeholders.¹⁰¹ However, from experience,¹⁰² these training sessions cover mandatory reporting provisions in detail, but rarely deal with the intricacies and implementation challenges related to mandatory reporting. Trainings with children and community-based organisations come with their own burden of mandatory reporting, as children and/or other stakeholders may discuss instances of disclosure of sexual abuse with trainers, which further creates a burden on trainers to report such disclosures. The Aarambh study¹⁰³ stated that “conducting POCSO awareness programmes with actual or potential victims as well as the duty bearers and service providers was full of possibilities of a close encounter with the provisions of Mandatory Reporting.”¹⁰⁴ Lastly, these trainings are not conducted often enough, as police officers, judges, special public prosecutors and those working closely on these cases have transferable jobs which means that there is a constant rotation in the personnel dealing with each case. This presents the need to have training with each rotation, which is a mammoth task.

⁹⁸ ‘4 Years Since POCSO: Unfolding of the POCSO Act in the State of Maharashtra’ (n 65).

⁹⁹ ‘240th Report on the Prohibition of Child Sexual Offences Act, 2012’ (n 47) Comment 10.2.

¹⁰⁰ ‘4 Years Since POCSO: Unfolding of the POCSO Act in the State of Maharashtra’ (n 65).

¹⁰¹ Delhi Commission for Protection of Child Rights, ‘Workshops & Training Sessions’ (Government of Delhi, 22 June 2021) <<https://dpcr.delhi.gov.in/workshops-training-sessions>> accessed 25 February 2022; Staff Reporter, ‘Training for Stakeholders in POCSO cases Stressed’ *The Hindu* (Thiruvananthapuram, 18 November 2020). <<https://www.thehindu.com/news/national/kerala/training-for-stakeholders-in-pocso-cases-stressed/article33120582.ece>> accessed 25 February 2022; Project Caca <<http://projectcaca.org/>> accessed 25 February 2022.

¹⁰² One of the authors of the paper provided legal representation to child sexual abuse victims in courts in Delhi from 2017-2019. During this period, she gave/attended multiple trainings on POCSO/mandatory reporting.

¹⁰³ ‘4 Years Since POCSO: Unfolding of the POCSO Act in the State of Maharashtra’ (n 65).

¹⁰⁴ *ibid.*, 251.

3. *Neglect of the Social and Cultural Complexities*

There are many nuances of child sexual abuse that the legislature has ignored while legislating on mandatory reporting. *One such nuance is the application of mandatory reporting in incest cases.* This becomes increasingly relevant since incest accounts for most instances of child sexual abuse. The National Crime Records Bureau Data from 2020 shows that in 96% cases relating to penetrative sexual assault and aggravated penetrative sexual assault, the offender was known to the victim.¹⁰⁵ As per a factsheet by HAQ Centre for Child Rights, based on the cases in which they have provided legal representation, about 87% accused are known to the child; 55% are neighbours; of close relatives - 77% are uncles/aunts (paternal or maternal), and 59% of cases report accused biological fathers (33% cases have stepfathers as accused).¹⁰⁶ Further, in most such cases, victims turn hostile and cases end in acquittal.¹⁰⁷

In many cases of incest, the other parent or a family member may know about the ongoing abuse or may suspect it. However, keeping in mind family dynamics and the safety of themselves and the child, they may be hesitant in reporting. The hesitance to report is also heightened due to the high sentences under the POCSO, extending to the death penalty (post the 2019 amendment) in cases of incestuous penetrative sexual assault.¹⁰⁸ In *Shreya's* case,¹⁰⁹ the child confided in her mother about the abuse, but they decided to not file a police complaint since the father was supporting the family and they loved him. However, Shreya informed her mother a few months later that her father had abused her again, and the mother filed a police complaint. In this instance, it was unclear whether the mother could be prosecuted for not reporting when the first instances of abuse occurred and reporting only when the last instance occurred. However, she was not 'charge-sheeted'. Whereas in *Naina's* case,¹¹⁰ in a similar circumstance, charges were framed under Section 21 against the mother initially. However, the child later changed her mind and did not want her mother prosecuted. The case is still ongoing so one does not know if the child will turn hostile to protect her mother or not. However, there is a likelihood that she might, as her mother is her only other caregiver. In such

¹⁰⁵ National Crime Records Bureau, Table 4A.10, Crime in India, 2020, available at: <<https://ncrb.gov.in/sites/default/files/CII%202020%20Volume%201.pdf>> accessed 30 December 2022.

¹⁰⁶ HAQ Centre for Child Rights and InteGRAL Asia, 'Access to Justice and Restorative Care: Five Years of Our Work' (February-March 2022) table 2. available at <<https://www.haqrc.org/wp-content/uploads/2022/06/evaluation-report-access-to-justice-and-restorative-care.pdf>> accessed 30 December 2022.

¹⁰⁷ HAQ Centre for Child Rights & CivicDataLab, '*Data4Justice - Unpacking Judicial Data to Track Implementation of the POCSO Act in Assam, Delhi & Haryana (2012 to April 2020): A Summary Report*' available at <<https://www.haqrc.org/wp-content/uploads/2021/12/upacking-judicial-data-implementation-of-pocso-act-summary-report.pdf>>.

¹⁰⁸ The Protection of Children from Sexual Offences (Amendment) Act 2019.

¹⁰⁹ This is a case from one of the authors' legal practice. The name of the victim has been changed to ensure anonymity.

¹¹⁰ *ibid.*

instances, other family members are unwilling to take in the child, and children end up in a shelter home, which is not an ideal living space for a child, and this further leads to the child wanting to go “home.” The Parliamentary Committee had also cautioned the dependency of the victim on the perpetrator emotionally and economically as being a deterrent for mandatory reporting.¹¹¹ The legislature has made provisions for mandatory reporting but has failed to take into account its complicated practical application, especially in cases of incest.

Another complication is its application in consensual sexual relationships between adolescents. The intent of the POCSO was to create punitive measures for sexual abuse, but owing to the high age of consent, the act inadvertently leads to criminalisation of consensual sexual activity between adolescents as well. Studies have shown that a percentage of cases in POCSO courts are cases relating to consensual sexual activity. The percentage of such cases varies from 5 to 21% depending on the state¹¹² with there being a 93.8% acquittal rate.¹¹³ Mandatory reporting would also lead to an increase in such cases as it burdens all members of the public to report all cases, including those that are consensual and higher responsibility is placed on persons in contact with children on a day-to-day basis such as teachers and doctors (as explained above). The burden is especially higher for this category of professionals since doctors are forced to report cases wherein a pregnancy occurs in an underage child, and teachers/social workers and other persons remain in close contact with children and interact with them at a personal level. Cases involving consensual activity adversely affect both children involved. From experience, in most cases, the girl involved is institutionalised specially when the parents may not be supportive of the child, and the boy ends up in an observation home/adult prison depending on his age. No good comes out of such cases. The legislature must be urged to carve out an exception for consensual/non-exploitative sexual acts by adolescents. The same has also been pointed out by way of an obiter by the Supreme Court in the case of *Maruthupandi v. State*,¹¹⁴ wherein the bench stated that “We (Judges) have encountered these problems...There are serious difficulties because of the definition of “child” under the POCSO.” Further, the Chief Justice of India, Justice DY Chandrachud, has also commented that the

¹¹¹ ‘240th Report on The Prohibition of Child Sexual Offences Act 2012’, (n 47) Comment 10.2.

¹¹² Centre for Child and the Law, ‘Implementation of the POCSO Act 2012 by Special Courts: Challenges and Issues’ (National Law School of India University, February 2018) <<https://ccl.nls.ac.in/wp-content/uploads/2017/01/Implementation-of-the-POCSO-Act-2012-by-spical-courts-challenges-and-issues-1.pdf>> accessed 25 January 2022, 133.

¹¹³ Enfold, UNFPA, UNICEF. ‘Implication of the POCSO Act in India on Adolescent Sexuality: A Policy Brief’, 13. <<http://enfoldindia.org/wp-content/uploads/2022/12/POSCO-Act-Policy-Brief.pdf>> accessed 2 January 2023.

¹¹⁴ *Maruthupandi v State*, Supreme Court of India, SLP(CrI) 2782/2021.

age of consent under POCSO needs to be relooked at in light of the growing cases of consensual sexual activity by adolescents.¹¹⁵

In addition, mandatory reporting acts as a barrier to children's access to reproductive rights in three ways. Firstly, it inhibits children from accessing contraceptive information and contraceptives¹¹⁶ since even the apprehension of abuse is to be reported.¹¹⁷ Secondly, it inhibits a child's access to safe abortion as, in the circumstance of a child becoming pregnant as a result of consensual sexual activity, they would be reluctant to seek abortion from a certified medical professional, who would be mandated to report the child's pregnancy.¹¹⁸ This would lead to the child seeking a back-alley abortion/at home abortions,¹¹⁹ endangering the child's life. Thirdly, it inhibits the right of the child to access health services during pregnancy as well as pre and post-natal care. There have been many such cases reported, such as in the case of *Olius Mawiong v State of Meghalaya*,¹²⁰ wherein a girl aged 17 years and 7 months was impregnated by her husband. When she went to seek medical assistance with her pregnancy, her case was reported under the mandatory reporting provision by her attending doctor. In this case, the High Court decided to quash the FIR, but there are many children in similar situations wherein Courts are reluctant to quash such FIRs involving consensual sexual activity. These reasons are also supported by Aarambh's study, which states that one of the reasons for doctors not being in favour of mandatory reporting is the obstruction in access to reproductive rights of children.¹²¹ The Supreme Court in the recent case of *X v. The Principal Secretary Health* has stated that the doctor, on request of the minor and their guardian, need not disclose the identity and other personal details of the minor, since Section 5A of the Medical Termination of Pregnancy Act,

¹¹⁵ TNN, 'CJI DY Chandrachud Pitches for Relook at "Age of Consent" under POCSO Act' *The Times of India* (New Delhi, 12 December 2022) <<https://timesofindia.indiatimes.com/india/cji-dy-chandrachud-pitches-for-relook-at-age-of-consent-under-pocso-act/articleshow/96139041.cms>> accessed 2 January 2023.

¹¹⁶ Dipika Jain and Brian Tronic, 'Conflicting Abortion Laws in India: Unintended Barriers to Safe Abortion for Adolescent Girls' (2019) 4 *Bioethics & Law*, *Indian Journal of Medical Ethics* 310, 312.

¹¹⁷ For example, if a 17-year-old girl were to ask her gynaecologist for contraceptive information or if an underage child went to buy condoms or birth control pills at the chemist, the doctor and the chemist would both be duty bound to report this as there is an apprehension that the children may indulge in sexual activity.

¹¹⁸ Mrinal Satish, Dr Aparna Chandra and Shreya Shree, 'Legal Barriers to Accessing Safe Abortion Services in India: A Fact Finding Study' (Centre for Reproductive Rights, New York, National Law School of India University, Bengaluru and Centre for Constitutional Law, Policy, and Governance, NLU Delhi) <<https://www.nls.ac.in/publications/legal-barriers-to-accessing-safe-abortion-services-in-india-a-fact-finding-study/>> accessed 20 February 2022, 148.

¹¹⁹ *ibid.*

¹²⁰ *Olius Mawiong v State of Meghalaya*, High Court of Meghalaya at Shillong, 2022 SCC OnLine Megh 332.

¹²¹ Patkar and Kandula (n 65) 227.

1971 (“MTP Act”) mandates confidentiality of persons seeking abortions.¹²² However, the judgement is not clear on how this would be applied in practice as, while this would ensure confidentiality, not disclosing the child’s name would defeat the very purpose of mandatory reporting.

Mandatory reporting in India has many ways to go. The legislature, civil society and central/state child rights bodies need to work together to resolve these issues and make mandatory reporting a provision that helps children and does not vitiate their other rights.

IV. COMPARATIVE ANALYSIS OF LEGISLATION AND LEGISLATIVE STRATEGY IN INDIA AND CHINA

The comparative analysis of the legislations in the two states is done on the basis of (A) divergence of their legislative models, and (B) explanations of the divergence in their legislative strategies from the lens of rule change versus cultural change.

A. The Divergence of Legislative Models

After analysing the law in the two countries, we believe that the essence of the law in both states is based on: 1) who is responsible for reporting, 2) whether a lapse in mandatory reporting is punishable, 3) what instances are to be reported and 4) the age of consent under law. The table below lays down these factors so we may further analyse the implementation of the law and the challenges faced by both countries in legislating mandatory reporting.

	Who is responsible for mandatory reporting?	Is Mandatory reporting punishable?	What instances are to be reported?	Age of consent under law
India	Everyone	Yes, for adults with imprisonment and/ or fine	Apprehension of an offence under POCSO being committed or having knowledge of an offence being committed.	18

¹²² *X v Principal Secretary Health and Family Welfare Deptt.*, 2022 SCC OnLine SC 1321, Supreme Court of India [81].

China	Differentiating Actors with duties to children (“ADC”) (mandated) and Ordinary actors (“OA”) (suggested).	OAs are not punishable for non-reporting. However, ADCs are punishable but mainly through disciplinary action and, rarely, penal action against them.	Differentiating reporting conditions between ADC and OA, for details by reference to Article 11 of LPM (2020 Revision)	14 ¹²³
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In China, the legislative model is geared towards selected actors rather than being universal in nature. In terms of law enforcement strategy, it focuses more on the public awareness of the law and the possible challenges for the implementation capacity. Enforcement measures lean towards influencing or attracting compliance rather than forcing compliance.

China began its foray in mandatory reporting by giving the right to the public to stop/report child rights violations in the 1990s. From the 2010s onwards, influenced by the child rights movement, civil society-based lawyers and front-line juvenile tribunal judges nudged mandatory reporting a step further by differentiating ADC and OA through abstract judicial interpretations. These steps, however, were focused more on promoting awareness among reporting entities and individuals rather than on enforcement, with no punishment for non-reporting. From 2015 onwards, the legislature took a few steps further by incorporating mandatory reporting into ADV Law and LPM (2020 Revision). But the law continues to be very modest with regards to the legal consequences for non-reporting, which are mainly in the form of disciplinary sanctions.

In terms of implementation, China faces challenges similar to India, such as low awareness and low willingness to report. But China has made conscious efforts to incentivise reporting through diversified policy experiments for enhancing reporting awareness and reporting willingness after 2018. However, this approach of policy experimentalism has also caused fragmentation of the reporting system. Another challenge of policy experimentalism is that it heavily relies on institutional incentives and leadership attention. For example, the current commitment of law enforcement on mandatory reporting by the SPP has been prioritized under the leadership of Dr. Zhang Jun, Chief of SPP.¹²⁴ We are not very sure if these efforts would sustain if the SPP shifts its priority to other areas under a new leadership.

¹²³ Criminal Law of the People’s Republic of China, art 236 s 2.

¹²⁴ Zhang Jun has delivered several speeches on promoting the mandatory reporting system which no previous leaders of SPP have commented on. For example, he clearly mentioned that institutional building of two systems: database of sexual offenders for background screening of candidates seeking jobs closely working with children and mandatory reporting cannot wait. Wang Jun, ‘SPP Emphasized that the Institutional Building of the Two Systems Cannot Wait’, *The Beijing News* (19 January 2022) <https://www.sohu.com/a/367867667_114988> accessed 28 April 2022.

In India, universal mandatory reporting was centrally introduced via the POCSO in 2012, thereby extending the obligation for mandatory reporting of child sexual abuse to the public at large and making non-reporting a punishable offence for adults. Unlike China, India did not introduce mandatory reporting in a phased manner. The legislature directly introduced universal mandatory reporting even though the parliamentary committee suggested a milder approach. This has been shown to be detrimental in many aspects. The first has been the lack of use of the provision as is visible from the CCL-NLSIU study, with a very meagre number of cases being reported by persons other than the victim/their family. Secondly, there has also been a lack of implementation of the provision with regard to other stakeholders, the police as well as the judiciary, as seen through the Aarambh study and case law. One can conclude that this has been due to the controversial nature of the provision itself, and the issues it presents in terms of both implementation and implication: 1) lack of guidelines on the application of the provision; 2) lack of capacity building for key stakeholders; and 3) the neglect of social and cultural complexities.

B. Explanations for the Divergence in Legislative Strategy

Mandatory reporting is deeply rooted in the willingness of society to report, as without the same, implementation is impossible. It connects public awareness with law enforcement. This brings cultural change to the forefront as an enabling mechanism for reporting, as well as an influence on the legislative approach that is taken by the State. After delving into both systems of mandatory reporting, we can conclude that India and China have adopted very different strategies in legislating mandatory reporting. China has focused more on cultural change, using law as an instrument for persuading societal change, which is manifested in both the rule-making tools and the use of coercive power in implementation. India on the other hand, has relied on legislative change to influence societal change, using the law as a vehicle by introducing punitive measures for non-reporting. The sharp difference is even reflected in the focus of implementation. In China, the focus is on who should lead the implementation, how to improve the effectiveness of the implementation and how to mobilize the attention of the public and law enforcement agencies due to the ambiguousness of the framing of the legal content. However, in India, the focus has been on comprehending the implementation of the law due to a lack of guidelines, especially how the provision interacts 1) with the nuances of child sexual abuse such as incest and 2) with existing laws such as the age of consent under POCSO and the MTP Act. Steps in this direction have only been made by civil society and the judiciary, with no input from the legislature at the state or central level.

Based on the existing literature for rule change versus culture change,¹²⁵ or the study of legislative efficiency by differentiating legal strategy results (the change for the law itself) from legal policy outcomes (the implementation),¹²⁶ or legal formalism v. policy experimentation¹²⁷ we develop our prognosis on the difference in the legislative strategy regarding mandatory reporting taken by China and India respectively.

In China, legislators and policy makers are very sensitive to implementation. One of the key reasons stems from the special demand for political legitimacy created by the horizontal and vertical centralisation of Chinese constitutional governance, and the lack of an electoral democracy. That means law-making is centralised and law implementation is linked to outcome based political legitimacy.

When the legislative power is centralised, it means that the policymakers' concern would be taken as priority. One of the authors has participated in more than ten legislative and policy-making processes in China including the LPM 2004 Revision. Through participatory observations, the author found that in the legislative process, policymakers have disproportional say. When legislators or policymakers have no confidence in the implementation, they would push for the law to be more general, or more ambiguous in terms of punishment, or even without specific punishment. This pattern is not just limited to children's rights but spills across policy domains.¹²⁸ This resulted in Chinese legislation being principle-based and hence criticised as being a 'toothless tiger'.¹²⁹ This gives a lot of leeway to implementation agencies. On the flip side, it is also helpful in dealing with social issues in need of substantial cultural changes such as the public perception of their role in intervening in child abuse. This is evidenced by the legislative model of mandatory reporting. Even today, the punishment for non-reporting is minimal.

From the other side, when the legislative power is centralized the use of the power needs to be very prudent to prevent devastating consequences. Since the Cultural Revolution, the Communist Party of China ('CPC') has shifted more to a model of policy experimentalism known as "Across the River by Feeling

¹²⁵ Thomas B Stoddard 'Bleeding Heart: Reflections on Using the Law to Make Social Change' (1997) 72 *New York University Law Review* 967.

¹²⁶ David Ike, 'Theory of Efficiency in Legislative Strategy: Brief Legal Rational Analysis' (2021) 2 *Law and Social Justice Review* 2.1 184, 187-189.

¹²⁷ Victoria Nourse and Gregory Shaffer, 'Empiricism, Experimentalism, and Conditional Theory' (2014) 67 *SMU Law Review* 141; Jennifer Wallner, 'Legitimacy and Public Policy: Seeing Beyond Effectiveness, Efficiency, and Performance' (2008) 36 *Policy Studies Journal* 421.

¹²⁸ David L Weller 'The Bureaucratic Heavy Hand in China: Legal Means for Foreign Investors to Challenge Agency Action' (1998) 98 *Colum L Rev* 1238.

¹²⁹ Gongyi Wang, 'Revising the Law to Protect Children' (2020) 33 *Journal of Beijing University of Aeronautics and Astronautics (Social Sciences Edition)* 1, 2.

the Stones¹³⁰. Scholars generally agree that policy experimentation after the reform era enabled China's fast economic development and enhanced its political resilience through increasing the capacity of the CPC to adapt institutions and policies for economic and social transformation.¹³¹ The policy experimentalism provides the political background to understand the legislative strategy of mandatory reporting in China. Firstly, the agenda setting of mandatory reporting is through an ever-evolving experimental procedure, from announcing it as a right, to announcing it as a duty without punishment, to announcing it as a duty for certain stakeholders with mild punishment. Secondly, the implementation of the law is also through pilots from a local level to a national level, led by SPP.

