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EDITORIAL

"In a world that is naturally geared towards acquiring certainties, it is by no means obvious that doubt is the inevitable companion of the researcher, whatever his or her discipline. All the more so in a discipline like law in which the notion of authority is so powerful and ingrained in our mind."

- Andrea Bianchi, An Inquiry into Different Ways of Thinking

A foundational principle of any functional legal system is the presumption of a single, objective reality. Judges, in part, are tasked with authoritatively discerning this reality from competing interpretations. However, law has multiple audiences that it speaks to, and this adopted reality is constrained by the questions we choose to ask or avoid and the boundaries we draw in framing those questions. As Bachelard reminds us, the knowledge we construct is shaped by "*epistemological obstacles*"—changes, or rather realities, we are unwilling to accept or even see. In this ecosystem, scholars play their role by asking new questions and illuminating new ways of seeing, enabling us to construct richer, more inclusive realities of what is possible in law and beyond. This is the purpose that this Journal, like many others, aspires to serve.

The articles in this edition remind us that asking better questions can lead to better answers. From the long-standing conflict in Nagorno-Karabakh to the need for insolvency laws for municipalities, they tackle pressing issues with fresh perspectives. Whether it's rethinking gig workers' safety, secular realities, judicial performance or balancing rights like free speech and privacy, each piece challenges us to see the law not just as it is but as it could be.

This ethos of curiosity and openness has guided the work of this Board. Over the past months, we have reflected deeply on what it means to be an editor and how to engage with submissions in thoughtful and meaningful ways that genuinely add value. Moving away from a test-based evaluation system, we adopted a continuous evaluation process for the promotion test, introduced more flexibility in subject area choices for reviewers, and set new ambitious targets that the Journal can strive towards.

With that, we proudly present the first issue of the nineteenth volume of this Journal. I express my heartfelt gratitude to our authors, whose thoughtful contributions form the heart of this edition; to the editors, whose inspiring dedication and sincerity have guided every step and detail of this process; to Hari Sir for his unwavering support; to Anil Sir for his invaluable guidance; and to our faculty advisors, whose thoughtful suggestions have greatly enriched the editorial process.

On behalf of the Board of Editors,
Fathima Rena Abdulla,
Editor-in-Chief
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The Tragedy of Nagorno-Karabakh - Key Takeaways on Why International Mediation Failed to Achieve Lasting Peace for Over 30 Years

Tero Lundstedt, LL.D.*

Abstract

The Azerbaijan offensive in September 2023, in just a few days, took over the remaining Nagorno-Karabakh region that had been held by the Armenian separatists and Armenian military forces since the late 1980s. An ethnic cleansing campaign ensued, after which more than 90% of the Armenian population fled the province. While the case seems closed with Azerbaijan's victory, this is not a stable peace. Indeed, there are justifiable fears that triumphant Azerbaijan may be looking into attacking the province of Syunik in Armenia proper. This article analyses why international mediation of the conflict failed so spectacularly for over 30 years and offers a new framework to mediate territorial conflicts in the post-Soviet space.

I. Introduction: Nagorno-Karabakh and International Law

The conflict over the control of a small Armenian enclave within the borders of Azerbaijan has been going on for more than 30 years. The roots of the dispute come from the Soviet era, when an Armenian minority within the Soviet Republic of Azerbaijan was given significant territorial autonomy with newly-drawn internal borders under the name of Nagorno-Karabakh Autonomous Oblast. The fragile coexistence between Azeris and the Armenian minority worked more-or-less during the Soviet times due to the mediating federal centre and the internal censorship in a dictatorial State that kept any discontent under the radar.

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Mihail Gorbatchev's *perestroika* and *glasnost* policies opened a can of worms in the Soviet national structure – including igniting the Nagorno-Karabakh ("NK") conflict. During the last years of the Union of Soviet Socialist Republics ("USSR"), the Karabakh authorities tried to bypass Azerbaijan and petition directly to the Soviet authorities to cede the territory of NK from Azerbaijan to Armenia. This was rejected by the USSR, after which NK unilaterally proclaimed independence, and the First Karabakh War (1988-1994) ensued.