Furthermore, unlike a liberal democracy, which focuses on procedural legitimacy through elections and judicial review, Chinese political legitimacy is much more outcome based.¹³² That means that the law enforcement effect has a direct link to political legitimacy, which creates more concerns toward law implementation. When the legislative issue is closely linked to changing awareness, legislators would be more careful. During the legislation and policymaking of mandatory reporting, the key issue discussed was changing people's awareness and attitude towards child sexual abuse and other abuse by parents. Civil society usually pushes for clearer sanctions while policymakers insist on soft rules and cultural awareness programs. Sometimes, certain tragic incidents add to the bargaining power of civil society for more specific enforcement provisions, but most of the time policy-makers' concerns dominate. Legislators have figured out the close link between public awareness and law enforcement for mandatory reporting, which makes them more conscious of the implementation challenges. Hence mandatory reporting has been understood as a cultural issue and has been responded to in an evolving process. Firstly, China has never been bold enough to place the burden of punishable reporting on all adult citizens. Secondly, it hesitates to use coercive power for enforcement and has mainly focused on raising awareness among the public from 1990 to 2015. Thirdly, even if legislation provides for punishment, it is very modest and abstract, and the main reliance of law enforcement continues to be on public awareness campaigns.

¹³⁰ It means that the reform in China is through policy experimentalism. More discussions can be accessed in Sebastian Heilmann, 'Policy Experimentation in China's Economic Rise' (2008) *Studies in Comparative International Development* 1; Jessica C Teets and Reza Hasmath, 'The Evolution of Policy Experimentation in China' (2020) 13 *Journal of Asian Public Policy* 49; Shaoda Wang and David Y Yang, 'Policy Experimentation in China: The Political Economy of Policy Learning' (2021) National Bureau of Economic Research Working Paper 29402 <<https://www.nber.org/papers/w29402>> accessed 26 January 2022. See also Wenjuan Zhang, 'Another Perspective to Read the Picture of Lawyering for Change in China' in John Mathew, Vishwas H Devaiah, Pritam Baruah, Moiz Tundawala and Niraj Kumar (eds) *The Indian Yearbook of Comparative Law 2019* (Springer Singapore 2021), 330.

¹³¹ Heilmann, *ibid*; Teets, *ibid*; Wang, *ibid*.

¹³² Yun-han Chu, 'Sources of regime legitimacy and the debate over the Chinese Model' [2013] *China Review* 1.

Unlike China, Indian political legitimacy is based on universal suffrage and judicial review.¹³³ The State comparatively faces lesser pressure of outcome-based legitimacy. If the legislative procedure is legitimate, the legislature isn't held accountable for implementation failure. In India, the POCSO was enacted as an aftermath of a study conducted by the Ministry of Women and Child Development on 'Child Abuse' in 2007.¹³⁴ The study found that 53.22% of children had faced one or more forms of sexual abuse.¹³⁵ A need was felt by both civil society¹³⁶ and the legislature to enact separate legislation to deal with child sexual abuse, as: 1) the IPC did not deal specifically with sexual abuse against children; 2) the IPC was not gender-neutral in its detailing of sexual offences which meant that sexual abuse against male children was not detailed, the only provision available was Section 377, which dealt with peno-anal penetration and; 3) at the time, the IPC also did not detail all sexual offences which are covered under the ambit of POCSO.¹³⁷ The drafting of the bill began in 2007 and after five years of consultations, the bill came to fruition in 2012.¹³⁸

The POCSO bill was subject to review by a parliamentary standing committee which had extensive consultations with ministries, State Governments, civil society, and experts.¹³⁹ The Committee additionally also issued a press release to get views from the public and civil society on the proposed legislation.¹⁴⁰ The Committee concluded that "... given the situation prevailing at ground level, such universal mandatory reporting cannot be considered practical. It might act as counter-productive for the child victims themselves".¹⁴¹ They further concluded that Section 21 should be amended to have stakeholder-specific mandatory reporting.¹⁴² The Committee predicted in their report the implementation challenges that may arise. However, their comments were not considered, and Section 21 was retained as is.

¹³³ Buultjens, Ralph. "India: religion, political legitimacy, and the secular state." *The ANNALS of the American Academy of Political and Social Science* 483.1 (1986): 93-109. Also see Upendra Baxi, 'Law, Politics, and Constitutional Hegemony: the Supreme Court, Jurisprudence and Demoprudence,' in Sujit Choudhry and et al (ed.) *The Oxford Handbook of the Indian Constitution*, (OUP 2016) 94.

¹³⁴ Child Rights and You, 'All You Need to Know About Protection of Children From Sexual Offences (POCSO) Act' <<https://www.cry.org/downloads/safety-and-protection/Protection-of-Children-from-Sexual-Offences-2013.pdf>> accessed 25 February 2022.

¹³⁵ *ibid.*

¹³⁶ Centre for Child and the Law, 'Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues' (National Law School of India University, February 2018) <<https://ccl.nls.ac.in/wp-content/uploads/2017/01/Implementation-of-the-POCSO-Act-2012-by-speical-courts-challenges-and-issues-1.pdf>> accessed 25 January 2022.

¹³⁷ *ibid.*

¹³⁸ '240th Report on The Prohibition of Child Sexual Offences Act, 2012' (n 47).

¹³⁹ *ibid.*

¹⁴⁰ *ibid.*

¹⁴¹ *ibid.*, Recommendation 10.3.

¹⁴² *ibid.*, Recommendation 10.4.

The active participation of civil society has enabled an ambitious and comprehensive legislation, unlike China which is very conservative and modest due to the concerns of the implementation challenges. Due to the above, the mandatory reporting law is much more aggressive in terms of legislative change. The text of the law itself is well-rounded, and the UMR provision imposes penal sanctions for non-reporting (albeit with a few exceptions). The law is used as a coercive instrument to change the cultural attitude. Initiatives are being taken up by civil society to bring about cultural change, but actions from the government and legislature itself are scant.

However, the enforcement of the provision itself has many obstacles and the use of the provision is infrequent. In practice, despite the law providing for UMR, the implementation is seen to be more stakeholder-specific when it comes to punishment for non-reporting with a focus on stakeholders such as doctors and police officers. It is surprising to see that there have been no revisions or detailed rules for implementation of mandatory reporting to address these challenges, even after a decade of the enactment of POCSO, despite objections having been raised to the provision during the drafting of the Act, and the implementation barriers being brought up before the judiciary time and again. The activist judiciary does attempt to bridge the implementation gap, even though their legal interpretations are not always coherent. There is an urgent need for comprehensive guidelines on mandatory reporting in India to circumvent the negative implications of mandatory reporting, to better manage the implementation challenges and for the legislature to pay heed to the recommendations to limit mandatory reporting to specific stakeholders, at least in terms of criminal sanctions.

V. CONCLUSION

Mandatory reporting legislation imposes an obligation on select professionals, or the general public, to report child abuse cases for early identification of abuse and protection of children. It was enacted first in the United States of America and has now proliferated to other jurisdictions. India and China have both enacted mandatory reporting legislations in the last decade. Despite some similar challenges in law enforcement, both countries have taken a distinctive approach with their respective legislations. Their legislative content varies in terms of who should report, under what circumstances, report to whom, and the punishment for non-reporting.

Their divergence in legislative strategy is even sharper. China treats public awareness as the inhibitor for the legislative content and adopts an incremental and experimental legislative approach, shifting gradually first from resetting the public's role in family protection, to setting reporting duties for selected actors through abstract judicial interpretations (but without clear sanctions),

and then to legislating punishable mandatory reporting for selected actors. The challenge faced in the Chinese context is that the soft law gives law enforcement agencies discretionary power with regard to enforcement.

India, on the other hand, has focused on instituting a well-rounded Universal Mandatory Reporting provision and legislating a framework to pave the way for cultural change. It also presents implementation challenges such as application cases of incest and consensual sexual activity between adolescents, and the obstruction of the child's access to reproductive health and cultural barriers. India's UMR is fraught with implementation barriers and there is a need for the legislature, judiciary and civil society to work together to enhance the existing framework and make it more geared towards implementation.

The sharp divergence in dealing with the relationship between law and society in both countries is fascinating. We find that the concern of political legitimacy and the dominance of civil society or law enforcement agencies in the legislative process influences the legislative strategy. In China, outcome-based political legitimacy and the dominance of law enforcement agency representatives over the weaker civil society in the legislation process pulls the legislative process more toward implementation capacity, while in India the powerful influence of society leads to the focus being more on the legislation itself, while neglecting the social and cultural complexities. India and China both face enforcement challenges, albeit for different reasons. In practice, there is an urgent need for active participation by all stakeholders, to bridge the gap between culture and the law for better enforcement of mandatory reporting for child abuse. In terms of scholarship, we need more nuanced and empirical comparative studies to understand the impact of legislative divergence on the effects of law enforcement in both contexts.

CHILD SEXUAL ABUSE CASES IN INDIA AND JUDICIAL OFFICERS' PERCEPTIONS AND EXPERIENCES OF POCSO-RELATED SPECIAL TRAINING*

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Stakeholder training has been considered essential to tackle the problem of poor engagement with child sexual abuse ('CSA') victims in the pre-trial and trial stages of the criminal process. Be it stakeholder attitudes and behaviour towards the CSA victims and the accused involved in CSA cases or stakeholders' procedural practices, more and improved training has been repeatedly emphasised. It is, therefore, pivotal to investigate what kind of special training is imparted to stakeholders under the Protection of Children from Sexual Offences ('POCSO') Act, 2012, as well as the challenges and limitations to such training. Also important is to analyse and discuss what, if any, implications such training has on stakeholder engagement with child victims and on CSA cases. This article answers these questions by employing a qualitative empirical method and a new set of data – in-depth face-to-face interviews with 17 judicial officers (Judicial Magistrates & POCSO Special Judges) on their perceptions and experiences of special training to deal with POCSO cases, along with court observations, conducted during six months' fieldwork (2019-2020) in India. The findings

* Content warning: This article contains sexually explicit and graphic language in some places.

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suggest that around half of these respondents received training on POCSO matters. Such training resulted in stakeholders, though not all, implementing the special POCSO procedures during pre-trial and trial stages. Through these findings, the article showcases that there are limitations to special training and to the law itself in its present form, given the infrastructural challenges that exist for these stakeholders and the socio-economic inequalities capturing both victims and accused in registered POCSO cases. Consequently, it aims to contribute to thinking through new ways on effective stakeholder training and of future directions of research, and argues that despite several limitations, the law remains a site of possibility to deliver improved experiences with the justice system to both CSA victims and accused.

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I. INTRODUCTION

The Protection of Children from Sexual Offences ('POCSO') Act, 2012, has led to a profound transformation in the legal position of child victims¹ and the accused in cases of sexual offences against children within the Indian criminal justice system ('CJS'). It has categorised these sexual offences in a comprehensive manner by considering not only the nature of care, power, trust and familial relationship between the child and the assaulter, and the nature of mental, physical and biological status of the child, but also the circumstances in which the assault was committed.² All the offences under the POCSO Act are gen-

¹ This paper uses the term 'child victim(s)' to encompass children who are victims or alleged victims, of sexual offence(s) under the POCSO Act, 2012. It should be noted that in some contexts this term is deemed problematic; for example, where the offence has not been proven, the term 'complainant' may be preferred from a legal perspective, while some commentators and campaigners on sexual violence opt for 'survivor' rather than 'victim' as a more positive designation. However, the general term 'victim' is applied as a shorthand here. Also, because child victims in POCSO cases are predominantly girls, and the accused are usually men, my pronouns usage may reflect that.

² The POCSO Act, 2012, ss 5 & 9. There are twenty-one ways in which the Act categorises aggravated penetrative sexual assault and aggravated sexual assault against children

der neutral and can be committed by any person against children, i.e., a person below the age of 18 years.³ Moreover, all sexual activities involving children have been criminalised, including non-exploitative consensual cases.⁴

The POCSO Act has introduced special procedures and rules of evidence about reporting sexual offences against children and recording a child victim's testimony in the pre-trial and trial stages respectively.⁵ There are provisions for special courts,⁶ special judges, special public prosecutors,⁷ and supporting staff,⁸ such as support persons, interpreters, translators, special educators, and experts. There is a presumption of guilt rather than of innocence.⁹ The burden of proof, thus, has been reversed from the prosecution to the accused persons.¹⁰ There are harsher punishments since 2018, including death,¹¹ for certain sexual offences against children.

The Act introduced a provision to employ audio-video electronic means to record a child's statement by a police officer and judicial magistrate in the pre-trial stage, and a video-conferencing system or any other physical device to support a child witness in testifying before a special court during the trial.¹² The POCSO reforms target the Sessions Courts because these are the highest courts at the district level, where criminal trials take place in India and are held by the senior most members of the district judiciary, i.e., sessions judges. These courts, along with the nature of criminal process at the trial court level, have also been identified as one of the major contributors to inordinate delays and arrears that affect the delivery of criminal justice in India.¹³ These reforms

respectively.

³ Ravinder Barn and Ved Kumari, 'Sentencing in Rape Cases: A Critical Appraisal of Judicial Decisions in India' (2017) 51(1) *Journal of the Indian Law Institute*, 1.

⁴ Shradha Chaudhary, 'Reforms to the Legal Framework of Child Sexual Abuse in India: Legislative Band-Aids on Systemic Wounds' (2020) 44(1), *Statute Law Review*, 1–22, <<https://doi.org/10.1093/slr/hmaa007>>. Swagata Raha, 'Criminalizing Adolescent Sexuality – The Protection of Children from Sexual Offences Act and the Rights of Adolescents' (2021) P39A *Criminal Law Blog*.

⁵ The POCSO Act 2012, chs V, VI and VIII.

⁶ This is a designated district-level criminal court - a Court of Session, for each district in India, with specific architectural and procedural requirements. Its objectives are to support effective engagement of child victims of sexual offences committed by adult defendants, and to provide for their speedy trial. See, s 28, the POCSO Act, 2012. The judicial officer presiding this special court is called a special (POCSO) judge.

⁷ The POCSO Act 2012, s 32.

⁸ The POCSO Rules 2020, Rules 2(1) and 5.

⁹ The POCSO Act 2012, s 30.

¹⁰ The POCSO Act 2012, s 39.

¹¹ The Indian Penal Code (IPC) 1860, ss 376-AB and 376-DB, which prescribe death as one of the maximum punishments for rape and gang rape of women under twelve years of age, read with s 42 of the POCSO Act 2012. These changes were brought by the Criminal Law (Amendment) Act, 2018, and discriminate against male children in the same age group and female children between under 12 years and 12-18 years age groups.

¹² The POCSO Act 2012, ss 26(4) and 36(2).

¹³ Abhinav Sekhri, 'Pendency in the Indian Criminal Process: A Creature of Crisis or Flawed Design?' (2018) 15(1) *Socio-Legal Review*, 15.

seek to ensure speedy trials in POCSO cases. They also warrant that all the actors in the criminal process give priority to the child victims' needs and rights without jeopardising the accused's rights.¹⁴ They ensure that the interest and well-being of the child is safeguarded at every stage of the judicial process by incorporating child-friendly procedures for the reporting of the offense, recording of evidence, investigation, and trial of POCSO offences.

The POCSO Act, therefore, mandates that the central government, and every state government, take measures to ensure that their officers and other connected persons (including the police officers) receive periodic training on the matters related to the implementation of its provisions.¹⁵ The objective is the implementation of special procedures and rules of evidence.¹⁶ However, the Act does not explain what it means by 'periodic' and 'training'.¹⁷ This paper is an empirical study of the stakeholder perceptions and experiences of their training to deal with the cases under the POCSO Act. Scholars have argued for re-orienting legal and judicial reform in India by engaging in 'an empirically grounded, theoretically nuanced and systemic approach'.¹⁸ Such an approach necessitates qualitative approaches to empirical research on the social policy reforms that are being implemented.¹⁹

II. STAKEHOLDER TRAINING TO DEAL WITH THE POCSO CASES: ANALYSING ITS SIGNIFICANCE AND AVAILABLE LITERATURE

The previous section highlights the reforms that have been brought through the POCSO Act, and the pertinent roles that have been assigned to different

¹⁴ The POCSO Act 2012, s 36(1).

¹⁵ The POCSO Act 2012, s 43(b).

¹⁶ The onus of monitoring of design and implementation of modules for training police personnel and other concerned persons, including officers of the Centre and State Governments, for the effective discharge of their functions under the POCSO Act and for implementation of the provisions of the Act, has been put on the National Commission for the Protection of Child Rights or the relevant State Commission for the Protection of Child Rights. See, The POCSO Rules 2020, r 12(1)(d).

¹⁷ The POCSO Rules 2020, though, talk about different aspects of such training, which are focused on sensitisation of stakeholders on child safety and protection, educating them regarding their responsibility under the POCSO Act, and building their capacities in their respective roles on a regular basis. Trainings are mandatory for all persons, whether regular or contractual, coming in contact with the children. See, Rules 3(4) & 3(6).

¹⁸ Sudhir Krishnaswamy, Sindhu K Sivakumar, & Shishir Bail, 'Legal and Judicial Reform in India: A Call for Systemic and Empirical Approaches' (2014) 2(1) *Journal of National Law University, Delhi* 2, 3.

¹⁹ Martin Partington, 'Empirical Legal Research and Policy-Making' in Peter Cane & Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010), 1002; Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane & Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010), 926.

actors, various stages of the criminal process, and technology in POCSO cases. A glance at the National Crime Records Bureau ('NCRB') India data suggests that there is low rate of completion of investigation of the POCSO cases, and a much lower rate of completion of trial, with a low rate of conviction.²⁰ However, when we look at the conviction rate in terms of POCSO cases whose trial was completed, then India's conviction rate goes up to 30-35%.

Conviction rates may not be directly linked to training as convictions depend on several factors. It is nonetheless important to note that given the conviction rate in cases with a completed trial is much higher than in total cases registered, and the charge-sheeting rate is around 90%, the main attrition must occur between the point of charge and trial.²¹ Another aspect of the POCSO cases that the NCRB data reveals is the role of gender of both the child victim and the accused and their relationship with each other in how POCSO cases play out.²²

It is evident that special training to implement the POCSO law flows from the creation of POCSO special courts. Further, the training is for the special judges, special prosecutors,²³ police personnel, and the members of the POCSO court staff. This might also include public defenders involved in POCSO cases who represent accused persons through the free state legal aid route, as the provision does state that for the Act's implementation, 'other connected persons' shall also be given periodic training. Public defenders are not 'officers' of the state but they play a significant role, particularly at the trial stage, and with their required cooperation with the special courts. The Act mandates that like prosecutors, defence counsels shall communicate the questions to be put to the child to the Special Court, which shall in turn put those questions to the child witnesses while examining them.²⁴

Considering the reforms being envisaged by the Act, its implementation would largely depend on whether, how much, and what kind of training

²⁰ See, NCRB (National Crime Records Bureau), *Crime in India, 2016-2020*.

²¹ Shailesh Kumar, 'Access to Justice and Sexual Violence Against Children in India: An Empirical Study of the Reforms under the POCSO (Protection of Children from Sexual Offences) Act 2012' (2023) PhD thesis, Birkbeck, University of London.

²² 99% of the child victims in registered POCSO cases are female. Accused persons are predominantly male. In 9 out of 10 cases of penetrative and aggravated penetrative sexual assault, offenders were known to child victims, while in one out of ten such cases the known offenders were family members of the child victims. See, NCRB (National Crime Records Bureau), *Crime in India, 2016-2019*.

²³ The Code of Criminal Procedure (CrPC) 1973, s 24(8): The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor. A proviso was inserted in 2009 by Act 5 of 2009, s 3 (w.e.f. 31-12-2009), which provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section.

²⁴ The POCSO Act 2012, s 33(2).

is given to the stakeholders working on POCSO cases. The link between the POCSO training regime and any issues with the implementation of the POCSO law, including the operation of the special courts, cannot be established without empirical evidence on the nature of such training. In this regard, it is important to explore the existing literature on the status of stakeholder training related to implementation of the POCSO law and sexual offences against children in India.

An empirical study of POCSO Special Courts in Delhi & Mumbai from 2012 to 2015 argues that they use the same yardstick and competencies as used for adults, when dealing with and weighing the evidence of a child, thus defeating the objectives of the POCSO Act.²⁵ It also found that training modules have been developed around the law, and training sessions are being regularly held by the judicial academies, national and state legal services authorities as well as the police.

In one report based on structured interviews with 22 key stakeholders carried out in February 2015 and May 2015 and an analysis of judgments of the POCSO Special Courts in Delhi, a lack of sufficient training was found.²⁶ Several stakeholders from this study stated that they had never been trained on the POCSO Act prior to taking up a post or even after, and felt that training is needed not just on the POCSO Act but on several related aspects such as child psychology and child sexual abuse in general.²⁷ This report gave recommendations to the Hon'ble Delhi High Court ('DHC') and the Delhi government to periodically train judges, judicial magistrates, prosecutors, legal aid lawyers, and police, on age and developmentally appropriate techniques of interviewing children and appreciating their statement, and to address preparation of a child victim without it leading to tutoring.²⁸ It also argued that in order to be 'special', there is a need for orientation and training of judges, prosecutors, and court staff to enable them to conduct the trial in a child-sensitive manner.²⁹

Another study, an edited volume published in 2018, on the working of POCSO special courts in five states, namely, Delhi, Assam, Maharashtra, Karnataka, and Andhra Pradesh, found that special public prosecutors often

²⁵ Bharti Ali, Maharukh Adenwalla & Sangeeta Punekar, 'Implementation of the POCSO Act: Goals, Gaps and Challenges- Study of Cases of Special Courts in Delhi & Mumbai (2012-2015)' (*HAQ: Centre for Child Rights, Forum Against Sexual Exploitation of Children*, 2017) <<http://haqrc.org/wp-content/uploads/2018/02/implementation-of-the-pocso-act-delhi-mumbai-study-final.pdf>> accessed (date unknown).

²⁶ The sample for this study did not include POCSO special judges; Centre for Child and the Law, NLSIU 'Report of Study on the working of Special Courts under the POCSO Act, 2012 in Delhi' (2016).

²⁷ *ibid.*, 24.

²⁸ *ibid.*, 26.

²⁹ *ibid.*, 116.

lack training on how to question and communicate with the child.³⁰ Findings from the study also revealed that the Special Courts failed to stop defence lawyers from cross-examining children directly, thereby not enforcing the law to reduce a major source of secondary victimization.³¹ Courts were either handing over their authority to the defence counsel or were exercising judicial discretion, where none existed. This meant that the judges were making the law rather than enforcing it, thus reducing the rule of law to “rule by judge”, weakening judicial institutions, and also violating the child’s right to a fair and child-friendly trial.³²

Moreover, stakeholders at all levels were found ill-equipped to engage with children, leave alone child victims of sexual abuse, and most did not have the necessary skills to enable them to elicit information from children in a non-threatening and child-friendly manner.³³ The study proposed that to address the gap of lack of understanding of the dynamics of child sexual abuse, all special judges should be provided with preparatory training or at least with quality reading material on the complexity of POCSO cases as well on judicial precedents, which should ideally be provided before the Judge takes charge of the Special Court.³⁴ Another important proposal was made to the DHC to consider issuing guidance notes to Magistrates, on core minimum measures that should be taken to ensure compliance with the child-friendly procedures under the POCSO.³⁵

Another empirical research study, though not directly linked to the operation of POCSO reforms, explored High Court judges’ accounts and perceptions of rape and sentencing in India.³⁶ It was based on in-depth semi-structured interviews with 10 High Court judges, and survey data from 261 criminal justice professionals along with an analysis of rape cases. It found that there is an urgent need to train criminal justice professionals in sentencing in rape cases, in both the trial courts and the High Courts.

³⁰ Sonia Pereira and Swagata Raha, ‘Structural Compliance of Special Courts with the POCSO Act 2012’, in Centre for Child and the Law, NLSIU (ed) *Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues* (National Printing Press 2018), 1-10.

³¹ Michelle Mendonca, ‘Factors Affecting Acquittals in Special Courts’, in Centre for Child and the Law, NLSIU (ed) *Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues* (National Printing Press 2018), 31-49, 39.

³² *ibid.*

³³ Kushi Kushalappa & Suja Sukumaran, ‘Support Gaps and Linkages Between the Criminal Justice and Child Protection Systems’, in Centre for Child and the Law, NLSIU (ed) *Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues* (National Printing Press 2018), 177-189, 182.

³⁴ Mendonca (n 31) 38.

³⁵ Centre for Child and the Law, NLSIU (ed) *Implementation of the POCSO Act, 2012 by Special Courts: Challenges and Issues* (National Printing Press 2018), 209.

³⁶ Barn and Kumari (n 3).

There are also judicial recommendations regarding POCSO-related personnel training. The Supreme Court has recommended a two-pronged approach to address investigative and prosecutorial failure - *first*, by building the capacity of the police and public prosecutors through training, and *second*, to hold them accountable for their lapses leading to acquittals.³⁷ These studies were carried out till the year 2015 and the recommendations are in place since then. It is thus important to know if and how the situation has changed since then in terms of stakeholder training with regards to dealing with POCSO cases in India.

III. METHODOLOGY & ACCESSIBILITY: APPROACH AND CHALLENGES

To carry out this research in India, I selected Bihar and Delhi as the two field sites. The two regions were selected based on their contrasting nature and certain relevant commonalities. While there are a few studies carried out on Delhi, I struggled to find empirical research on the implementation of POCSO reforms, including POCSO-related stakeholder training in Bihar. The findings of the Ministry of Women and Child Development's 2007 Report stated that two of the four states with the highest percentage of sexual abuse among both boys and girls are Bihar (68%) and Delhi (72%).³⁸ For sexual assault cases too, Bihar and Delhi reported the highest incidence.

Further, there is a difference in conviction rates as a percentage of registered POCSO cases in Bihar and Delhi. While the conviction rate was only 3% in Bihar from years 2012 to 2016; in Delhi, it was exponentially higher than in Bihar, i.e., 18% from years 2014 to 2016. However, when we look at the conviction rate in terms of POCSO cases whose trial was completed, then the percentages obviously go up, and it is Bihar with 63% that has a higher conviction rate than Delhi which has a 58% conviction rate. These conviction rates are from years 2017 to 2019, and are much higher than India's conviction rate, i.e., 30-35%.

A healthy justice delivery system is a prerequisite for strengthening democratic norms, improving access to justice, enforcing the rule of law, and having a check on state excesses, which in turn are significant for human development.³⁹ Bihar and Delhi, therefore, seemed very important for a comparative case study. Delhi, the Indian Capital city and a Union Territory, and Bihar, a

³⁷ *State of Gujarat v Kishanbhai* (2014) 5 SCC 108.

³⁸ Loveleen Kacker, Srinivas Varadan & Pravesh Kumar, *Study on Child Abuse: India 2007* (Ministry of Women and Child Development, New Delhi 2007).

³⁹ Pratiksha Baxi, 'Access to Justice and Rule-of (Good) Law: The Cunning of Judicial Reform in India' (2007) UN Commission on the Legal Empowerment of the Poor, Institute of Human Development, New Delhi, <<https://www.researchgate.net/>

north Indian state, stand at two ends of the spectrum of Human Development Index ('HDI') and Gender Development Index ('GDI') categories, which look at three dimensions of human development - health, literacy, and standard of living, with Delhi being much ahead of Bihar.⁴⁰

In 2011-12, Bihar was the only state in the Low HDI category out of the 36 Indian states and Union Territories (UTs), which slightly improved in the 2017-18 HDI rankings, putting Bihar into the Medium HDI category- though still on the last – 36th position.⁴¹ Delhi, on the other hand, continues to be in the Very High HDI category, and topped India with the highest HDI score of 0.839 in the 2017-18 rankings. In the GDI, divided in five groups from High Equality to Low Equality, while Delhi was in the third category, Bihar was in the fifth. In terms of the percentage of budget spent on the judiciary, Delhi is much ahead of Bihar, as it was the only state/UT that spent more than 1 per cent of its budget on the judiciary – 1.9 %, while Bihar was among the lowest to spend on its judiciary.⁴² Further, while Delhi's per capita pending criminal cases in its district courts is double of those in Bihar's district courts (Delhi has 0.6 while Bihar has 0.3),⁴³ Delhi also occupies a distinctive position in the journey of institutional and procedural reforms related to sexual offences, including CSA cases.⁴⁴

The two sites and the interviewees were selected and recruited respectively using the purposive & opportunistic sampling techniques. The project employed a mixed-methods approach. It combined in-depth semi-structured

publication/228914213_Access_to_Justice_and_Rule-of_Good_Law_The_Cunning_of_Judicial_Reform_in_India> accessed 18 April 2023; Krishnaswamy, Sivakumar, & Bail, (n 18).

⁴⁰ Ankur Bharadwaj, 'HDI: How States Fare in Human Development' (Centre for Economic Data and Analysis, 14 June 2021), <<https://ceda.ashoka.edu.in/hdi-how-states-fare-in-human-development/>> accessed 18 April 2023. See also, Bihar, India, Subnational HDI (2019, Global Data Lab, Institute for Management Research, Radboud University) <<https://globaldatalab.org/shdi/table/shdi/?levels=1+4&interpolation=0&extrapolation=0>> accessed 18 April 2023.

⁴¹ *ibid.*

⁴² India Justice Report: Ranking States on Police, Judiciary, Prisons & Legal Aid (2019, Tata Trusts).

⁴³ See, National Judicial Data Grid (District and Taluka Courts of India). The total number of pending criminal cases of Bihar is 2,938,662, while that of Delhi is 1,048,573 (data as on 31 December 2020). Bihar population is 104,099,452, while that of Delhi is 16,787,941 (as per the 2011 census).

⁴⁴ In 2010, the Delhi High Court had constituted a committee to monitor proper implementation of several guidelines laid down by Hon'ble Supreme Court as well as Hon'ble High Court for dealing with matters pertaining to sexual offences and child witnesses. Under its aegis, in 2012, the country's first Vulnerable Witness Deposition Complex was established in Karkardooma courts in Delhi, designed to spatially separate and shield the prosecutrix from the accused during deposition. It was followed by district-wise trainings for judicial officers, police, legal aid lawyers/ prosecutors aimed towards enhancing responsiveness of the system to victims of sexual offences. See, Partners for Law in Development, 'Towards Victim Friendly Responses and Procedures for Prosecuting Rape: A Study of Pre-Trial and Trial Stages of Rape Prosecutions in Delhi' (2017, PLD, New Delhi).

interviews with key stakeholders⁴⁵ (n=17) at the two Indian locations: Bihar (n=8; 2 females and 6 males)⁴⁶ and Delhi (n=9; 4 females and 5 males),⁴⁷ with the site visits and the observation of proceedings in POCSO special courts in those two jurisdictions.⁴⁸ Interviews and observation were conducted in 2019-2020 (six months' fieldwork). Interviews were anonymised in accordance with the research ethics committee approval.⁴⁹ The selection of an appropriate sample design, it has been argued, is a key decision that affects the type of conclusions that one can draw later during data analysis.⁵⁰ I adopted a mix of purposive & opportunistic sampling – reflecting pragmatic constraints as well as the focus of the investigation. Participants were recruited through invitations and the snowballing method. Rowden has employed a similar sampling process to recruit her participants to seek their opinions on the remote appearance of participants by video link in Australian courts.⁵¹

Sampling methods where personal contacts are involved have certain disadvantages such as getting skewed samples. As in the snowball method, 'those who have been interviewed are asked, who else they could recommend for an interview, this procedure leads to clustered samples, because nominations take place, as a rule, within a circle of acquaintances'.⁵² Put differently, such a sample has the potential to result in bias and may not be a true reflection of the diversity of the professional groups whose members I interviewed. But it has been said, "In qualitative studies, the stimulus for empirical data collection

⁴⁵ These stakeholders, who were either working during my fieldwork or had worked in the past in POCSO special courts, are categorised into two groups: POCSO special judges and judicial magistrates. They were interviewed, subject to their informed consent to participate in this research.

⁴⁶ POCSO (special) judges: 4 (4 males), Judicial Magistrates: 4 (2 females and 2 males).

⁴⁷ POCSO (special) judges: 7 (2 females and 5 males), Judicial Magistrates: 2 (both females).

⁴⁸ Ethics permission was granted for this project by the Ethics Committee of the School of Law, Birkbeck College, University of London, and in India, the respondents and POCSO special courtrooms were accessed through different routes and informal permissions secured by using personal and professional contacts. Site visits and observation of trials in POCSO special courts were conducted in Bihar and Delhi. A total of seven court complexes - four in Bihar and three in Delhi, which represent four (out of 38) Bihar and six (out of 11) Delhi districts respectively, were visited. Special efforts were made to choose districts in a way that they represent different regions of Bihar and Delhi. Eleven POCSO special courts across these locations, along with the vulnerable witness deposition rooms and video-linkage rooms wherever available and permitted, were observed.

⁴⁹ Interviews were numbered and given an alphabetic code to specify the jurisdiction and category of the interviewee. For example, BPJ 2, B = Bihar, PJ = POCSO (special) judge, 2 = Interviewee number 02. Other codes include: D = Delhi, JM = Judicial Magistrate. Some professional details of the respondents have also been concealed to further the objective of anonymity.

⁵⁰ Sharon Rivera, Polina Kozyreva and Eduard Sarovskii, 'Interviewing Political Elites: Lessons from Russia', (2002) December, *Political Science & Politics*, 683.

⁵¹ Emma Rowden, 'Distributed Courts and Legitimacy: What do we Lose when we Lose the Courthouse?', (2018) 14(2) *Law, Culture and the Humanities* 263.

⁵² Uwe Flick, Ernst Von Kardoff & Ines Steinke (eds), *A Companion to Qualitative Research* (Sage Publications Ltd 2004), 167.

often consists of guaranteeing accessibility to a particular case or a particular group or institution. Then it is not particular selection procedures that are in the foreground, but rather that the selection is constituted by accessibility.⁵³

Though it is true that access is important and challenging, addressing the issue of bias is also important, particularly in policy research, where the objective is to apply the findings to other courts, situations, or locations. In this regard, the actual sample that came about is sufficiently large and covers various parameters of seniority, locations, and gender to allay any bias. Moreover, such research is important to conduct in the interest of access to justice.

Accessibility plays an important role in the choice of interview subjects. This approach was considered by Krishnan et al. in their ethnographic work on access to justice in the district-level courts of three Indian states.⁵⁴ I had no prior contact with any of my participants. The biggest accessibility challenge was to access the judiciary, an issue highlighted by scholars⁵⁵ from different jurisdictions and an Indian research organisation⁵⁶ in its report on the working on children's rights. Being elites,⁵⁷ they were the most difficult to access. Further, as there is no defined formal institutional process in India to access the subordinate judiciary for the purpose of research, nor there has been enough empirical legal research and institutional deliberations to drive that process forward, access became more arduous. Also, it was not necessary that every participant, especially the elite interviewees such as the judges, despite being accessible, would be willing to be interviewed.

Further, the number of participants for the project has been fixed by keeping in mind the time and resource constraints and the importance of their knowledge and experience to address the project's research questions. So, in the sample of 17 judicial officers, the number of POCSO special judges (n=11; 2 females and 9 males) is more than that of judicial magistrates (n=6; 4 females and 2 males) because the special judges preside over special courts, supervise POCSO trials, and decide POCSO cases, while judicial magistrates record a child's statement during the pre-trial stage and attend to the accused under police custody. Such a small sample size is an inherent limitation of qualitative

⁵³ *ibid*, 166.

⁵⁴ Shirish Kavadi, Jayanth Krishnan & Kalindi Kokal, 'Grappling at the Grassroots: Access to Justice in India's Lower Tier' (2014) 27 *Harvard Human Rights Journal* 151.

⁵⁵ Pratiksha Baxi, *Public Secrets of Law: Rape Trials in India* (Oxford University Press 2014), 170. She argues that 'by and large, judges are forbidden to speak on matters before them and refuse to give interviews'. See also Jennifer Ward, *Transforming Summary Justice: Modernisation in the Lower Criminal Courts* (Routledge 2017). On conducting research on members of the lower judiciary in England & Wales, Ward points out accessibility difficulties such as the lengthy permission process and institutional resistance.

⁵⁶ Centre for Child and the Law, 'Report of Study on the working of Special Courts under the POCSO Act, 2012 in Delhi' (2016 NLSIU), 11.

⁵⁷ Bogdan Denitch, 'Elite Interviewing and Social Structure: An Example From Yugoslavia', 1972 36(2) *The Public Opinion Quarterly* 143.

works but also one of its strengths, which is to give an in-depth understanding of the law, legal processes, legal actors, and their experiences.⁵⁸ That is why qualitative works necessarily entail working with small samples.⁵⁹

Some qualitative methods were directed to more precise issues within the general field of inquiry. The observation focused primarily on the extent to which judicial officers engage with child victims and the accused, follow the special procedures, and use technology during the POCSO trials. The interview schedules were varied as per the role of the stakeholder in a POCSO proceeding. So, for example, Judicial Magistrates were asked questions about their experiences of recording a child victim's statement and of using video-conferencing to not only record a child's statement but also when they attended to a POCSO accused virtually produced before them. The interviews, in the context of this paper, sought to examine the judicial experiences and perceptions of the POCSO-related training.⁶⁰ These methods yielded a wealth of qualitative data.

Five of the seventeen interviews were tape-recorded and subsequently transcribed; in the other cases, detailed notes were taken by the researcher and then immediately typed up. The data from interviews where one or more languages and dialects such as Hindi, Magahi, and Bhojpuri were used was first translated into English. Thereafter, the transcribed data from all the interviews and observations was imported into the MAXQDA software, where it was organised and coded,⁶¹ and then analysed with the help of thematic method.⁶² Before I present my findings, it is important to find out the nature of POCSO-related training the Bihar and Delhi governments claim to have imparted to the stakeholders.

⁵⁸ Richard Tewkesbury, 'Qualitative Versus Quantitative Methods: Understanding Why Qualitative Methods are Superior for Criminology and Criminal Justice', 2009 1(1) *Journal of Theoretical and Philosophical Criminology* 38.

⁵⁹ Kathy Mack and Sharyn Roach Anleu, 'Performing Impartiality: Judicial Demeanor and Legitimacy' (2010) 35(1) *Law & Social Inquiry* 137; Jessica Jacobson, Gillian Hunter, and Amy Kirby, *Inside Crown Court: Personal Experiences and Questions of Legitimacy* (Policy Press 2016); Carolyn McKay, 'Video Links from Prison: Permeability and the Carceral World' (2016) 5(1) *International Journal for Crime, Justice and Social Democracy* 21; Ward (n 55); Rowden (n 51).

⁶⁰ While there are many agencies that conduct trainings for these stakeholders in India, such as the state legal services authorities, and the Special Police Unit for Women and Children (in Delhi), this research is confined to trainings organised by the national and state judicial academies.

⁶¹ Stefan Rädiker and Udo Kuckartz, *Focused Analysis of Qualitative Interviews with MAXQDA: Step by Step* (MAXQDA Press 2020), Udo Kuckartz and Stefan Rädiker, *Analyzing Qualitative Data with MAXQDA: Text, Audio, and Video* (Springer 2019).

⁶² Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology', 2006 3(2) *Qualitative Research in Psychology* 77.

IV. SPECIAL TRAINING OF THE JUDICIAL OFFICERS DEALING WITH POCSO CASES: WHAT DO THE GOVERNMENTS CLAIM?

The previous section set out the methodological approach adopted, and challenges faced during the fieldwork. This section explores the trainers, i.e., people and institutions, responsible to train the POCSO stakeholders and the nature and key features of their training as per the public information from the year 2015 to 2020 available on the websites of the relevant institutions and of the governments of Bihar and Delhi.

The institutions responsible to provide induction and in-service training to the newly appointed judicial officers and in-service judicial officers of all categories in the subordinate judiciary respectively are the state-level judicial academies. The academies organise refresher courses, core competence building and sensitisation programmes, orientation and collaborative programmes, stress management retreats, and village immersion programmes. Alongside the computer training and management skill development, the academies also organise seminars and workshops for different stakeholders under the guidance of the Judges of the High Courts. The High Court judges, senior judicial officers, eminent lawyers, and subject experts preside over the training sessions of the officers on selected topics of law followed by a discussion and interaction.