The international mediation of the conflict began on 24 March 1992, when the Organization for Security and Co-operation in Europe ("OSCE") established a Minsk Group to encourage a peaceful, negotiated resolution to the conflict over NK. On 30 April 1993, the United Nations ("UN") Security Council confirmed the task of international mediation belonging to the Minsk Group.[1] The Group´s Co-Chairs were Russia, France, and the United States, and permanent members were Armenia, Azerbaijan, Belarus, Germany, Italy, Sweden, Finland, and Turkey.

Until September 2023, the battle over this self-proclaimed State called Nagorno-Karabakh between Azerbaijan on one side and Armenian separatists backed by Armenia on the other side had lasted for over 35 years, mostly under a fragile ceasefire. It seemed like just one of the post-Soviet "*forever conflicts*" alongside Abkhazia and South Ossetia (Georgia), and Transnistria (Moldova) – all of which have been disputed since the dissolution of the USSR in the early 1990s.

The stalemate changed with the successful Azerbaijani offensive and the

[1] United Nations Security Council, *Resolution 822*, S/RES/822 (Apr. 30, 1993).

subsequent fleeing of the Armenian population. However, while this last stage of the conflict was relatively low in violence, this is not how territorial disputes should be settled under international law. This begs the question: why did international mediation fail to achieve lasting peace for such a long time, and why was the international community unable to stop the violence in three separate wars over NK (1988-1994, 2020, and 2023)?

To answer these questions and to make sense of the case of Nagorno-Karabakh, this article begins by going through the main applicable legal rules over territory. The article aims to explain that although the international mediation failed to bridge the gap between the right to self-determination and territorial integrity, it would have been possible in the case of NK.

Following, Section II examines the Soviet federal model and its continuing effect on the conflict, which was consistently insufficient with the international mediation efforts. The focus is especially on the extent and key limits of NK's autonomy during the Soviet times.

Section III summarises the key events and international mediation efforts in NK during the 31-year timespan. It specifies the pitfalls in each package proposal in the late 1990s that made them unacceptable to all three parties of the conflict.

Finally, Section IV lists the key takeaways from the failure of international mediation and the deficiencies of the peace proposals. It suggests a way forward for the remaining post-Soviet conflicts under international mediation.

A. The Right to Self-Determination, Territorial Integrity, and *Uti Possidetis Juris*

International legal rules have been developed over a long period of time via codification and State practice. The three most commonly used legal rules in

relation to territorial disputes are the right to self-determination, territorial integrity of states, and *uti possidetis*. The right to self-determination guarantees a legal right of people to decide their own destiny in the international order, while the right to territorial integrity guarantees states the inviolability of their borders.

Uti possidetis provides that newly formed sovereign states should retain the internal borders their preceding dependent area had before their independence.[2] In effect, it transforms former internal administrative borders into international borders at the moment of independence, with all the legal ramifications this status change entails. However, *uti possidetis* does not create independent states or justify secession by itself. In essence, the conceptual logic of *uti possidetis* is that a change of sovereignty should not change the status of a boundary.[3] The International Court of Justice ("ICJ") has defined the content of *uti possidetis* as follows:

> "By becoming independent, a new State acquires sovereignty with the territorial base and boundaries left to it by the colonial power. International law - and consequently the principle of *uti possidetis* - applies to the new State (as a

[2] For articles and other scholarly publications of the *uti possidetis* doctrine, in general or in a decolonisation context, *see, inter alia*, J. Crawford, *State Practice and International Law in Relation to Secession* 69(1) BR. YEAR. INT. LAW 85, 85-117 (1998); R. McCorquodale and R. Pangalangan, *Pushing Back the Limitations of Territorial Boundaries* 12(5) EUR. J. INT. LAW 867, 867-888 (2001); E. Hasani, *Uti Possidetis Juris: From Rome to Kosovo*, 27(2) FLETCHER FORUM WORLD AFF. 85, 85-94 (2003); P. Hensel, M. Allison and A. Khanani, *Territorial Integrity Treaties, Uti Possidetis, and Armed Conflict Over Territory*, BUILDING SYNERGIES: INSTITUTIONS AND COOPERATION IN WORLD POLITICS 1-41 (2006); F. Jankov and V. Coric, *The Legality of* Uti Possidetis in the *Definition of Kosovo's Legal Status*, 2 EUROPEAN SOCIETY OF INTERNATIONAL LAW (2007); and P. Muwanguzi, *Reconciling Uti Possidetis and Self Determination: The Concept of Interstate Boundary Disputes*, SOCIAL SCIENCE RESEARCH NETWORK (2007).

[3] R. McCorquodale and R. Pangalangan, *Pushing Back the Limitations of Territorial Boundaries* 12(5) EUR. J. INT. LAW 867, 867-888 (2001).

> State) not with retroactive effect, but immediately and from that moment onwards. It applies to the State as it is, i.e., to the "photograph" of the territorial situation then existing. The principle of *uti possidetis* freezes the territorial title."[4]

While this sounds simple enough, the problem is that internal and external borders serve very different purposes under international law. Internal borders can have more administrative functions and be easily modified - compared to external borders, which are hard to change and rarely changed. Usually, states do not expect their internal borders to become external ones.[5] For example, the internal borders of the Yugoslav Republic of Serbia became a serious problem with the dissolution of Yugoslavia in the early 1990s, as the Serbs were, in reality, scattered all over the federal State and not just in 'their' designated home Republic of Serbia.

If states did expect their internal borders to become external someday, they would probably look very different in many places. For example, this point has been raised in relation to the internal borders of Quebec in Canada.[6]

The main rationale behind all these rules is to pre-empt or mediate armed conflicts over territory while simultaneously guaranteeing the right to self-determination for all peoples. This is a tall order, and the track record for

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[4] Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J Rep. 554, ¶ 30 (Dec. 22, 1986).
[5] M. Shaw, *Peoples, Territorialism and Boundaries*, 8(3) EUR. J. INT. LAW 478, 478–507 (1997).
[6] For example, there has been a lot of academic discussion on the borders of Quebec if it would secede from Canada. *See*, for example, P, Radan, *"You Can't Always Get What You Want": The Territorial Scope of an Independent Quebec* 41.4 OSGOODE HALL LAW J. 629, 629-663 (2003).

international law preventing and mediating territorial conflicts is far from perfect.

The recurring problem is that the right to self-determination often contradicts the right to territorial integrity - while all peoples have a right to self-determination, an external form of it (i.e., secession) is usually prohibited due to the host State's right to territorial integrity. Thus, in most but not all cases, and all else being equal, territorial integrity takes legal priority over self-determination.[7]

However, the framework changes with the dissolution of a State. In these cases, the decisive legal fact is that there is no longer a host State whose territorial integrity is to be protected. What follows is that the right to self-determination becomes the primary rule, and *uti possidetis* is used to determine the boundaries of the emerging State. This is highly relevant in the context of NK, which inherited its internal autonomous borders from the dissolved USSR federation in the 1990s.

In the absence of an agreement between the parties, *uti possidetis* acts as the final compromise rule to delineate State borders in the cases of secession or State dissolution. In other words, the main tenet of *uti possidetis* is that the emerging State must accept the pre-existing boundaries. Without this, the peaceful nature of the rule would be lost.

Uti possidetis has been successful as it has been used to determine the borders

[7] Confirmed for example by the United Nations General Assembly, *Resolution 2625*, GA/RES/2625 (Oct. 24, 1970) and United Nations General Assembly, *Resolution 61/295*, GA/RES/21/295 (Jun. 13, 2007). In addition, a review of the thirty major secessionist movements of the post-war era reveals no formal support in the United Nations for those groups' demand for independent statehood. T. GURR, MINORITIES AT RISK: A GLOBAL VIEW OF ETHNOPOLITICAL CONFLICTS 294-298 (1993).

of emerging states for the last 200 years, including most of the current UN Member States.[8] Given this crucial role in shaping the political map of the contemporary world, many scholars have referred to *uti possidetis* as a legal doctrine.[9]

Despite its shortcomings, *uti possidetis* has been systematically applied and endorsed by the ICJ and other legal institutions.[10] This is due to the fact that there is rarely an agreement between invested parties over the boundaries, and *uti possidetis* is thus the only compromise available.

Since the end of the Cold War, its target group has expanded significantly. Therefore, *uti possidetis* is solidifying its status as a general principle of international law and the go-to rule of State dissolution.[11]

However, no international legal rule works in a legal vacuum, and thus, *uti possidetis* must be re-adjusted to the paradigms of international law. There are three separate main cycles of the doctrine's application and evolution: the

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[8] For example, when in 1957 the United Kingdom accepted the independence of its colony, British Ghana, *uti possidetis* then legally established within which borders a new State would be constituted.