The district judiciary in Bihar and Delhi are trained by the Bihar Judicial Academy ('BJA') and the Delhi Judicial Academy ('DJA'), respectively.⁶³ There are academic calendars published on the two academy's website which mention the education and training programmes for different stakeholders. The DJA website is well maintained and updated while that of the BJA is poorly maintained and not updated.⁶⁴ The former had voluminous academic calendars of six years (2015- 2020), with details of the training programs of different stakeholders with names and designations of contributors and resource persons, alongside pictures of retreats and trainings.⁶⁵ On the other hand, the only aca-

⁶³ The Bihar Judicial Academy has been established in 2003 on the recommendations of the Shetty Commission with the aim and to impart training to inter alia the Judicial Officer of State to improve Judicial Administration and other matters incidental thereto. See, About Us, Bihar Judicial Academy, (*Patna High Court*) <<http://patnahighcourt.gov.in/bja/AboutUs.aspx>> accessed 18 April 2023. The Delhi Judicial Academy has started functioning formally since 2002, though it started imparting judicial education since 1992. See, Academic Calendar 2019, 5.

⁶⁴ See, Academic Calendar, Bihar Judicial Academy, (*Patna High Court*) <http://patnahighcourt.gov.in/bja/PDF/Academic_Calendar_2019.pdf> accessed 18 April 2023. See also, Academic Calendar, Delhi Judicial Academy, (*Judicial Academy*) <<http://www.judicialacademy.nic.in/activities-and-calendar/academic-calendar>> accessed 18 April 2023. This website had the academic calendars of the years 2019 and 2020 alongside the archive of previous years' (2015-18) calendars.

⁶⁵ All academic calendars were of around or over 100 pages.

demical calendar I found on the BJA's website was of the year 2019, which was a brief eight-page document with no details of the courses, trainings, and trainers. Even the archive of the previous years' academic calendars of the BJA was absent.

The DJA's academic calendars of the years 2015 to 2019 contain dates for annual training events of different stakeholders on a variety of related topics; child rights, gender justice, and the POCSO law. Since 2014, there has been a social context adjudication programme for the lower judiciary on rights of children and judicial contribution in developing children's rights jurisprudence. There have also been programmes for POCSO special judges on court procedure, attitude building, skill, and personality development. The pedagogy highlighted is of consultation before the preparation of training modules. The methodology of training has been mentioned as an inter-disciplinary approach to understand the social context in which laws/systems exist and operate.

There have also been conferences by the DJA on 'strengthening the justice delivery system through integration of knowledge, skill and attitude in adjudication', 'towards excellence in qualitative & quantitative justice', and 'substantive and procedural challenges in trial related to sexual offences' for Additional Sessions Judges (ASJs), i.e. special judges, of the POCSO courts.⁶⁶ These conferences had sessions on understanding the psychology of children in conflict with law, impact of social media, understanding Post-Traumatic Stress Disorder faced by victims, the jurisdiction of special children courts, the appreciation of evidence, settlement in sexual offences, challenges in sentencing, importance of counselling of victims of sexual abuse, the psychological impact of child sexual abuse on victims, sensitive handling of witnesses/victims, and giving due regard to mental health during trials.⁶⁷

These conferences were of one to three days with a methodology of lectures, group presentations by participants, and exercises, role-playing and audio-visual media including PPTs. The participation was sometimes mandatory (jurisdiction-wise), sometimes on a voluntary basis, and other times by nomination by the concerned District & Sessions Judge or the Director of Prosecution. In 2017, the DJA also conducted six on-site programmes at the six district court complexes in Delhi on issues relating to repatriation, restoration, rehabilitation, age inquiry, adoption and minimizing bias for children.⁶⁸

⁶⁶ DJA Academic Calendar 2015, 37; DJA Academic Calendar 2016, 36; DJA Academic Calendar 2017, 33; DJA Academic Calendar 2018, 30, 55; DJA Academic Calendar 2019, 14, 65-66; DJA Training Calendar, 2020, 48-49.

⁶⁷ The details of sessions are available only in the 2019 and 2020 academic calendars of the DJA.

⁶⁸ DJA Training Calendar, 2018, 11. This followed the Delhi High Court's directions in *Chanderjeet Kumar v State*, 2016 SCC OnLine Del 5431.

Refresher courses, seminars, and workshops for the judges of POCSO courts have also been provided by the National Judicial Academy ('NJA').⁶⁹ Its publicly accessible website contains the details of the programmes like the schedule, reading material, list of participants, resource persons, and evaluation reports from 2015 to 2020. The materials cover different aspects and stages of the POCSO cases, POCSO special courts, and their stakeholders, including handling of child witnesses. Many of the resource persons and trainers were women with their professional background as a High Court judge, lawyer, academic, NGO personnel, or forensic scientist. Overall, in these five years, the NJA could train only 7 POCSO special judges from Delhi and only 8 POCSO special judges from Bihar. It is important to note here that the number of POCSO special judges that were working in Delhi and Bihar at any given point in the year 2019-20 were 19 and 38 respectively.

V. MAPPING THE POCSO-RELATED TRAINING PROVISION IN THE TWO LOCATIONS

In this section, I explore the experiences and perceptions of my respondents about special training to deal with POCSO cases. I present my interview and observational data to assess the frequency and quality of POCSO-related training given to them, their practice to implement the POCSO Act by employing that training, and the challenges they face in doing so. I examine the perceptions of the respondents about what they consider to be requisite training to handle POCSO cases and whether they have undergone such training or not. I also explore the reasons for them not receiving special training. I further study whether they are willing to undergo training if they have not received it, and if there is unwillingness then the factors behind that. I also outline their views on other legal actors from their or other professional groups.

Overall, 14 respondents (82 percent), i.e., slightly more than three-quarters of the total 17 respondents, across the two field sites, gave a positive response when asked if they received any professional training in their judicial career. Out of these 14 respondents, 8 respondents (47 percent) reported receiving special training on POCSO matters. The rest of the 6 respondents reported of receiving only the general training to deal with criminal cases. Out of those eight respondents who reported of receiving the special POCSO training, six

⁶⁹ There have been three Refresher Courses in January 2020, September 2018, and September 2017; a 'National Seminar on Working of the POCSO courts in India' in March 2017; and a 'Workshop to Assess nature of difficulties faced by POCSO courts' in September 2015. All these five events were for the POCSO special court judges and were of two to four days with seven to fifteen sessions. On an average, there were 37 participants in each event, with one to five participants from different districts of Delhi and Bihar. See, Concluded Programmes, (*National Judicial Academy, Bhopal*) <https://nja.gov.in/concluded_programmes.html> accessed on 11 January 2021.

respondents reported their satisfaction with it. Two respondents who reported of not being satisfied had varied opinions: 'more training is needed' (BPJ 2) and 'training is not much important' (BPJ 3). They gave an account of their practice of implementing POCSO special procedures. It was evident that the special training led these respondents, except for some, to implement the special procedures, which I discuss later in this section.

Among three (18 percent) of the 17 respondents with no response to training, one respondent (DPJ 5) did not want to respond to the question on training, while the other two (DPJ 4 & BJM 4) were short of time for the interview to reach the question on training. All the POCSO special judges across the two sites, who responded to the question, mentioned receiving the routinised general training. Further, one stakeholder's accounts, a POCSO judge in Bihar (BPJ 1), showed a clear rejection of the idea that formal special training is required to deal with POCSO matters.

The presentation of data and analysis in this section has been organised based on the sequence of sites during my fieldwork visits, i.e., Bihar, followed by Delhi. In terms of the respondents, I begin with the judicial magistrates and then go on to discuss the perceptions and experiences of the special POCSO judges. The logic behind this approach is at what stage of the criminal process in POCSO cases a group of respondents play a role. So, a judicial magistrate who records a child victim's statement in the pre-trial stage has got precedence followed by the responses of the POCSO special judges who preside over the trial and sentencing stages. Further, positive responses have been discussed first, followed by the negative ones.

A. Training Provisions in Bihar

A total of 4 (50 percent) out of 8 Bihar respondents said they received the special POCSO training. While 2 of these respondents (BPJ 2 & BPJ 3) were special POCSO judges, 2 were judicial magistrates.

1. Judicial Magistrates

A judicial magistrate is the first point of contact between a child victim and the judiciary. They are responsible for recording the child's statement, and because of the independence of the institution of judiciary, such a statement becomes vital during the trial.⁷⁰ The POCSO Act states that the Magistrate shall record the statement as spoken by the child without the presence of the

⁷⁰ The Code of Criminal Procedure, 1973, s 164(5A) (b): Moreover, a statement made by a child with temporary or permanent mental or physical disability who is victim of rape before a Magistrate shall be considered a statement in lieu of examination-in-chief and the child can be cross-examined on such statement without the need for recording the same at the time of trial.

advocate of the accused and in the presence of the parents of the child or any other person in whom the child has trust or confidence.⁷¹ There is also a provision for the Magistrate to take the assistance of a translator or an interpreter, or special educator, or any person familiar with the manner of communication of the child or an expert in that field, while recording the statement of the child, if needed.⁷² The Act further mandates the Magistrate to ensure that, wherever possible, the statement of the child is also recorded by audio-video electronic means.⁷³

Describing the process of recording a child's statement, one female Magistrate (BJM 2), who joined the Bihar Judiciary in 2017 and reported of receiving the special POCSO training, said that she writes down all things pertaining to essential ingredients in a POCSO case. In case she is unable to note down *verbatim*, she said that she notes down the important phrases or words. She also gives chocolates and toffees to a child while recording their statement. She reported that prior to recording the statement, she asks about colours and objects such as frock, *Sameej*, or *Salwar* to test the child's capacity to give a statement.

She further stated that she always records Section 164⁷⁴ statements in her courtroom without the presence of the accused's advocate and has never used audio-video electronic means while recording such statements. While highlighting the difficulty faced by many POCSO victims who commute to Patna, she said it is a big problem for them as there are various peripheral cities of Patna district like *Punpun*, *Barh*, *Bikram*, *Mokama*, *Hathidah*, which are very far from Patna and yet victims from all these places must come to Patna by themselves. They spend their own money to come to Patna, she added. To tackle this problem and to benefit the victims, she suggested the use of audio-visual system, but then pointed out the lack of infrastructure:

There is no audio-visual recording support system. Even if it is there, it is at the output end, and it is not there at the input end. So, it may be at the Police Station, NIC Centre (National Informatica Centre),⁷⁵ or DM (District Magistrate)

⁷¹ The POCSO Act, 2012, ss 25(1) & 26(1).

⁷² The POCSO Act, 2012, ss 26(2) & 26(3).

⁷³ The POCSO Act, 2012, s 26(4).

⁷⁴ CrPC, 1973, ss 164(1) & 164(5A)(a): Any Metropolitan Magistrate or Judicial Magistrate may, whether or not he has jurisdiction in the case, record any...statement made to him in the course of an investigation...or at any time afterwards before the commencement of the inquiry or trial. Regarding the recording of statement in sexual offences, the Judicial Magistrate shall record the statement of the person against whom such offence has been committed...as soon as the commission of the offence is brought to the notice of the police.

⁷⁵ National Informatics Centre. It provides nationwide ICT infrastructure to support e-Governance services and various initiatives of Digital India. To design, develop and implement various e-Governance initiatives and Digital India programme, NIC State Centre in 36 States/UTs along with 741 District Centres are continually engaged to automate and accelerate

Office, but it is not at the places where the victims usually live. (BJM 2).

Still, she believed the office of the SDM (Sub-Divisional Magistrate) can be used for taking 164 statements with the help of NIC. Adding that the victims are usually scared and shocked when they come for the 164 statements, she proposed recording of a child's statement by a local Judicial Magistrate First Class (JMFC), say, of subdivisions like Barh, where the victim resides. She said that the immediate recording of witnesses' statements is very important and would be very significant for the POCSO cases.

A young male Magistrate (BJM 3), working as a member of the Bihar judiciary since 2013, also reported of receiving special POCSO training. He explained its effect on the implementation of POCSO procedures while recording a child's statement. He said he records a child's statement in a closed court and the statement is made voluntarily. If he finds any problem with a child victim, for example, of health, or if he feels coercion is involved, then he asks the victim to return. He further said that if it is a small kid then he initially asks a couple of questions to the victim to test their competence before moving on to record their statement.

On being asked about the reason behind it and what kind of questions he asks, he reported asking different questions of simple nature. He said that if they give rational answers to those questions as per their age and understanding, then he concludes the child as a competent witness and moves ahead to record the 164 statements. Giving examples of the simple questions, he said, if there is a female child victim of six to seven years, then he asks child's name, father's name, school's name, where have you come, who brought you here, and so on. He went on to narrate, "Why have you come here? To get my testimony recorded (*Bayaan dene*), she will say. Did your mother say that you have to give so and so statement (*Apki mummy ne bataya ki ye bayan dena hai*)? No, she will say. (BJM 3)" He added that after he finds the child to be competent, he also writes a letter in that regard giving his reasons.

Talking about the courtroom environment that is made available to record a child's 164 statement, he said that his courtroom is different from a POCSO court, which is a special courtroom. A first-class Judicial Magistrate's court is not a child-friendly court, he added. Further, he said that one can make an exception by recording the 164 statements in the chamber. Talking about his practice, he stated that for security purposes, he keeps his courtroom's door open, and makes the guardian sits outside. If he finds a victim is scared, then he asks victim's mother to sit inside. If a victim is unable to speak, then he

e-Governance processes in close interaction with Government Departments. See, District Officer (*National Informatics Centre*) <<https://www.nic.in/district-offices/>> accessed 18 April 2023.

gives biscuits and toffees to make her mentally free and asks her to give statement only if she feels secured. Once the testimony is recorded, then he either asks the victim to read it or he reads it to her. Then it is sealed in an envelope, he added.

He also raised concerns about victims' security when they come to give a statement. He said that because of disturbance in the gallery, it becomes difficult for Police to bring and take victims back, as there is no special task force yet. Reporting that there are many kinds of interferences, such as, by parents, by in-laws, by involvement of political people, he recalled an incident when he faced such an interference. He said there was one situation where a father slapped the victim twice and then the village people barged into courtroom. In another instance, he stated, it was an inter-caste issue and the whole gallery outside the courtroom was full. Reflecting on his helplessness in handling such situations, he advised that there needs to be proper security to tackle such incidents as police cannot understand what to do in such circumstances.

This Magistrate (BJM 3) also said that he is using the video conferencing (VC) technique since the last two years for attending the production of accused from jails, and for recording the statements of juvenile accused persons in the POCSO cases from observation homes. A Magistrate, being the first line of defence against the state to check on state excesses, has the duty to look after the safety and security of the accused. Explaining that the production of accused via VC is only when the accused is under enquiry and not under trial, the Magistrate (BJM 3) said he asks the accused if he wants to have free legal aid or not, and about his health condition.

He further added that the accused is produced via VC only till the charge-sheet has not been filed, and after the filing of the charge-sheet the production is made through accused's physical presence. Talking about the usefulness of VC for producing accused in POCSO cases, he said if a jail is 25 kms away, then police is required to bring an accused from there, which is a big security issue as there have been some incidents of running away or escaping by the prisoners in the past. So, the use of VC is about securing transportation of accused persons from and to jails, saving time and alleviating constraint on resources, he added.

He further said he had even used WhatsApp and Skype due to problems with internet connectivity to record a minor accused's statement in a POCSO case when he was produced before him from an Observation Home of another district in Bihar. Emphasising, however, the repercussions of these platforms he argued that there are chances of confidentiality breaches and moreover, third parties are involved in this process, who are not aware of the issue of privacy yet. While he said he is trained to use the VC technology, he raised the issue of other staff members involved in the process not being trained in its usage,

saying ‘operator training should also be there’. He suggested that the Social Welfare Department should take initiative in this regard. Advocating the need for training in technological knowledge for judicial officers, he claimed ‘there are still training gaps between judicial officers’ work and their technological knowledge (BJM 3).’

On the other hand, one young female judicial magistrate, who reported of not receiving special POCSO training, believed she did not need training on the usage of VC when an accused person under police custody is produced virtually, as for her,

...it is a very normal thing. There is nothing much to know about it because the questions that you are supposed to ask are almost the same, that how you are...are you getting correct treatment...whether or not you are being beaten up. So, that does not require much of a training. That comes from handling the court anyways. (BJM 1).

One judicial magistrate (BJM 3) also highlighted the benefits of using VC to record child victims’ statements. It was his belief that VC would be very useful in mitigating the distance and security issues, say, in cases where a victim is at any distant location like other city, state or country for study purpose or where there are threats to child victims in public transport systems. He then pointed out how the lack of necessary infrastructure to meet the requirements of a special law like the POCSO Act can impact the functioning of even trained judicial officers expected to implement such special POCSO provisions. He said there are issues of weak internet connection and non-availability of continuous electricity, which leads to disturbances in video connectivity.

He suggested having continuous back-up of electricity for courts. He further said there needs to be reliable equipment and infrastructure and reported that 70% of offices are such where training has been given but there is no computer, and the broadband connection that is used is slower. He said that the lease line is very good but there is no knowledge on the technology part. He then claimed that the concerned person did not know the difference between a broadband and a Lease line and even the policymakers need to be aware of all these problems.

I observed in one of the Bihar districts that the Magistrates went to a special VC room or had access to VC facility to attend virtually produced accused persons. These facilities, however, were unavailable to record child victims’ 164 statements, which was conducted in person in a Magistrate’s office in all the districts I visited.

2. *Special POCSO Judges*

Talking about his training, one male Judge from Bihar said, ‘I have received general bookish training in relation to POCSO’ (BPJ 2). However, he added that ‘more training should be given’. When asked about what exactly he would like to learn about in the training, he suggested that information about best practices of special POCSO courts in a particular state in India or of the foreign courts dealing with child sexual abuse cases should be discussed during the training. Another judge agreed to have received ‘general training’ on POCSO matters (BPJ 3). He then spoke in a disinterested tone about the importance of special training to judges for POCSO matters: ‘I think training is not that much important’, as he just needs to follow the Act. Showing his procedural knowledge of the POCSO trial, he further stated that a questionnaire during trial is a must, which should be submitted by the Prosecutor and by the Defence Counsel that such and such questions will be asked from the child witness. He will then peruse it and only after his permission, the lawyers will ask those questions. My observation, however, indicates that while he was aware of the trial procedure, this was not being implemented.

Thereafter, he (BPJ 3) went on to talk about the procedural abuses by lawyers working in the special POCSO court he presides over. He said that there needs to be more sensitivity on part of the lawyers as they cannot misbehave with a seven-eight year old child. They cannot ask her about the size of penis or mode of sexual intercourse, which is impermissible. He further suggested the necessity of ‘self-teaching’ to handle POCSO matters. He went on to discuss the ‘misuse’ of POCSO matters. He said, in land disputes, people are projecting children as pawns. Discussing a case in which a six-month baby was a rape victim, he said that Doctor and Investigating Officer (IO) were also deposing against the accused person in the case. And then he said, “she is a six-month baby; if the accused person throws her on the floor, she will die. Why will he rape her? What will he gain by raping her? (BPJ 3)”⁷⁶ This statement reflects not only his own insensitivity towards child victims of POCSO offences but also a lack of empathy and understanding the motivations behind child sexual abuse.

When I asked him about his approach to cases where he thought the POCSO law is being misused, he said he just looks at the evidence and decides the matter. He then highlighted the reasons for his approach and the tension between a judge’s knowledge and implementation of law vis-à-vis knowledge of social ‘realities’, i.e., what goes outside the courtroom. He said, “Why should I take the burden on my head? Why should I make an enemy? Have all the social reformers died? If I do something, who will then protect me?”

⁷⁶ Translated from Hindi: *Chhe mahina ki bachchi hai. Patak dega, mar jaayegi. Rape kyun karega? Rape karne se kya milega?*

(BPJ 3)⁷⁷ Pointing out the lacunas, he then blamed the Police that it is their responsibility to bring correct people as witnesses during the investigation and claimed that they write the Case Diary sitting at home.

Among the POCSO special judges who said they did not receive training, one stated that there was no specific training given to him to deal with the POCSO cases (BPJ 1). Upon being asked if he needs such training, he said he does not think there is any need of special training for such matters. He claimed that working for so many years in the judiciary has given him 'enough experience to deal with such cases.' He also seemed to be consciously offering a reason for his lack of knowledge of the POCSO law that was reflected from his responses during the beginning of the interview. He said he joined as a special POCSO judge only 3-4 months ago, and he has learnt about the POCSO law in the court itself, and soon he is being transferred to another court because of his promotion.

Through the in-court learning, this judge (BPJ 1) knew the POCSO special procedures about victim's deposition through video linkage and Vulnerable Witness Deposition Room during the trial and called these as important changes. He explained to me that the victim sits in a separate room and can see only him and nothing else while deposing through the video-link, and the accused person cannot see the victim. The judge then said that he puts questions before the child victim, and she responds. My observation data of his court, however, suggests that this was not put in regular practice, as in most cases the child victim was required to be in the courtroom in an almirah like box with a one-sided mirror. Further, both public prosecutor and defence counsel asked questions directly to child victims, which sometimes were even inappropriate, without any interference by him. He also said that he rejects all bail petitions in POCSO cases.