[9] For example, *see* F. Woolridge, *Uti Possidetis Doctrine*, in ENCYCLOPEDIA OF DISPUTES INSTALLMENT 10, 519-521 (1987); S. Ratner, *Drawing a Better Line: Uti Possidetis* and the *Borders of New States*, 90(4) AM. J. INT. LAW 590, 590–624 (1996); and M. Shaw, *The Heritage of States: The Principle of Uti Possidetis Juris Today*, 67(1) BR. YEARB. INT. LAW 75, 75-154 (1997).

[10] For official or otherwise authoritative statements of *uti possidetis* being a generally applicable principle, *see* for example the ICJ's Frontier Dispute, *supra* note 4, ¶ 20; Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua Intervening), Judgement, 1992 I.C.J Rep. 351, ¶ 386L (Sep. 11, 1992); Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment, 2001 I.C.J Rep. 40, ¶ 10, 148 (Mar. 16, 2001); The Indo-Pakistan Western Boundary (Rann of Kutch) between Indian and Pakistan, 27 Reports of International Arbitral Awards, 1-576 at 527 (Feb. 19, 1968); and Arbitration Committee on Yugoslavia, *Opinion No. 3*, ¶ 2 (Jan. 11, 1992).

[11] *Id.*

Decolonisation of Latin America (1808-1836), the Decolonisation of Africa (1960s), and the Socialist Federal Dissolutions (1990s).[12]

For the contemporary content of *uti possidetis*, the last cycle is the most relevant. The early 1990s dissolutions of the two great socialist federations were a test of how the rule could be used to peacefully delineate contested borders. The results varied greatly, as in some places, the delineation of borders was organised and peaceful (e.g., between Russia and Belarus), whereas in others it caused violence (e.g., Serbia, Croatia and Bosnia-Herzegovina, Armenia and Azerbaijan).

B. *Uti Possidetis* and the Socialist Federal Dissolutions

When the Socialist Federal Republic of Yugoslavia ("SFRY") started to collapse internally in the summer of 1991, the European Community ("EC") established an ad-hoc legal body to determine the international legal rules concerning State dissolution and recognition.

An Arbitration Commission of the Peace Conference on Yugoslavia ("the Badinter Commission")[13] was established by the initiative of the EC Council of Ministers on 27 August 1991.

In the series of 15 opinions, the Badinter Commission gave its interpretation on the applicability of *uti possidetis* and the legality of the recognition of the Republics of dissolving SFRY. The main legal issue was the clash between

[12] T. Lundstedt, *From Kosovo to Crimea – The Legal Legacies of the Socialist Federal Dissolutions* (Aug. 1, 2020) (Dissertation, University of Helsinki), https://helda.helsinki.fi/items/27baba86-ed7e-4a3e-9f10-2adc27194e63.

[13] The five-member Commission consisted of Presidents of the Constitutional Courts from Germany, Italy, Spain, Belgium, France, which chaired the Commission. P. Radan, *Post-Secession International Borders: A Critical Analysis of the Badinter Arbitration Commission*, 24(1) MELB. UNIV. LAW REV. 50, 50-76 (2000).

the right to self-determination (of the SFRY Republics) and the right to territorial integrity (of the SFRY).

The more recent precedent for *uti possidetis* is from the 1960s African Decolonization,[14] where the European colonies were granted a right to self-determination within the colonial administrative boundaries drawn up by the former colonisers. However, the key difference between the two cases was that territorial integrity did not protect the colonial possessions of the European states due to the illegitimacy of colonialism. In contrast, during the early 1990s, the principle of *uti possidetis* was applied to protect the territorial integrity of the constituent republics of the SFRY as they moved towards independence.

At first glance, the territorial integrity of SFRY should have overruled the right to self-determination of its constituent republics. However, the Badinter Commission's legal interpretation of the situation was that *uti possidetis* was applicable based on the *Frontier Dispute* case. In this case, the ICJ delineated that the doctrine is a "*principle of general scope, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs*."[15] The Commission ruled that the SFRY was "*in the process of dissolution*," which made it lose its right to territorial integrity. With competing legal rules

[14] The latest were the decolonisation of Portugal's five colonies in 1975, and the dissolution of the final colony of South Africa, Namibia, in 1990.