Another judge also said that he did not receive any training after his appointment as a POCSO special Judge and claimed that the trainings occurred regularly but were 'only interaction' (BPJ 4). He said that he just needs to see the evidence and work as per the POCSO Act. Shifting focus on prosecutors' training, he said that even the Prosecution agency undergoes training, but not in a proper manner. He argued that investigation in POCSO matters is poor because of lack of training to the police officers, and that he thinks that there should also be sensitisation program for the police officers. This judge pointed out that there were many instances when the Investigating Officer did not get the medical examination of the child victim conducted or when they did then were late in doing so, and that they are unable to get it done on the spot.

⁷⁷ Translated from Hindi/Magahi: *Hum kaahe ke liye apne sir pe lein? Hum kyun dushman banayein? Saare social reformer mar gaye hain? Hum kuchh karein, fir who will protect me?*

B. Training Provisions in Delhi

The overall training provision as reported by the Delhi respondents was not very different from those of Bihar. A total of 4 (44 percent) out of 9 Delhi respondents said they received the special POCSO training. While 2 of these respondents (DPJ 6 & DPJ 7) were special POCSO judges, others were the two Delhi judicial magistrates.

1. *Judicial Magistrates*

Both judicial magistrates in Delhi reported receiving special POCSO training. One of these Magistrates (DJM 1), who joined the Delhi Judicial Services (DJS) around 10 years ago, told me about the nature of a very young child victim and its impact on the process of recording their statement:

When a child is very small, you can say about, till five years six years, the child actually does not know what to say and how to say. And they are actually clueless also that such a heinous offence has [been] committed upon them. They don't know that they have been molested or something, whatever has happened to them. So...they are actually scared to come and disclose everything to a third person who they never know. When they grow up, and when they become aware of the body, then the realisation comes. I think after six to eight, six onwards, I think the realisation is more, that this is wrong. (DJM 1).

She then explained how she records a child's statement:

Initially the comfort level has to come. We make them comfortable. You have to go down to their language: "Was the [penile] penetration at the urinal area? Was the [penile] penetration at the anal area? Did he insert his finger? What do you say? Did he take off your underwear?"⁷⁸ So, all those languages that a child understands, you have to go down to that level. You have to make them feel a lot comfortable, so...I used to give chocolates. Sometimes make them sit on my lap, to make them comfortable. You make a parent sit behind. The parent sits on the sofa, so that the parent knows nothing hanky-panky is coming up. Sometimes you even have to, means, point finger [to body parts]. And then you write. I pointed. The child nodded. (DJM 1).

⁷⁸ Translated from Hindi: *Sushu wali jagah pe kiya tha? Potty wali jagah pe kiya tha? Ungli kiya tha? Aap kya bolte ho? Kachchhi utaara tha?*

She then added that ‘you basically write *ad verbatim* what happens, and that’s how it is interpreted...because these statements are not on oath. Below twelve, it is not on oath. So, you have to ask a lot of question so that the child actually understands what you are saying.’ She reported having recorded the statements of children who have been molested in school cars, school vans or by their brother. Therefore, she said, ‘It takes time for them to open up to a stranger.’

When I asked about the location where she records a child’s statement, she replied, ‘Initially, it was my chamber, but then after the [relevant] rule and regulation came, we had to go to the Vulnerable Witness Room. So, we went there.’ She further emphasised that ‘the victim does not travel (within the court building). The child stays in the Vulnerable Witness Room. It is the IO (Investigating Officer) who does all the running to help the child reach the Vulnerable Witness Room. The child is never made to run from pillar to post.’ Even the Magistrates come to the victims, the victim does not go to the Magistrate, she added. Regarding the design and environment of the Witness Room, she said that “the identity [of victim] is protected in every manner. There is a separate pathway for the child. Victims are not made to enter through the common gates. Even the accused is kept in a separate barrack.”

Highlighting the role of gender in policy development, she said that as per the guidelines, ‘now the rule is that only women record [164 statements], as being considerate...you are able to extract better of what has happened.’ She added that every female magistrate is allotted one child victim to record their statement.

She also reflected on the challenges to record statements of children who are in 15-18 years age group:

By the age they are fifteen sixteen, it is more of a love affair. If it is concocted, then it is [a] love affair. Then they...they just bluntly refuse. ‘I did not say anything (Main to kuchh kaha hi nahi tha).’ Then they are very arrogant also. ‘I want to take it [complaint] back. How does one do it? (Mujhe to wapas leni hai. Kaise lete hain?). So, we write that ‘I want to take it back. How does one do it? (Mujhe to wapas leni hai. Kaise lete hain?),’ and then sign it.”

She further talked about cases where victims in this age-group say, ‘I committed mistake in writing, because my parents were not marrying me to my boyfriend’⁷⁹. Emphasising on recording the statement as it is given by a child, she said,

⁷⁹ Translated from Hindi: *writing me maine galat kar di thi, kyunki mere maa-baap mere boyfriend se meri shaadi nahi kara rahe the.*

Ad verbatim you write, and you send it. You cannot add a sentence...because you give a certificate in the end, "whatever has been said, has been written." So, you write, and you make them sign, "I do not want to pursue this case. I was deposing. It was my false complaint (mera false complaint tha)." You sign.

She also highlighted that improvement in public awareness about the POCSO law and stakeholders' special training by the District Legal Services Authorities, other legal authorities, and Non-Governmental Organisations, along with establishment of more POCSO special courts in Delhi, have led to increase in access to courts and improvement in access to justice for the public in POCSO cases.

Another female judicial magistrate (DJM 2), who joined the DJS in 2018, also reported positively on receiving special POCSO training. She said that while going through the one-year training at the Delhi Judicial Academy after joining DJS, there were sessions, where the resource person gave training on how to record 164 statements and discussed the law in that regard. Regarding recording a child victim's statements, she said she was given a full day training and was even taken to the Vulnerable Witness Room.

She discussed the procedure she follows to record a victim's statement. She said 'we generally make sure that the child is without any fear, whatever he is saying, he is saying it voluntarily, and what all he wants to say...for 164. Then he has to depose as per...whatever he remembers, and then we jot it down and record it accordingly.' On being asked whether she faces any challenge in performing this task for which she was specially trained, she mentioned that recording a child's statement in verbatim by hand has always had a potential of human error.

She contended that she has to hear and jot down every word of a child victim's narration properly and for this purpose she has to keep asking questions repeatedly. Sometimes she had to record in writing a long statement of seven-eight pages. To tackle this challenge, she recommended mandatory video recording of 164 statements, which as per her would not only save the time but will also prevent a child witness from repeating their story again and again. Arguing that this would be a better approach, she further added that the recording can then be sent to the POCSO court for its usage. Another issue she flagged was when children breakdown while giving the statement. She said usually it's the adolescents who breakdown because young children simply depose, whatever they have to say. To handle this situation, she said, 'we say that, okay take a pause, calm yourself, and then you tell. Only me and you are there, nobody else is there. So, be fearless and tell whatever you have to say.'

2. *Special POCSO Judges*

One Delhi male judge (DPJ 6), who joined DJS more than a decade ago and became a POCSO special judge in 2019, contended that a good amount of special training was given to the POCSO judges, including the training on child psychology. Talking about how he uses the training provided to him, he said that to record a child's testimony during the trial, he uses confidence building measures, as one would not touch such a topic directly and there should be general conversation to begin with. So, he puts some introductory questions to the child, an approach he argued is quite helpful, particularly for a child below twelve years of age but works generally well for other children too, and even the child is able to respond in a better way. He said one should not expect that children would give narratives during trial and that even the higher courts have said that child victims' statements should be taken in the Question-and-Answer format to extract their responses in a better manner. He also highlighted a ready-made pro forma, which has been written in a manner that the other party [defendant] would not raise any objections.

Praising the use of video-link and the Vulnerable Witness Courtroom ('VWC')⁸⁰ during trial, he claimed that if the video-link system would not be there, then in 80-90% cases it would be very difficult for the child to depose, as there are such statements given during the trial that even the lawyers tend to skip them in the court. He then gave an example where a girl said during trial, "the uncle tried to insert into my urinal spot, but when it did not get in, then the uncle applied oil on it."⁸¹ So, in such situations even the in-camera pro-

⁸⁰ This is a unique architectural and digital arrangement that has been made to facilitate recording of statements by child victims during POCSO trials. In Delhi, under this arrangement, there are three separate rooms, two of which are connected digitally to each other. One, the special POCSO courtroom, which is publicly accessible and used for all the case proceedings except the recording of child victim's testimony and is not connected to the other two rooms; two, the Vulnerable Witness Courtroom (VWC) – a separate courtroom, which is on the same or a different floor of the building in which the special POCSO courtroom is situated, and where only the special judge, special public prosecutor, defence lawyer, stenographer, police personnel, and accused person can be present; and the third, called a Video Linkage Room (VLR) – a live link room with sofas, chairs, tables, and an adjacent children's play area, with nothing that is courtroom-like, where a child sits with a support person without anyone else's presence except the child's parent or guardian. The second and third rooms are digitally connected through a live video-link in a way that the audio-video feed of VLR is produced in VWC on a computer screen for the accused person and others to hear and watch, and the judge's voice from the VWC to reach only to the support person in VLR. So, the child in the VLR, who is giving evidence by live link, hears only what the support person says and cannot see the accused, or any other person, present in the VWC, except when they need to do so for identifying the accused person(s), and therefore feels that they are not in a courtroom. My observational data say that while in Delhi, all district court complexes I visited and observed had at least one VWC being used by POCSO courts, in Bihar this facility was available only in one of the four districts I observed, and even that one was not used regularly.

⁸¹ Translated from Hindi: *Mere shushu waley jagah me daalne ki koshish kiye, nahi gaya tab uncle ne fir tel lagaya.*

ceedings do not work, because you cannot avoid the presence of Stenographer in courtroom, he argued. Further, as per his experience, younger the child the more difficult it is to get good evidence or response from them:

They will say that he did it to my urinal spot.⁸² Then, I will ask what exactly he did. Did he just touch it, or did he insert? Because touching and penetrative sexual assault have big difference in terms of punishment. Also, you cannot put leading questions to the victim. (DPJ 6).

He highlighted the pro-active role that POCSO special judges need to play. He said that gone are those days when Judges used to sit idle with calmness, and used to listen and watch quietly whatever is happening in the court. Now, every judge is pro-active, as they must constantly watch that there is no character assassination of the child by the Defence Counsel, he added. He also said that he does not give any leverage now and even the Defence Counsels' body language has been taken care of, and he just tells them that they can watch the victim on the computer screen present in the Vulnerable Witness Courtroom.

Talking further about engaging with victims during trial, he narrated a case of child prostitution he was dealing with, where the girl was brought from another place for prostitution in Delhi. He said that Police tried to change the statement of the victim and the Child Welfare Committee's observation was that her mother used to receive money for that, and some government officer was involved who gradually developed an individual interest in the victim. While deposing, the victim could not say anything in the courtroom despite that being an in-camera proceedings, the judge added. This is when he asked her to come to his chamber, where he could successfully secure her statement, and where she said many things to him, which he was unable to share with me during the interview. He argued that this process needed a rapport-building by him with the victim, which at times, he claimed, a support person is unable to do.

While this Judge was satisfied with the special training given to him, he highlighted lack of training of other stakeholders and certain socio-legal and infrastructural limitations, which despite him being specially trained, pose challenge to him in dealing with POCSO cases. He criticised the role of support persons and discussed the repercussion of their lack of training on recording a child's testimony during trial.

Talking about the VWC rules, i.e., the lawyers putting the questions to the Judge, the Judge relaying it to the Support Person, and who in turn asking

⁸² Translated from Hindi: *Wo kahenge ki meri shushu wali jagah kiya tha. Fir hum poochenge kya kiya tha. Touch kiya tha kewal, ya andar dala tha?*

those questions to a child, this Judge noted that the quality of support persons is a concern. He said support persons are mostly lawyers who are not getting any briefs, but in a way, are replacing a Judge in POCSO trials. He argued that there needs to be a process of zone-making where he makes child victims comfortable first, but in the present process, his voice does not reach them. Questioning why his voice should go into the Support Person's ears, he contended that his expression would be lost in the voice of the Support Person. Asking how it makes a difference if the victim hears the voice of the Judge directly, he proposed that the victim should hear the voice of the Judge and the present system of relaying questions to a child through a support person should go away unless the support persons are very well trained.

Speaking on behalf of himself and his fellow POCSO special judges, he then outlined three major socio-legal challenges that they face while dealing with POCSO cases. First is what he called 'the cases of elopement'. Explaining the pattern in such cases, he further said that a girl of sixteen and a half years or seventeen years or just short of majority of 18 years under the POCSO law consensually goes away with a guy and has penetrative sex with him, including on occasions many times in one night which is normal. Noting that the POCSO Act has taken away the concept of consent for such girls, which earlier was considered legal, he argued that such instances now fall under the severe offence category of repetitive penetrative sexual assault. In such cases, he argued that despite the victim deposing in favour of the defendant, the defendant must be found guilty and be severely punished for a minimum of twenty years. He added that a very important issue in a case under the POCSO Act is that the entire case rests on a victim's statement as there would not be any public witnesses.

The second socio-legal challenge in handling the POCSO cases, he argued, comes up in those instances where parties are accused of child marriage. He said while the POCSO Act is a gender-neutral and a secular legislation and applies even to cases of marriage provided the bride and/or groom is under 18 years of age, child marriage is still rampant in the Indian society. He noted that the practice is more among Muslims than Hindus, as under Muslim personal law, puberty is a criterion for marriage, and that there is a conflict between the POCSO law and personal law which has not been taken care of. Moreover, he argued that discretion has been taken away from courts on this issue, and he and other judges have to punish the boy who had consensual (non-exploitative) sexual relationship within marriage with, say, a seventeen-year-old girl. He further contended that not only the POCSO Act but also the later enhancement of punishment are products of knee-jerk reactions.

The third challenge, more of a socio-economical in nature, he talked about, was in incest cases where in a poor family, a father rapes his minor daughter while also being the sole bread winner of the family. He discussed a case of a

fifteen-year-old girl who lodged a complaint against her father for being raped since the last four years. She had an illiterate home maker mother, who did not have any skill to earn money, and four other children to feed, he said. Arguing that usually bail is not granted in POCSO cases, especially in aggravated cases, the Judge said the man is behind bar now and raised several livelihood questions for the family: “Now just think how they will live. What will they do? How will they run their family?” While he emphasised on “law taking care of some of her things, say through compensation, but not other things”, asserting he gave her a rightful compensation of one lakh (rupees), he went on to blame the child: “Because of her, the father is inside jail.” “Economics always prevails,” he added, arguing that there is no assistance by law or government for a family in such situation, and a girl is bound to turn hostile if she goes home. To prevent this, he directs such victims to be put in the child homes – a decision usually taken by the Child Welfare Committee. While he did raise some valid points such as insufficient compensation and witness becoming hostile, he also clearly displayed victim-blaming attitude, despite having received special training to deal with POCSO cases.

In terms of infrastructural limitations that make the POCSO’s legislative mandate impossible to achieve, he argued that the provision to record a child’s testimony within a month of taking cognisance is just not possible. There are around four hundred to five hundred cases in one POCSO court in a month, and for implementing this provision, charges need to be framed within one month, and so do recording of the child’s testimony, he said. Noting that there are now four-five POCSO courts here in his district, but only two Vulnerable Witness Courtrooms, he proposed that there should be six to seven POCSO courtrooms as well as the same number of Vulnerable Witness Courtrooms in his district.

Another male judge (DPJ 7), working with the DJS for more than a decade, and who became a POCSO judge around the same time as DPJ 6, said that he along with other judges have undergone regular training and there were regular programs at intervals of three to six months. He mentioned a sensitisation training in relation to POCSO cases and said that he had been lectured by High Court Judges, Delhi Judicial Academy and sometimes even by the Bar. The training also included sessions on how to take evidence of different age groups of child victims – a child victim of below twelve years of age requires a different kind of indulgence than a child of a tender age of four-five years, and a different approach is needed if you have to record evidence for fourteen to sixteen years, and sixteen to eighteen years age groups, he added. He asserted that recording statements while in office since the last ten years has also provided him sufficient experience of recording testimonies of victims of any age-group, adding: “You just have to treat the child as your own,” thereby overlapping judicial and parental empathy.

Talking about his engagement with a child during trial, he said he asks the child to sit beside him near the dais in case they feel uncomfortable in saying anything from the VLR. Claiming that for a four to eight years child, it does not make any difference who is asking question, he said he sends the Police officer outside the VWC in such situation, and it has once happened that a child witness was unable to give statement in the VLR but easily said whatever he wanted to in the VWC. When I asked in what situations he brings a child near the dais, he argued that when sometimes a child is not comfortable with both the parents or mother or father being present in the VLR, he asks the child to come to VWC and sit near him.

Explaining the nature of questions he asks a child, and how he creates a 'child-friendly' environment, he claimed that when he finds a child witness is not feeling comfortable because of any reason, he gives them Frooti (Mango juice), or even Chips. He contended that he asks questions in a very informal manner with a joking outlook like one would usually talk to a child in daily life: "You know I also have a son of your age", "Was this the uncle who did wrong act with you?" If the child has been tutored by parent to not say anything in the court, then the child will say, "Nothing happened to me," he added. Still, he said, he would ask the child repeatedly and then she would tell him, claiming that she is trying to open up gradually, and so you cannot rush with her. He went on saying that then he would ask, "But the uncle did touch you, right?", and then, "Where did the uncle touch you?" Then, he said, if she does not respond, he would prompt, "Okay, he touched your cheek,," then, she will say, "No, not cheek. He touched my chest." He also discussed the challenges in incest cases and what he called as 'love-affairs cases' under POCSO.

While this Judge, like DPJ 6, appreciated the use of video-link during trial, noting that it takes care of secondary victimisation of child victims by providing them comfortable environment during their depositions, he raised concern about its implications on the rights of the accused person. He contended that the use of video link hampers accused's rights, "because the manner in which she speaks cannot be perceived in the same way through video-link as it can be when the child is physically present." He emphasised on demeanour, saying it has its own value in a criminal trial and added that the problem is further exacerbated when sometimes the victim is inaudible from the VLR.

One male Delhi respondent (DPJ 3), who had worked for around two years as a POCSO judge without any special training, said: "There was no such formal training. Some one-day seminar type event was organised, and I attended that." On further questioning about how then he dealt with POCSO matters, he responded: "I am a Judge. I am trained. I have trained myself in that manner." Upon being asked how he formulated his approach towards a child witness, the judge said, "These were through hit and trial. This is how it goes." He stated that it continues to be the case that specific training is not given to the judges.

One female judge from Delhi (DPJ 2), who said she did not receive any training after her direct appointment to the Delhi Higher Judicial Services ('HJS'), stressed on the need for POCSO training. She described how she, along with two other newly appointed judges, trained themselves to handle the POCSO matters:

We quickly trained ourselves with the help of our neighbours, by asking them, they gave their judgments. All three of us came together, and we collected whatever materials was possible for us to collect and shared amongst ourselves. (DPJ 2).

The neighbours here were not her peer judges but her former students who became judges. She revealed that there is a lack of space for peer-level interaction in the lower judiciary. Emphasising the importance of interpersonal relations in lower courts and the difference between law-in-books and law-in-practice, she said she had learnt more than half of her word from her stenographer who was far more practically experienced than her. She believed that special POCSO training is a must for special POCSO judges, saying that 'most importantly sensitisation is needed'. As per her, special judges need POCSO training also to know the roles of NGO members and the Delhi Commission for Women members in POCSO proceedings, and how can they control them or seek their assistance. She also suggested that as part of judges' POCSO training "We should have been made to sit in the sitting [POCSO] courts" for a week or ten days, to enhance judges' learning.

Another notable comment about self-training was made by a Delhi male judge, who said that he had received routine training but no specific training to deal with POCSO matters, and he had sensitised himself to work in a better manner in this Court (DPJ 1). When I asked how, he replied, by watching movies on sexual violence against children. He gave me a brief description of a Bollywood movie, titled 'That Girl in Yellow Boots',⁸³ which he had watched.

VI. ANALYSIS AND DISCUSSION

The POCSO Act and Rules mandate the central and state governments to take measures to ensure that the judicial officers receive periodic training on the matters related to its implementation. The data from the BJA's website, which was limited in comparison to those from the DJA's website available in much-detailed manner, and other training agencies, show that POCSO-related special training was imparted to judicial officers. However, the frequency of

⁸³ A 2011 Indian Hindi-language thriller film by director Anurag Kashyap, starring Kalki Koechlin and Naseeruddin Shah. It is a story of Ruth, a British woman, coming to India in search of her father who is of Indian descent. It is based on the themes of child (sexual) abuse, drug addiction, and incest.

POCSO-related training and if it was sufficient were difficult to gather, mainly in the case of Bihar.

Further, the interview data tells a different story – one that is a mixed bag and can be unevenly divided into three groups of respondents based on their responses – (1) received POCSO-related special training and satisfied, (2) received POCSO-related special training and dissatisfied, and (3) did not receive POCSO-related special training. On a positive note, around half of the total respondents, 4 out of 8 in Bihar and 4 out of 9 in Delhi, said they received special training to deal with POCSO cases, with one Delhi Judge saying that he received training even on the related aspect of child psychology. Out of these eight, six said they were satisfied with the training provided to them and were all based in Delhi. Two of these eight respondents reported of not being satisfied and were from Bihar. While one said, ‘more training is needed’, the other said, ‘training is not much important’, showing a clear rejection of the idea that formal training is required to handle POCSO matters.

On the other hand, a minority of 6 respondents across the two locations responded negatively saying they never received special POCSO-related training. The remaining three respondents, which included two Delhi POCSO special Judges, either could not or did not say anything on the POCSO-related special training. All POCSO judges, however, mentioned receiving the routinised general training upon their induction into lower judiciary as magistrates. Thus, there was a similarity in terms of percentages of respondents across the two locations who reported of receiving POCSO special training, i.e., 50% in Bihar and 44% in Delhi.

Nevertheless, this similarity was not reflected in the observational data, which revealed that in terms of the implementation of POCSO special procedures by judicial officers, particularly by POCSO judges at the trial stage, Delhi was way ahead of Bihar. The reason behind this difference was that the Delhi respondents put their special training in practice by implementing POCSO procedures in their courts and their functioning. On the other hand, the Bihar respondents, even those who reported of being specially trained, or those who at least knew the POCSO special procedures, did not do so, thus blatantly violating the POCSO Act, and thereby the rule of law.

My findings suggest that there was a clear link between training, learning, and implementation of the POCSO procedures, in Delhi, both at pre-trial and trial stages, on how to question and communicate with the child. There was proper engagement with the child by judicial officers with special training. However, such training could neither eliminate a victim-blaming attitude nor could evoke child sensitisation completely. The nature and mode of questions asked during recording of 164 statements by judicial magistrates were reported to be in line with the POCSO Act, except that there was no use of

audio-video electronic means for this purpose – a mandate of law subject to ‘wherever possible’, a phrase speaking about perhaps the *possibility* of availability of resources and/or circumstances. This issue was highlighted by one Delhi judicial magistrate (DJM 2) who proposed it should be made mandatory.

Further, my findings from Delhi also indicate that there is use of separate entrances and vehicles at the trial itself that facilitate discreet arrival and departure of child victims from court. Moreover, to create a child-friendly environment during trial, certain practices were being employed, some of which do not even find mention in the POCSO law. The trial was conducted using the live video-link. There was a practice by special Judges of giving fruit juice and chocolates to the child giving their testimony. The Judges seemed to be actively supervising the proceedings in a manner that no lawyer was able to ask any question directly to a child, thereby strictly adhering to the law. The Judges appeared well versed with age and developmentally appropriate techniques of questioning children and appreciating their statement and employed these techniques without leading it to tutoring. The Judges also used what they argued to be a child-friendly measure for young children, a technique of calling the child near themselves in Vulnerable Witness Courtroom when they found the child unable to testify via the live video-link from the Video Linkage Room. Important to note here is that the accused in the VWC was kept behind a one-way view mirror, so that even when a child testifies in the VWC, they are unable to see the accused, but then the idea of not letting children encounter a court room space fails in such a situation. Even the reported practice of making the child sit on one’s lap seems to assume of it being a child-friendly behaviour, which needs critical consideration. Moreover, there seemed to be a lack of clarity among the special judges about the precise role of support persons in POCSO trials, with some respondents finding their presence unnecessary or conflicting, particularly because of reported lack of availability of trained support persons.

The findings from Bihar, even after more than a decade of the POCSO Act, and past recommendations from researchers, remain a serious concern. While at the pre-trial stage, the nature and mode of questions asked during recording of 164 statement by judicial magistrates and facilities for children to access magistrates were in line with the POCSO Act, yet not child-friendly to the level that they were in Delhi, the trial stage had many flaws. Although the special Judges were aware of the special procedures, they were not implementing these, leading to the secondary victimisation of children at the hands of lawyers in violation of the law. Even in the districts where there was no video-link infrastructure available, the special Judges could have actively supervised the trial proceedings, preventing the lawyers from directly asking questions and that too inappropriate ones, to the child, but it seemed absent. The suggestion of recording a child’s 164 statement at the local judicial magistrate, rather than at the judicial magistrate’s court situated in district headquarters, should be

considered to prevent harassment of children and their caregivers, and ensure their safety.

It has been argued, albeit in the context of police interventions in domestic violence cases, that training, as a lever of change, is expected to be a mechanism to change stakeholder actions and responses, but thinking about training as a mechanism of change too often removes it from the culture and structures within which those stakeholders make their decisions.⁸⁴ Thus the issue of judicial officers' perceptions and experiences of POCSO-related special training in the two places and the lack of implementation of special procedures particularly in the trial stage in Bihar, can be linked to the contrasting nature of the socioeconomic, cultural, and infrastructural factors of the two locations, suggesting a situation of law-in-books versus law-in-practice, as well as to the fact that judicial officers do not operate in vacuum but along with other legal actors.

Further, the data revealed that there is an assertion on part of a few judges of the belief in their intrinsic abilities and knowledge of court procedures. This suggests that while subordinate judicial culture and personnel are changing over time, the judicial training is largely wrapped within the core culture of subordinate judiciary, i.e., lack of judicial diversity, a know-all judicial attitude, and a command ethos. The data also reveals the significance of courtroom interaction among different groups of court personnel as a learning tool for the special Judges to carry their professional task effectively. The findings highlight the responses of court personnel's self-training through a fictional movie, which, in the absence of formal institutional training and guidance to use it as an aid, could be rather fatal to their understanding of the real-life issues in POCSO cases.

Being mandated under the POCSO Act, the importance of POCSO-related personnel training has been emphasised time and again for the welfare of child victims in the criminal and judicial processes by child rights organisations and activists, researchers, and higher courts. The lack of training of judicial officers, particularly the special Judges, can adversely affect the rights of children, the accused, and the fairness of the trial. Although there appears to be improvement in the judicial officers' POCSO-related special training, much more needs to be done, particularly in Bihar. In 2021, the Patna High Court recommended special training for a special judge while setting aside

⁸⁴ Carolyn Hoyle, *Negotiating Domestic Violence: Police, Criminal Justice and Victims* (Oxford University Press 2000); Elizabeth Stanko and Katrin Hohl, 'Why Training is not Improving the Police Response to Sexual Violence Against Women: A Glimpse into the 'Black Box' of Police Training', in Emma Milne, Karen Brennan, Nigel South, and Jackie Turton (eds) *Women and the Criminal Justice System: Failing Victims and Offenders?* (Palgrave Macmillan 2018), 168-186.

his judgment awarding 10 years' rigorous imprisonment to an accused in a POCSO case.⁸⁵ It observed:

*A trial Judge especially a Judge having power to award death sentence must have correct knowledge of legal principles and zeal to its proper application while exercising the most onerous responsibility of taking decision on the life and liberty of person before him. Lack of knowledge of legal principles leads to miscarriage of justice and unnecessary harassment to the parties to the litigation. Bias and prejudices, conjectures and surmises and personal views contrary to the material on the record have no place in the court of law.*⁸⁶

VII. CONCLUSION AND THE WAY FORWARD

This article aims to kindle critical debate about the special training of judicial officers – both judicial magistrates and special Judges, who deal with the cases of sexual violence against children in India under the POCSO Act, which are very sensitive and could potentially be emotionally draining. Because of the nature of these cases, there is also a possibility of their personal biases finding their ways into their engagement with child victims and accused and decision making.

I began this article with an assessment of the status and nature of training given to these stakeholders, who are responsible for the implementation of the POCSO reforms, as shown by the available research works. The paper then embarked to find out the status of the training given to judicial officers and nature of implementation of the POCSO reforms employing a qualitative empirical approach. It outlined the methodology and challenges involved in conducting qualitative empirical research in the area of child sexual abuse in India, particularly the issue of accessing elite respondents like the (district) judiciary. The paper then analysed and discussed the data generated from the stakeholder interviews on the experiences and perceptions of their special training, their self-reported practices, the observation of POCSO courts and trials, and the implications of these findings.

The findings show improvements over the last couple of years in terms of stakeholder periodic training and implementation of POCSO reforms by judicial officers dealing with POCSO cases and their engagement with child

⁸⁵ *Deepak Mahto v State of Bihar*, (2021) 3 BLJ 328: The court further directed forwarding its judgment and the judgment of the POCSO special Judge to the director of the Bihar Judicial Academy to ensure proper academic training to the judicial officers to make them conversant with the correct legal proposition.

⁸⁶ *ibid*, 17.

victims. However, there were certain situations when the Judges have pictured children insensitively, showcasing not only patriarchal and stereotypical thoughts at work but raising questions of whether training has interrupted male state power or has it entrenched or modified it. Further, challenges and limitations highlighted by the participants in the form of socio-legal, economic, and infrastructural factors such as 'love-affairs', child marriage, and incest cases in poor families and lack of sufficient number of Vulnerable Witness Courtrooms as well as absence of video recording of child's statement by Magistrates were reported to act as barriers in effective engagement with child victims and accused and delivering justice in POCSO cases. These barriers will need to be tackled by bringing substantive and procedural changes to the present POCSO law as well as through sex education and public awareness programmes.

Recording a child's statement, particularly young ones, in the pre-trial stage, and their testimony in the trial stage poses several challenges to judicial officers – rapport building with and understanding the past and present situation of child victims and managing their own emotions and biases. They also need to coordinate with and supervise lawyers, support persons, police officers and other court staff members to ensure that the child has access to emotional support to reduce anxiety and distress, improve the accuracy of their recall of who sexually abused them and when and in what order the events took place, and most importantly, to heal. They also need to safeguard the rights of accused during the trial. A trained support person is a must in POCSO trials, particularly when the child is of tender age.

Considering, as one Delhi judge said, that both the parties in a POCSO case mostly – in 99.9 % of cases – belong to the poor strata, which means also from socially marginalised communities such as Dalits, Adivasis, and Muslims, would the training imparted to the judicial officers on POCSO matters and related aspects such as child psychology be sufficient if it is devoid of the aspects of caste, class, disability, gender, race, religion, and sexuality. As per their responses, children seemed a monolith category, raising the question if such training approach ignores a child's intersectional experiences as well as the fact that a child's identity and lived experience can affect how they engage with professionals and services at every stage of the judicial process. Might, therefore, an intersectional framework be adopted to prepare training materials, to train stakeholders, and to engage with children in an alien environment as per their differential need?

My findings suggest that individual initiatives like the one mentioned above by the Patna High Court cannot have a true systemic impact on improvement of the status of judicial officers' POCSO-related training. The efforts to impart such training must be able to acknowledge, assess and tackle the socio-legal and economic factors and the cultural practices that perpetuate inequality and endorse violence against women and children that exist in

society, along with improving state funding towards the training. Moreover, given India's predominant caste system and patriarchal structures leading to increased criminalisation of the poor and the socially marginalised, insights from the feminist and Dalit rights research on sexual violence against women and children ought to inform the content and content delivery mechanism of stakeholder training for the POCSO cases.⁸⁷ We need to think and ask questions such as how the materials and trainers are put together to deliver judicial training in POCSO matters, and what is the socio-economic and educational background of those trainers. Finally, this work demonstrates the significance of intra-country comparative empirical research, and I hope it would pave the way for more such works to enhance our understanding of the nature of implementation of the POCSO law and similar social and legal policies in India and the Global South.

I envision several avenues for continued study of the POCSO reforms, judicial and other stakeholder training, and delivery of justice to child sexual abuse victims and accused. For instance, it is possible that studying perceptions and experiences of child victims about the gender of the stakeholders would yield insights on the nature of stakeholder engagement and behaviour, which data limitations prevented me from exploring in this paper. Future research might also investigate lawyers' and police officers' perceptions and experiences of their POCSO-related training. Another aspect that could be examined is socio-economic background and intersectional experiences of child victims and accused and their implications on judicial engagement during the criminal process and decision-making. The role of emotional labour in stakeholder training and engagement with child victims, and how emotions are constituted, mobilised, and embodied by judges while recording child testimony via live link during POCSO trials could be another area worth exploring.

⁸⁷ Bincy Wilson, 'Can Legislation Alone Protect Devadasi Girls from Child Sexual Abuse and Exploitation?' (2020) 29(5) *Journal of Child Sexual Abuse*, 606-625, DOI: 10.1080/10538712.2020.1774696. Aishah Shahidah Simmons (ed), *Love with Accountability: Digging Up the Roots of Child Sexual Abuse* (AK Press 2019). Sunaina Arya and Aakash Singh Rathore (eds.), *Dalit Feminist Theory: A Reader* (Routledge 2020). Sameena Mulla, *The Violence of Care: Rape Victims, Forensic Nurses, and Sexual Assault Intervention* (New York University Press 2014). Arushi Garg, 'Conjugality and Crime: Hegemonic Constructions of Rape Laws in India' (2018) vol XX, no X, *Social & Legal Studies*, 1-18, <<https://doi.org/10.1177/0964663918808069>>. Aakash Singh Rathore and Garima Goswamy, 'Rape and Security: A Buddhist Vantage Point' in *Rethinking Indian Jurisprudence: An Introduction to the Philosophy of Law* (Routledge 2018). Srujana Bej, Nikita Sonavane, and Ameya Bokil, 'Construction(s) of Female Criminality: Gender, Caste and State Violence' (2021) 56(36) *Economic & Political Weekly*. Gaurav Bhawnani, 'The Mother's "Character" on Trial in Child Sexual Abuse Cases' (2021) *Indian Law Review*, DOI: 10.1080/24730580.2021.1952376. Alankaar Sharma, 'Disclosure of Child Sexual Abuse: Experiences of Men Survivors in India' (2022) *British Journal of Social Work*, 1-18, <https://doi.org/10.1093/bjsw/bcac073>.

UNDERSTANDING CONSTRUCTION OF TECHNOLOGIES OF (TRANS) GENDER IN INDIA SHAPED BY MECHANISMS OF SECURITY, SURVEILLANCE AND WELFARE

—Kaushal Bodwal*

Through this paper, I aim to understand how the notion of surveillance as it functions in state welfare contributes to the construction of transgender identity. By looking critically at welfare mechanisms not only as failures in proper implementation but also as inscribing technologies of security on bodies through surveillance techniques, I try to question the value of state legibility by focusing largely on its relation to the security apparatus. This security apparatus does not simply function through the law but through a host of institutions, particularly psychology and medicine, which allow the state to regulate and employ dominant understandings of gender and transgender selves in the governing processes. In doing so, I rely on transgender narratives of engagement with these fields. I reflect on how the state has dealt with the question of transgender persons more recently through an analysis of the third gender category in NALSA v Union of India, and its transposition to Transgender Persons (Protection of Rights) Act, 2019.

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I. INTRODUCTION

I am writing this paper amidst the lockdown and growing surveillance imposed in light of the COVID-19 pandemic. While it is clear that the luxury of a safe home is only available to a more privileged section of the population, for many—such as women, queer, trans and homeless people, the ostensibly ‘safe space’ of the home can be the site of violence and abuse, which has only increased during the lockdown. As I write this paper, I remember all those going through a heightened sense of precarity in this moment. While this precarity may seem exceptional, it has always existed for some people, especially trans individuals. This paper is about those trans persons who have been living precarious life; and exploring their selfhood through their stories is a small step to render them more humane.

The paper aims to understand how the notion of surveillance as it functions in the provision of state welfare constructs the transgender identity. By looking critically at welfare mechanisms not only as failures in proper implementation but also as inscribing technologies of security on bodies through surveillance techniques, I try to question the value of state legibility by focusing largely on its relation to the security apparatus. James C. Scott writes of modern states as having a detailed map of their subjects by focusing on the metric of “translating” the knowledge about subjects.¹ This is done through techniques like “[the] creation of permanent last names, the standardization of weights and measures, the establishment of cadastral surveys and population registers, the invention of freehold tenure, the standardization of language and legal discourse, the design of cities, and the organization of transportation” which are all comprehended into legibility.² State legibility is basically a simplification process for the state to know more about the subject and thereby govern not just the flesh and blood i.e. the present but also lay down foundations for governance/cultivation of future subjects. This security apparatus does not simply function through the law but through a host of institutions, particularly psychology and medicine, which allow the state to regulate and employ dominant understandings of gender and transgender bodies in the governing processes. In doing so, I rely on transgender narratives of engagement with these fields, collected through 5 extensive interviews in the months of March and April 2020.

I also reflect on how the state has dealt with the question of transgender persons through an analysis of the transposition of the third gender category from *National Legal Services Authority v Union of India*³ (‘NALSA’) to the Transgender Persons (Protection of Rights) Act, 2019. Here, it becomes clear that laws of welfare inevitably cultivate populations that fit into the state’s cri-

¹ JC Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press 1998).

² *ibid.*

³ *National Legal Services Authority v Union of India* (2014) 5 SCC 438.

terion of legibility and allows governance through the technology of security, as Foucault conceptualises it.⁴ I draw parallels with the idea of technology of gender by Teresa De Lauretes to contextualise how this happens in the case of transgender persons in India.⁵ I also point out ambiguous conceptions of ‘need’ and ‘desire’ as perceived by the state. These perceptions have translated into processes of normativity that extraneously define transgender identities. I end by questioning the assumed value of state welfare for transgender persons and suggesting pathways that will allow individuals to self-identify as they choose without having to be excluded from citizenship rights and benefits.

II. BACKGROUND

Surveillance mechanisms rely on an apparatus of security that only becomes visible during exceptional situations (for example, a pandemic, dealing with a foreign threat, etc.) However, surveillance is not simply about keeping track of populations for welfare purposes but also cultivating populations that are governable and can be regulated. Historical analysis into state relations with marginalised groups makes it clear how these technologies of security are all too common when it comes to ‘deviant’ populations, such as trans persons. These security systems are central to governance and juridico-legal systems of bifurcating the prohibited and the permitted. In the words of Foucault, “security is the way of making the old armatures of law and discipline function in addition to the specific mechanisms of security.”⁶

Two laws, across different time periods, which operate through such logic are The Criminal Tribes Act of 1871⁷ (‘CT Act’) and the contemporary Transgender (Protection of Rights) Act of 2019 (‘TG Act’). They differ in important ways in bringing individuals under surveillance, viz. in the manner in which they regulate and discipline individuals who do not align with their ideologies. While the common ways of security can be traced in both, the TG Act is a representation of modern technology of security, which is notably missing in the CT Act.⁸ However, both of these laws carry aspects of security

⁴ Michel Foucault, *Security, Territory and Population: Lectures at the College De France, 1977-1978* (St Martins Press 2009).

⁵ Teresa De Lauretes, *Technologies of Gender: Essays on Theory, Film and Fiction* (Indiana University Press 2001).

⁶ Foucault (n 4).

⁷ I compare the colonial law that governed (or legitimised) an extermination campaign to the more recent law passed by the postcolonial Indian state to show similar techniques of power that have governed the transgender people in India.

⁸ By the phrase ‘modern technology of security’ I refer to the aspects of construction of gender ‘representations’ in Teresa De Lauretis (n 5) work on “technology of gender.” She writes of gender not as a representation through the referent of an entity but as a representation of relations through certain technologies of which language has been fundamental. The issue of using the term ‘transgender’ also has a huge impact on the people who otherwise might characterise the referents of being one. Therefore, I acknowledge that the usage of the term

as their foundational objective and betray the dispensability of queer bodies in the eyes of the state.

The CT Act was a colonial legislation which deemed ‘Eunuchs’ - colonial parlance used for hijra/transgender/gender non-conforming individuals in India - as being “obscene, criminals, professional sodomites,” and suspects of “kidnapping” and “castrating” children. Through the very act of their existence, they could be arrested without warrant, charged under non-bailable offences, and imprisoned for up to 2 years. The Act required ‘Eunuchs’ to be registered and brought under the surveillance of the state while simultaneously criminalising their existence; thereby essentially expunging them from visibility and securing Victorian morality from being challenged by these ‘deviances’.⁹

The Rules for the TG Act, notified in 2020, move past security mechanisms of exclusion and elimination into turning certain populations into biopolitical projects. Such a project is in-line with how gender as a category has been governed historically by employing monolithic understandings based on biological reductionism.¹⁰ Often taken to be fundamentally related to biological sex, these understandings of gender rely on the superiority of bio-medical epistemes.¹¹ One can think of these biomedical epistemes that are instrumental in assigning gender as external and being forced onto bodies whose lived experiences defies them. Therefore, any trans subject inevitably harbours inside them the techniques of modern biomedical episteme i.e. chromosomes and hormones that had no role to play in their “being” and yet are used to define them. With the sanctity given to biomedical episteme, these modern technologies of gender not only partake, but are fundamental in the creation of gender representations. Consequently, we witness a new legal system, governed by these epistemes of

transgender in Indian context erases the peculiar histories of multiple social relations vis-à-vis these multiple gender identities. And I use the term Transgender in the way it has been used by the NALSA, a blanket term used to signify the people “whose gender identity, gender expression, or behaviour does not conform to their biological sex”. *National Legal Services Authority v Union of India* (2014) 5 SCC 438.

⁹ Jessica Hinchy, *Governing Gender and Sexuality in Colonial India: The Hijra, c.1850-1900* (Cambridge University Press 2019); Michel Foucault, *The History of Sexuality Volume I: An Introduction* (Pantheon Books 1978). Michel Foucault refers to Victorian morality which suppressed sexuality while creating more profound distinctions between evil and good. Thus, a body which engages in these deviant practices has to be criminalised in order to save the moral premise of the above distinction.

¹⁰ While factors (such as language) other than this concept of biology go into forming that monolithic understanding of gender, I prioritise this for its relation with bio-medicine and the way in which popular conceptions use it as an ultimate explanation.

¹¹ One of the major biomedical epistemes to classify gender was reproduction. Anything not able to reproduce the biological or social hitherto would be considered as a disease. Moreover, the Criminal Tribes Act while categorising “Eunuchs” as criminals were their representation of being “filthy, disease, contagion, and contamination.” Jessica Hinchy (n 9) writes that by the 1870s colonial physicians were called to “diagnose” the impotency in order to make the subject eligible for criminality.

modern medicine, through a state apparatus that tends to dictate the lives, lived experiences and futures for many trans persons in India.

To make sense of this, I use the idea of ‘technology of gender’ by De Lauretis and repurpose it as ‘technology of (trans)gender’ in the Indian context. De Lauretis defines technology of gender as “the proposal where gender as representation and as self-representation, is product of various social technologies.”¹² These various social technologies include media, literature, cinema, law, medicine, politics, religion, and social norms. Technology of gender is the process of forming gender identities through these different institutional and non-institutional modes. To put it differently, these spheres do not depict notions of gender that already ‘reside’ in individual bodies; but rather, it is they who ‘cultivate’ the gender identity. Gender, therefore, is an effect of these social technologies and does not precede it. We can understand the representation of gender in terms of its very construction such that the construction then becomes the representation. Especially in the understanding of law, this construction reaches the level of truth which stands against the narratives of its very making. In order to understand this construction of representation, the colonial instrument of Criminals Tribes Act 1871 is pertinent. As I mentioned earlier, Part II of CTA was brought in “to solve the eunuch problem.” The population of hijra was discovered and thereby brought under the classificatory regime as one of the distinctions in the list covered under CTA. This was made in order to show the said population was incommensurable to the metropolitan sexuality of British India. Hijras by virtue of their social location exposed the existence of hybridisation, of being part of the social and cultural link to nature is to be found in such hybrids. The colonial archives regarding the hijra populace have a “multivocal character” which can be noticed in the short biographical accounts of hijras in police records. They were written on account of the knowledge bureaucrats of North Western Province had of hijras but also sometimes hijras themselves. This became the source of information regarding multiple types of labour carried out by hijras in addition to performance and *badhai*¹³. What colonial legality did was to attack this multitude of hijrahood through the combination of various legal and extra-legal instruments what Hinchy calls “contextual assemblages of practices and discourses.”¹⁴ In the discovery of hijras, colonials made the social and cultural dispositions of these groups into an essentialising and stabilising way to understand their identity. This provided a new discourse of the (trans)gender through the association with prostitution, performing and collecting *badhai*. This meant understanding them as deviating from the ‘respectable’ of the social like reproduction, household formation and conjugality. In terms of causal explanation, the locus of

¹² De Lauretis (n 5).

¹³ *Badhai* is referred to as a ceremonial ritual of blessing during the auspicious inaugural occasions like childbirth and weddings.

¹⁴ Hinchy (n 9).

it was found in nature thereby providing a basis for the biological abnormal which of course was also a moral judgement.¹⁵

Modern medicine, with the legitimacy it has in our society, has the major role to play in the institutionalisation of gender.¹⁶ This is not to say that traditional kinship setups of gender do not enforce rules and regulations, but only that they have been displaced by medicine as a hegemonic force. This displacement can be seen in the representation of gender relations and identities belonging to nosologies¹⁷ preceding biomedical formations of truth regarding these representations. This happens in a way that reduces all the parallel nosological formations to the level of symbolic order. In the case of modern technology of (trans)gender, medical institutionalisation happens through technological innovation in the field of endocrinology and plastic surgery.¹⁸ Simultaneously, psychiatry also plays a key role in cultivating certain ideas about the transgender self.¹⁹ As this paper will argue, these histories of medicine and psychology are critical to understand the shape taken by policy and legal frameworks, which choose certain forms of transhood as legitimate based on medical conceptions.

While groups now classified as transgenders have had some acceptance and recognition throughout history from various systems, they have always occupied an ambiguous position in society. A formal recognition of transgender persons came as late as 2014 when the Supreme Court decided to grant them the status of 'third gender' under the 'Other Backward Classes' category. In the light of this, Tiruchi Siva, Member of Parliament introduced a private member's Bill in the Upper House namely the Rights of Transgender Persons Bill, 2014. Rajya Sabha passed the Bill later to be kept on halt by the Lok Sabha. BJP government in 2016 introduced the Transgender Persons (Protection of Rights) Bill 2016 which was considered an antithesis of the previous 2014 version of the Bill and the NALSA verdict.²⁰ It curtailed the very Right to self-identify. Amidst a lot of criticism and protests, the Bill was sent for the Standing Committee recommendations. The recommendations of the

¹⁵ *ibid.*

¹⁶ Anne Fausto-Sterling, *Myths of Gender: Biological Theories About Women and Men* (2nd edn, Basic Books 1992).

¹⁷ Nosology is the branch of medical science that deals with the classification of diseases. In this essay I use it in a sense in which most anthropologists of medicine use it to understand nosology as the entire set of beliefs, axioms and epistemes of a medico-ontological worldview.

¹⁸ Aren Aizura, *Mobile Subjects: Transnational Imaginaries of Gender Reassignment* (Duke University Press 2018).

¹⁹ Bernice Hausman, *Changing Sex: Transsexualism, Technology, and the Idea of Gender* (Duke University Press 1995).

²⁰ Vijayta Lalwani 'Explainer: Despite criticism, the Transgender Persons Bill was Just Passed. What's Next?' (*Scroll.in*, 27 November 2019) <<https://scroll.in/article/944943/explainer-despite-criticism-the-transgender-persons-bill-was-just-passed-whats-next>> accessed 31 August 2022.

Standing committee²¹ were ignored by the government and it introduced a newer version of the Bill which lapsed due to dissolution of Lok Sabha in 2018. This Bill, reintroduced in 2019, was passed by Lok Sabha amidst protests due to the revocation of the special status of the state of Jammu and Kashmir. Soon passed by Rajya Sabha, it became a law. Since then, the definitions of transgender in the legislative hall have been the point of discontent for the transgender persons (along with other discriminatory provisions of the Act).²²

Gayatri Reddy argues that that the figure hijra is not just a gendered or sexual category but is shaped by “a range of other axes” including kinship, religion, class, caste and hierarchies of respect.²³ Just to take one example, to become the member of the kinship houses of hijras one has to “put the rit”²⁴ which is a custom representing the belonging in the becoming of hijra (ibid.). The *rit* is one of the technologies used in the assigning of gender category. The category that is produced by the recent legislation is grounded in the matrix of normativity that has its causal explanations in the morphological and anatomical selves of the individual. These morphological and anatomical technologies provide for directing the terms of transgender identities and legitimisation of the trans self as ‘self-identificatory other’ in the binary order of the social. The binary gaze of the heteronormative disallows the eye to look into the varied, uneasy, non-legal, non-medical categories of desired selves.

The technology of security is a key factor in constructing a governable society. We can understand the technology of security in three aspects here: paternalism, documentation and criminalisation. State paternalism is an act of state in public policy, motivated by a claim that the target individuals would be better off/protected from harm, with such intervention. The TG Act, rightly called “Protection of Rights Act” flags to the paternalistic idea of state where the security apparatus seems to have taken a new turn of protecting the subjects and thereby controlling the proliferation of such subjects. The question then “who are these people?” is intimately connected with “what kind of people they are?”. Consequently, this idea of kind is suggestive of the “quantifying spirit” of modern identification apparatus that demands classification based on

²¹ Ministry of Social Justice and Empowerment, *The Transgender Persons (Protection of Rights) Bill* (Standing Committee on Social Justice and Empowerment 2016-2017, 2016).

The Committee recommended various changes some of which are (a) that a transgender person should have the option to choose either ‘man’, ‘woman’ or ‘transgender’ as well as have the right to choose any of the options independent of surgery/hormones. (b) that in cl 2(d) the word ‘rehabilitation’ be replaced with the word ‘housing’. (c) that there should be graded punishment for different offences and those involving physical and sexual assault must be met with higher punishment.

²² Lalwani (n 20).

²³ Gayatri Reddy, *With Respect to Sex: Negotiating Hijra Identity in South India* (University of Chicago Press 2005).

²⁴ ibid. Reddy wrote of *ritas* a symbolic kinship link to the house of hijra. It is a process that “involves a specific ritual involving the elders of the particular house, the aspiring hijra, and her guru, or immediate superior.”

specific bodily characteristics. This constitutes the second part of the security apparatus i.e. documentation. Databases created through these devices effectively arrest the beings or subject positions through a process of normation.²⁵ This allows the state to create an 'ideal subject' from the otherwise bifurcated categories of the permitted and prohibited. Such technologies include both legal and extra-legal institutional and non-institutional mechanisms. By applying Foucault's concept of power-knowledge, it becomes clear that (state) power not only employs existing knowledge in service of its goals, but also generates knowledge (of people, groups, systems) by giving it shape, primarily through law.²⁶ Such processes of power create different kinds of subjects and exist in large part 'because' of the law. For example, the provision of bringing all the individuals identifying as transgender under the category of OBC for affirmative action erases the multi-layered understandings of personhood especially in a society of caste hierarchy. Such an umbrella classification ignores the host of different subjectivities and expressions that emerge having different experiences of caste hierarchy. One of the fundamental methods the State deploys in documenting is to establish definitions so as to make sense of individuals in classificatory paradigms in the service of state legibility. Legibility here means the tendency of states to attempt to provide order to societal complexity.²⁷ What then becomes important is to make the multitudes of transgender selves readable to the language of state for the benefit of these individuals without diluting law and order. This process is then either carried by self-application, let's say for the Identity Cards; or used as a colonial tool of census collection. In another example of such practice, censuses carried out by the postcolonial states ascribed religions to indigenous people in the Indian subcontinent,²⁸ which included denying their own complex religious and spiritual beliefs and imposing a definition of faith that was not organic and inherent to them. As a result of such legal and administrative categories, the state created new subjects who were indigenous but also Hindu, or indigenous but also Christian. These processes are evident in both the CT Act and the TG Act. The former was based, under a larger colonial project to eliminate Victorian deviances, on the bifurcation of those who are allowed to be and those who are not; while the recent TG Act uses medical reports from government hospitals in creating a subject population.

The third and the most important aspect of the security apparatus is criminalisation. The TG Act engages in two kinds of criminalisation- implicit and explicit. The implicit aspect refers to the social sanctioning against modes of kinship and sociality practised by most transgender persons thereby protecting the traditional forms of family, individuals related to blood or as

²⁵ Michel Foucault, *Abnormal: Lectures at the College De France 1974-1975* (Verso 2003).

²⁶ Foucault (n 4).

²⁷ Scott (n 1).

²⁸ RB Bhagat, 'Census Enumeration, Religious Identity and Communal Polarization in India' (2013) 14(4) *Asian Ethnicity* 436.

sanctioned by law.²⁹ The explicit aspect of it is to make transgender persons available for the rehabilitation centre in the guise of protection or other similar ideologies.³⁰ Herein, the operation of a rehabilitation centre does not actually amount to the containment of such gendered violence or any form of real protection. Instead, it paves the way for new institutional forms of violence which control the body and its mobility through sanitised forms of confinement demanded by the progressive liberal ethos.

III. AGAINST THE NORMAL MEDICO-LEGAL SELF

What does it mean to not be the gender ascribed to you? What does it mean to practice a gender that is not expected of you? Gender as a category has played a substantial role in academic writing, motivated by a larger project of deconstructing the ‘normal’ of gender and sex. While the notion of human (both in terms of bodies and souls) has been theorised by philosophy for centuries, it was only through biology that a particular conception of the human self as a normal ‘reproducing’ member of the species got stabilised with the greatest legitimisation.³¹ Reproduction, consequently, became the major paradigm to conceptualise gender and sex. This made the anatomy of a human being’s reproductive system the template to define the idea of the self.³² While certain functions of the human body were held as being of paramount importance, others were obscured; as Foucault notes, the languages of all the “deviances” were restricted by the triple edict of modern puritanism viz. “taboo, nonexistence and silence.”³³ Taboo ranges from using the terminology of certain identities as a form of slurs to the ghettoisation of their households along with forced silencing through a juridico-legal apparatus, among others. The CT Act and the recently repealed Section 377 of the Indian Penal Code are examples of the latter. Although taboo has worked effectively to neutralise deviance, it was not enough to establish absolute truth and silence resistance. This, in turn, required bio-medicine to pathologise the bodies of these genders and sexual selves by making ‘normal’ and ‘pathological’ watertight categories. As the normative of reproduction sets rules for an individual to be a ‘normal’ man or woman, anything that disobeys the rule set by the said normative is rendered pathological. This has largely succeeded despite little empirical support even from the evidentiary protocols of modern medical nosology.³⁴

²⁹ The Transgender Persons (Protection of Rights) Act, 2019, s 12 (1).

³⁰ *ibid*, s 12 (3).

³¹ Maurizio Meloni, *Impressionable Biologies: From the Archaeology of Plasticity to the Sociology of Epigenetics* (Routledge 2019).

³² Georgiann Davis, *Contesting Intersex: The Dubious Diagnosis* (NYU Press 2015).

³³ Michel Foucault, *Security, Territory and Population: Lectures at the College De France, 1977-1978* (St Martins Press 2009).

³⁴ Georges Canguilhem, *On the Normal and the Pathological* (D Reidel Publishing Company 1978).

A. Am I sick, doctor?

While speaking to Rani, a trans woman in Delhi, I was reminded of anthropological debates regarding how different medical nosologies intersect and overlap, and of their social implications. Rani explained how her parents wanted to navigate her journey of transitioning via all the nosologies available to them through their belief systems, including the bio-medical. Rani was thus encouraged to consult with doctors affiliated with the Ministry of AYUSH. AYUSH in contemporary India is the ministry that stands as the bastion of alternate nosologies, albeit perhaps as a cheap bargain due to its drive for cultural and financial capital. This drive has led to the dilution of their own understanding and belief systems through integrating ideas and requirements emerging out of bio-medicine. In AYUSH, Rani was made to feel guilty for even considering transitioning, with doctors suggesting that she take some five-grain flour to ‘cure’ her sickness. Rani’s experience is not to suggest that parents of trans individuals hold stringently traditional positions justified through non-Western categories, but that there exists a wide, although mutually incommensurable, variety of nosologies that are preferred for both epistemic and pragmatic reasons. In practice, however, this apparent incommensurability has been dealt with by using modern medicine as a template for an “integrative medicine” due to its institutional legitimacy and near universal consensus around it.³⁵ Therefore, both institutional and non-institutional alternate nosologies are available, alongside modern biomedicine with its appeal, as routes to consider for many parents to deal with their children’s gender or sexual identities as possible cures.

Sujatha writes that the facets of ‘medical pluralism’ in South Asia, defined by anthropologists as the existence of multiple systems of medicine before biomedical science, exist on three levels, namely institutional, at the level of physicians, and of people. This is to say that the healing or curing involves various subject positions, in and through, a hospital,³⁶ the doctor, and the patient. Across biomedical and homeopathic nosologies, the vocabulary used in speaking about sexuality as illness reflects the social existence of illness, presented through questions like “*kya taqleef hai?*” (what is the problem?).³⁷ Doctors delve into a more holistic overlap of social factors, which may range from the patient’s diet to who they recently fought with and any familial problems; all of which could have led to the core disease to be treated. The language of self-diagnosis also includes the social in explaining the pain or the “*beemari*” (sickness). Rani’s experience suggests that her doctor’s idea of conversion therapy still predominantly relies on the traditional understandings of

³⁵ V Sujatha, ‘Beyond Medical Pluralism: Medicine, Power and Social Legitimacy in India’ in Sanjay Srivastava, Yasmeen Arif and Janaki Abraham (eds), *Critical Themes in Indian Sociology* (Sage Publications India 2019).

³⁶ *ibid.*

³⁷ Veena Das, *Affliction: Health, Disease, Poverty* (Fordham Univ Press 2015).

“*tritiya prakriti*” and “*ardhnarishwar*.”³⁸ Naraindas points out that for the middle class, the language of self-diagnosis or a medical complaint has become more allopathic over time.³⁹ This is happening in a context where the state as the legitimising force for any medical institution in the country gives primacy to modern bio-medical nosology. As a result, the social existence of medicine has continued to involve multiple languages and therefore multiple ways of curing and living with “diseases” of sexuality and gender.

On the other hand, India has also witnessed a recent form of traditionalism which is a conflict between modern medicine and its alternatives. Here, attempts are made to establish bridges between modernity and antiquity, and the putative status of modern science is employed to validate non-modern medicines.⁴⁰ One of the major attempts that emerge out of “elective affinity” between the modern biomedical and traditional forms of cure is the institutionalisation of the ministry of AYUSH. Bryan Turner’s notion of elective affinity refers to the dilution of tension between two opposing nosologies and forming of affinity at the merging point of cultural codes and medical practice. It’s the cosmopolitan form that is constituted by constant feedback loops regarding the validation of knowledge from one form of medicine to the other. All of this was also happening in the age of global capital exchange and where the export of herbs constituted the major part of state policy. Another model that emerged along with this is the pharmaceutical industry for pluralistic medicine. It’s important to note that AYUSH is “co-located with biomedicine in the National Rural Health Mission (NRHM)” which in itself represents a culture whose sense of cure is layered with the varied relations of power and culture. No matter what kind of affinity is built regarding the cure of certain diseases, the normative understanding of what constitutes a diseased state and the normal state, especially in situations of gender diagnosis, directs the practitioners in their therapeutic goals.

In the arena of gender and sexuality, this neo-traditionalism is used both in favour of and against transgender groups. Rani told me that one of the child psychologists she was visiting in Delhi often gave her examples of the mythological figure ‘Shikhandi’ from Mahabharata, and stressed the philosophy of karma with reference to the grief she was giving to her parents owing to her desire to transition. She was also encouraged to follow yoga practices and spiritual gurus who claimed to cure homosexuality and other gender/sexual “abnormalities.” It is important to note here I believe, that the Bhartiya Janata Party (BJP) government with its politico-religious ideology has played

³⁸ Gayatri Reddy, *With Respect to Sex: Negotiating Hijra Identity in South India* (University of Chicago Press 2005). ‘Tritiya Prakriti’ and ‘Ardhnarishwar’ are category of analysis among scholarship informed by Hinduism used to refer to transgender, homosexuals and intersex conditions.

³⁹ H Naraindas, ‘Of Spineless Babies and Folic Acid: Evidence and Efficacy in Biomedicine and Ayurvedic Medicine’ (2006) 62(11) *Social Science and Medicine* 2658, 2669.

⁴⁰ Sujatha (n 35).

a pivotal role in bringing the conservative approaches back in the debates of medical nosologies. This has led to a resurgence of competing claims for intellectual supremacy between science and non-science. This has resulted in the many distinct ideas competing for manoeuvring their legitimising effects in the discursive space of science and medicine. For example, one can note a certain demonisation and vilification of rationalists in the country leading to murders of persons such as Govind Pansare, M. M. Kalburgi or Gauri Lankesh. On the other hand, there is also a discursive separation of the “Western” episteme in culture, science and other settings despite the politico-economic dominance of “Western” originated nation-state and capitalism. Finally, like AYUSH ministry, there are attempts made to justify alternative nosologies through scientific template. The extent of this claim of legitimacy has reached the higher performances of biomedical sciences: the surgery. Recently, the Centre, in a Notification, allowed the post-graduate practitioners of Ayurveda to be trained for surgical procedures in the light of which a nationwide strike was observed by the Indian Medical Association.⁴¹

IV. GENDER IN MEDICAL NARRATIVES

In the colonial perspective, Hinchy describes how the *hijras* “embodied sexual disorder” in agenda of establishing patrilineal order of succession and reproductive order.⁴² For the maintenance of both, the monogamous sexual conjugality was not only necessary but also central to domestic life. Hijra sexuality was considered a threat to the establishment of this order and therefore was marked with “unnatural” notions of sexuality by ignoring a lot of sexual practices in their everyday lives, for instance, asexual asceticism. This mark of unnaturality associated keenly with prostitution and contamination of the colonial binary order rendered a particular notion of personhood to be established in understanding such lives. The East India Company’s prohibition of sodomy made unnatural sex an “unnatural crime.” This led to the criminalising of the personhood of hijras. Here, one can see that the state power held a unidirectional and asymmetrical power to define the units in the population. The medical jurisprudence manual of physician Norman Chevers describes the “lengthy account” of anatomical and morphological expressions of a hijra.⁴³ The key narratives of these physicians have commentary on body hair, age of castration, and depth of voice, wherein basically a kind of deep entanglement of “genitalia, body appearance and dress” is identified.⁴⁴ The description of these

⁴¹ ‘Govt Authorises Post-Grad Ayurveda Practitioners to be Trained to Perform Surgical Procedures’ *Indian Express* (22 November 2020) <<https://indianexpress.com/article/india/ayurveda-doctors-surgery-7061292/>> accessed 30 March 2023.

⁴² Jessica Hinchy, *Governing Gender and Sexuality in Colonial India: The Hijra, c.1850-1900* (Cambridge University Press 2019).

⁴³ Norman Chevers, *A manual of Medical Jurisprudence for India* (Thacker Spink and Co. 1870).

⁴⁴ Hinchy (n 42) 56.

bodies in the medical narratives of colonial times suggests not only distress to the order of things but strangely also an interpolation of new sexuality onto the bodies that were more than just sexed beings.

The study of narratives of medical illness reveals an interesting history of defining selfhood. It has moved from using narratological qualities to politico-economic conditions pertinent to the understanding of the development of diseases, from modern to postmodern development of illness narratives as analytical categories. A modern reading would accept the authorised medico-scientific narrative while in a post-modern reading patients reclaim power as creators and narrators of their own distinctive stories.⁴⁵ Subjectivity of this new ‘patient’ is very well summarised as “a new attention to hierarchy, violence, and subtle modes of internalized anxieties that link subjection and subjectivity”.⁴⁶ This also denotes that the national and the global politico-economic processes feed into “the most intimate forms of everyday experience”.⁴⁷ The anthropology of such narratives shows transgender selfhoods haunting colonial methods of legibility and regulation due to their defiance of the ‘normal body’ available and enforced during the colonial period. For example, the language of “dirt, contamination and contagion” strengthened the narrative of the British officials regarding hijras as “filth” or disease spreading beings across the Indian subcontinent.⁴⁸

In the cultivation of colonial subjectivity, biomedical science opened up new avenues for defining sexuality. Biology played a significant role in defining the natural human subject as a heterosexual whose gender identity is based on their physical characteristics. All other instances that did not adhere to this definition were marked as pathological, disorderly, and dangerous. This was rooted in the eugenic urges within the subfields of biology that regarded heterosexual reproductivity as axiomatic. Meloni explains that modern medicine tried to find answers to the disorders inside the body.⁴⁹ This inward-looking approach developed simultaneously with a modern genetic view of the body and the nucleotide sequence of DNA, became the truth and the defining characteristic of one’s subjectivity. These have more recently evolved into the uncertain science of DNA profiling, with severe repercussions for criminal procedures and the rights of marginalised groups.⁵⁰

⁴⁵ Veena Das, *Affliction: Health, Disease, Poverty* (Fordham University Press 2015).

⁴⁶ *ibid.*

⁴⁷ Mary-Jo DelVecchio Good and others (eds), *Postcolonial Disorders* (Berkeley: University of California Press 2008).

⁴⁸ Hinchy (n 42) 8.

⁴⁹ Maurizio Meloni, *Impressionable Biologies: From the Archaeology of Plasticity to the Sociology of Epigenetics* (Routledge 2019).

⁵⁰ Sobhana K Nair, ‘DNA Bill can be Misused for Caste-Based Profiling, Says Panel Draft Report’ *The Hindu* (New Delhi, 24 August 2020) <<https://www.thehindu.com/news/national/dna-bill-can-be-misused-for-caste-based-profiling-says-panel-draft-report/article32429334.ece>> accessed 31 August 2022.

With this, yet another subject of pathology was constructed: the intersex. Intersex has been defined as the condition where a person is born with characteristics (chromosomal-XX and XY, gonadal and genital-external and internal) that do not fit the typical alignments of male or female bodies.⁵¹ Fausto-Sterling writes that “until six weeks of development, XX and XY embryos are anatomically identical” where development of “undifferentiated gonads” takes place.⁵² While plasticity of the human genome produces a variety of phenotypes, only “proper” chromosomal, gonadal, hormonal and genital alignment qualifies as normal.⁵³ This normal heterosexual alignment considers only two kinds of bodies as normal, first the male body (with XY chromosomes, testes, primarily androgen, and penis) and the female body (with XX chromosome, ovaries, primarily estrogen and vulva and internal genitalia).

Since endocrinology lacked accurate information of hormonal production and various factors of interference in the process, it resorted to homophobic procedures to assign the “true sex”. Here homophobia through technologies of sex classification tried to contain any expression that would amount to contamination of the ‘natural’ reproduction. Traces of this process still exist in the medical and social psyche. This worked hand-in-gloves with the field of bodily aesthetics, particularly the development of plastic surgery which relied on a politics of authenticity and “passing” as other sex. The discourse of transsexualism demands the authenticity of the “other sex” in both social and biological variables, due to which the accepted category of transgender finds surgical transitioning relatively easier than a gender non-binary person seeking medical care. Rani told me about a psychologist in Delhi who collected some blood samples to verify her intersexuality before starting the therapy. Pushing the narrative of intersex bodies as “nature’s mistake” and medical surgery as a correctional method to maintain the true authority of the sacred (the heterosexual bodies, and implicitly God⁵⁴) has been the top priority of biomedical sciences. A trained sexologist told Rani that “*being gay is okay, but surgery toh kudrat k ek hi laaf hai*”(being gay is okay but medical transitioning is against nature) when no intersex traits were found on her blood samples. While this experience did not dictate her journey, another respondent, Tara, a trans woman from Gurgaon, Haryana added that in her experience, some people tended to perceive doctors with immense authority: “*doctor to bhagwan hota hai*” (a doctor is like a god), which reflects how multiple expressions of trans selves get restricted because of the authority of biomedical nosology.

⁵¹ Georgiann Davis, *Contesting Intersex: The Dubious Diagnosis* (NYU Press 2015); Morgan Holmes, ‘Re-Membering a Queer Body’ (1994) 6 *UnderCurrents* 11,13.

⁵² Anne Fausto-Sterling, *Myths of Gender: Biological Theories About Women And Men* (2nd edn, Basic Books 1992).

⁵³ Meloni (n 49).

⁵⁴ The Bible, Genesis 1:27: “So God created man in his own image, in the image of God he created him; male and female, he created them.” The above-mentioned quote from the Bible leaves no pretence that heterosexuality brings one closest to the divine.

V. TECHNOLOGY AS MOBILITY

Developments in technology have immediate repercussions for the subjectivity of transgender persons. Apart from biological and social authenticity, national and transnational travel has also become an important point of trans subjectivity.⁵⁵ Tara told me how her journey of thinking about a medical transition became a question of her living with her family. She told me, as did Rani, of talks in her family about resources required for a medical transition in Bangkok, a city claimed to have the best technology for sex reassignment surgery. But Tara decided not to undergo surgery in Thailand as not only would it have been a huge expense, but also they would have had to return home where the medical experts might lack sufficient knowledge of her medical record in case any post-surgery complications emerged. Instead, she left home for Mumbai to pursue a degree in Mass Communication, while undergoing medical transition on her own in the new city. Living in an unfamiliar city like Mumbai on her own while transitioning deteriorated her mental health. On the verge of breakdown, one morning she had to ask her family to book her a flight back home. She returned with many apprehensions about her journey to transition. Both her parents are medical professionals, which made her access to surgery in Delhi easier. These technologies are not as easily available to those without financial resources or social capital. Both international and intranational migration, in combination with transitioning technologies, have offered the possibility of social mobility to those characterised as sexual deviants in their homes. Aizura writes that “the metronormative migration plot dictates that migrating from rural spaces to urban ones, or migrating transnationally, can offer the possibility of self-fulfilment and the freedom to be who you are: by moving, trans people can find bearable and worthwhile lives in which their gender identity or sexuality (or both) is accepted, even celebrated.”⁵⁶ Vani, another transwoman, told me about the aspirations of leaving the violent household and joining a gharana of Hijras in Telangana which drew her out of her biological home into a city-based, ghettoised locality for transgenders. She had a violent and abusive elder stepbrother—the ideal male of the household, who got into the Indian Air Force and married within his caste on the will of his parents, all of which provided him more legitimacy to abuse her on the account of her femininity. Her mobility was not driven by desires to transition but rather to escape the violence at home. She started having conversations with the trans women begging at red light areas to move with them. They declined her offer initially but were open to conversations later. The matriarch used to ask her, “*kya milega tujhe ismein*”(what will you get in this?), but she insisted that she wanted to. One night when she ran away from an abusive relative’s home, she reached an infamous locality of the city where the matriarch found her unconscious in the morning. She took her in but was

⁵⁵ Aren Aizura, *Mobile Subjects: Transnational Imaginaries of Gender Reassignment* (Duke University Press 2018).

⁵⁶ *ibid.*

hesitant as Vani was still below 18 years. She arranged for Vani to appear as a “private candidate” in the senior secondary examination so she wouldn’t lose an education year. She completed 12th grade with good marks and worked in the ‘numaish’ as a sales worker selling crockery. The journey of her being a “mobile subject” included very little engagement with modern medical technology per se for reassignment but her social being as a transwoman brings out this layered picture of multiple trans selves.⁵⁷ (As for Vani, the act of moving was not to get gender reassignment surgery, but to escape the violence at her biological home, describing the immense mobility non-normative beings incorporate inside themselves which affects each and every social interaction they enter.).

To “invent oneself” one has to be bourgeoisie, wealthy, and informed by the discourse of “true transgender” from medical chambers of modern nosology.⁵⁸ Vani shared concerns about her inability to not get any surgery as she belonged to a lower-class household. Despite earning a little in real estate, she had to take a heavy loan to help her biological mother’s deteriorating health. She said that she wanted to get surgery but at her age, it would involve many complications which aggravated her worries, in addition to loan repayment.

Transgender bodies are evidently the site of biopolitics through technological tools. As the narratives brought forth by my respondents show, this search for ‘authenticity’ must be dropped in favour of recognising multiple bodies and subjectivities. This is more urgent when biomedical nosology and capitalism together produce an aspirational technological self which is amenable to governance. For example, the notion of hairless skin and choices in the kinds of the body in sex reassignment surgeries are not just an applied branch of science helping people out but rather constituting the technologies of existence in such kinds of bodies. There is an implicit understanding of what gender means even when trans-ness subverts certain underlying connotations of its experience. Therefore, the reassignment surgeries recuperate new, but similar, ways of constituting gender in the trans bodies through its medical legitimisation. Failing to achieve this body and selfhood can result in being categorised as monstrous, ugly, and lacking the supposed transgender authenticity.

VI. DETERMINING THE SELF: NALSA AND TG ACT

In the NALSA judgement, Justice K.S. Radhakrishnan mentions that the expression of the subject in Articles 15, 16, 19 and 21 in the Constitution of India is “gender neutral” and states that gender identity is the “core of one’s personal self,” which is based on self-identification and not on medical and

⁵⁷ *ibid.*

⁵⁸ Michel Foucault, *Security, Territory and Population: Lectures at the College de France, 1977-1978* (St Martins Press 2009).

surgical procedures.⁵⁹ This judgement states this position multiple times while granting the status of “third gender” to people identifying as transgender. It’s important to note here that the category of the third gender also implies the legibility informed with heterosexual normativity which even after recognition of the self-identification practice of personhood, doesn’t allow the heterogeneity to become part of transgender personhood. It also declares that central and state governments have to frame laws for safeguarding the rights of transgender persons.⁶⁰ On the basis of this declaration, the parliament passed the TG Act in 2019. The Act however, violates the judgement by making it mandatory by law to get a medical surgery in order to obtain the certificate of (bio-political) “other sex” i.e. male or female.⁶¹ It also ignores the important guidelines for medical transitioning, HIV serosurveillance centres⁶² and other mental and physiological healthcare encouraged by NALSA. Additionally, it betrays the lack of concern for accessibility to biomedical tools of transition; for example on account of factors such as caste or income levels, thus continuing the treatment of aspirations of bodily autonomy and self-identification as matters of privilege. Instead of integrating the principle of self-identification, it furthers a legal system influenced by colonial biopolitics, that homogenises trans subjectivity through a uni-dimensional criterion. In order to be identified as a “man” or “woman” one would need to undergo surgery and would need to appear before the District Magistrate, a representative of the state to get the legal status of their identity approved. This threatens to erase historical and contemporary subjectivities of trans-ness existing in the country.

The TG Act defines transgender persons as a “person whose gender does not match with the gender assigned to that person at birth and includes transman or trans-woman (whether or not such person has undergone sex reassignment surgery, hormone therapy, laser therapy, or such other therapy), person with intersex variations, genderqueer and person having such socio-cultural identities as *kinner*, *hijra*, *aravani* and *jogta*.” This is a laudable attempt at broadening the scope of the legal definition of trans personhood and covering multiple identities.

However, this is nothing but a smokescreen because while not explicitly erasing the representations of these identities, the Act does so by dismissing the social relations and expressions of these identities. It uses the language of bio-medicine to create a buffer, an acceptable population, derived from within the biomedical quadrants that range from genderqueer to intersex; bringing into existence a population that is allowed to be, pathologising all other

⁵⁹ *National Legal Services Authority* (n 3) [82].

⁶⁰ *ibid.*

⁶¹ The Transgender Persons (Protection of Rights) Act 2019, ch 3.

⁶² Serosurveillance programmes/centres are the sites where individuals are tested for HIV seropositive, AIDS and other STDs in selected populations.

identities. By virtue of laying down the instructions/rules to be a transgender person, the Act pathologises all those who do not follow these instruction/rules.

In this project of construction of a population, transgender persons occupy a key position, not just because the law has been named after them, but also because the medicalised ‘technologies’⁶³ within them do not conform to the normative representations⁶⁴ recognised by the law. Psychological and medical transitioning is one among many technologies of gender leveraged by trans persons to express their identities. It is not necessary for transhood to be expressed through this technology of transition. There exists an ambiguity between what is desired and what is demanded. As is evident through the CT Act and the TG Act, when the state frames a welfare policy it deploys security mechanisms that use one of these technologies of gender, treating it as an ‘imperative trait’ of defining that population. In doing so, it restricts the materialisation of other technologies of gender which de facto become a threat to the classificatory process. Despite having a broader definition of transgender, Section 5 of Chapter 3 of the TG Act stipulates that a person can make an application to the District Magistrate seeking a certificate of identity as transgender with “prescribed” documents which includes among other things, a “report of psychologist of a hospital of appropriate government.” This suggests that technology in the form of a medical report has been given primacy over all other technologies of trans-personhood. This is what leads to the creation of a transgender population through selected technologies, ignoring the blurred status of demands and desires.

VII. CONCLUSION

Hari, a trans man, told me about an incident where a person decided to come out as a trans man after giving birth, and went through medical transitioning through Hormone Replacement Therapy (HRT) and top surgery. Will the law and bureaucratic process recognise him as a man, and permit necessary changes in legal documentation to enable such recognition? If legal recognition is possible, will the trans man’s marriage stand null and void? Will the trans man continue to receive maternity benefits, if he was doing so earlier? If the couple decides to get a divorce, who will have legal custody of the child? As it stands, the TG Act and related legislation cannot comprehend such expressions of transhood and remains silent on their access to civil rights.

⁶³ Here I refer to the representations of the technology within a human biological body namely genetic, hormonal, and gonadal representations.

⁶⁴ I make this distinction here to refer to the category of transgender persons having both the referents of their identity in two of the important spheres of life the social and the biological. While non-binary persons and intersex carries a loaded referents of the social and the biological respectively, this not to say that either of the representations of such categories do not overlap.

NALSA recognises the need to treat the transgender person under detention “with humanity,” acknowledging rampant atrocities and rights violations. It goes on to say that any detainee should be provided

*adequate access to medical care and counselling appropriate to the needs of those in custody, recognising any particular needs of persons on the basis of their sexual orientation or gender identity, including with regard to reproductive health, access to HIV/AIDS information and therapy and access to hormonal or other therapy as well as to gender-reassignment treatments where desired.*⁶⁵

All my interviewees emphasised the need to sensitise medical professionals, particularly in the fields of endocrinology, gynaecology, plastic surgery and psychology. Such sensitisation must cover the legal rights of the subject, humane treatment, and critically, the social needs of transgender persons. This process of sensitisation can begin with the dissemination of the NALSA judgement, workshops with medical professionals, and provision of no-cost HRT, sexual and reproductive health facilities, and sex reassignment therapies for anyone with the desire to transition.

Reproductive health services must be extended to include biological processes beyond the heterosexual binary. Hari reminds me that many trans men menstruate, even after surgery and HRT. Similarly, pregnancy, abortions and adoptions also exist beyond the binary. The state must adopt empowering solutions to concerns raised by transgender communities, such as instituting a family sensitisation board to address the issue of violent homes, rather than admitting survivors to rehab centres as currently stipulated in the TG Act. Legality of the TG Act stands challenged in the court of law, but for further policy welfare,⁶⁶ the state must consult representatives from trans collectives to account for their criticisms, concerns, needs and desires.

With the parallels between technologies of gender and security, the distinction of desired and needed has to be channelised in policy making. As there is no consensus on medical transition within the community as desired or needed, any public policy has to treat this as a choice to be exercised by individuals. Most critically, access to welfare programmes, public services, civil rights, and indeed legibility to the state cannot be contingent on such technologies.

⁶⁵ National Legal Services Authority (n 3) [25].

⁶⁶ There have been two petitions challenging the constitutionality of the TG Act one filed by Swati Bidhan Baruah, a transgender advocate and the other by transgender activists such as Grace Banu and Vyjayanti Vasanti Mogli.

Transgender personhood is always in making and becoming, defying strict categorisations due to the lived reality of trans-ness. Therefore, to have these fixed subjectivities of (trans) gender in defining this population would do nothing but harm to these evolving categories.

In the last 3 years of my engagement with queer theory and trans studies as a genderqueer/non-binary activist, particularly with regards to the TG Act in India, an evolving language of understanding trans subjectivity has been provided by transgender communities. This paper is an effort to capture and expand that understanding. It is evident that legibility to the state brings advantages such as rights and protections, public services, and other benefits. As it stands, the TG Act demands a trade-off between self-identification and access to such protections. Instead, policy frameworks should encourage an ecosystem that allows transgender people to adopt fluid and multiple identities while also granting full citizenship and associated civil rights.

Note: All the names are changed to maintain the anonymity of respondents.