[15] *Uti possidetis*, though initially applied in settling decolonisation issues in America and Africa, is today recognized as a general principle, as stated by the International Court of Justice in the case between Burkina Faso and Mali, *supra* note 4. Nevertheless, the principle is not a special rule which pertains to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles; Arbitration Committee on Yugoslavia, *Opinion No. 3*, 31 ILM 1500 (Jan. 11, 1992).

thus gone, the ruling enabled the utilisation of the right to self-determination in the SFRY Republics.[16]

In addition to recognizing the right to independence for the SFRY Republics, the Badinter Commission also gave an important clarification to this rule concerning the borders, the emerging units, as well as the rights of the minorities within the areas of the emerging states:

> "Whatever the circumstances, the right to self-determination must not involve changes to existing frontiers at the time of independence (uti possidetis juris) except where the states concerned agree otherwise."[17]

Further, as noted by the Commission, the peremptory norms of international law require the states to "*ensure respect for the rights of the minorities*."[18]

Following, *uti possidetis* was then used to draw the borders of the emerging self-determination units.

There was another fire to put out in the East, as the USSR was simultaneously collapsing towards the end of 1991. It was a very comparable case, as the SFRY federal structure had been copied from the Soviet model. In the USSR, the constituent republics seeking independence were called "*Soviet Socialist Republics*." In addition, there were units with lower-level autonomy, such as the "*Autonomous Soviet Socialist Republics*" (such as Abkhazia and Crimea) and "*Autonomous Oblasts*" (such as Nagorno-Karabakh). Following the

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[16] Arbitration Committee on Yugoslavia, *Opinion No. 1*, 31 ILM 1494, 1495-1496 (Nov. 29, 1991).
[17] Arbitration Committee on Yugoslavia, *Opinion No. 2*, 31 ILM. 1488, Art. 1, (Jan. 11, 1992).
[18] *Id.* art. 2.

example and logic of the Badinter Commission's ruling on the SFRY, the EC drafted guidelines for State recognition, which were published under the name of Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union[19] on 16 December 1991.[20]

According to the criteria set out in the Guidelines, the recognition of all the other Soviet Socialist Republics ("SSRs") other than Russia[21] was contingent upon them respecting the rule of law, democracy, and human rights as stipulated in the UN Charter and the Conference on Security and Cooperation in Europe ("CSCE") framework; guaranteeing the rights of national groups and minorities under the CSCE commitments; reaffirming the inviolability of *uti possidetis* borders apart from common agreement; and committing to arbitrate any regional or State succession disputes and to adhere to the Nuclear Non-Proliferation Treaty.

The combination of the EC's recognition policy, the capability of the SSRs to agree on State succession questions, and the utilisation of *uti possidetis* managed to make the breakup of the USSR rather peaceful in terms of the 15 SSRs. Less known is the fact that when combined with the unique circumstances of USSR federalism, the application of *uti possidetis* caused a distortion of self-determination that ignited endemic territorial conflicts on the lower-level units all over the former SSRs – in Azerbaijan, Georgia, Moldova, Russia, Tajikistan, Ukraine, and Uzbekistan.

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[19] European Community, *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, 31 ILM. 1486 (Dec. 16, 1991).
[20] European Community, *Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, 31 I.L.M. 1485 (Dec. 31, 1991).
[21] As all the other SSRs supported Russian legal continuation of the USSR legal personality, the Russian President simply sent a letter to the UN asking for the name of the USSR to be changed to the Russian Federation. *Letter of the President of the Russian Federation to the UN Secretary-General*, ILM 31, 138 (1992).

The issue was that the *uti possidetis* borders were only recognised partially. For example, when Azerbaijan declared independence in January 1992, it was recognized as an independent State within the former administrative borders of the SSR of Azerbaijan. This was undisputed, as there was no longer the USSR whose territorial integrity was to be protected. The autonomous province of NK did not have the same right to independence as there was now a State of Azerbaijan (within which NK was located) that had an international legal right to territorial integrity.

Nevertheless, as demonstrated in the next Section, this is not the entire case due to two factors: the Soviet federal model called "*ethnofederalism*"[22] and the right to internal self-determination. When these factors are combined with the EC recognition criteria of inviolability of *uti possidetis* borders apart from common agreement and commitment to arbitrate any regional or State succession disputes, a framework emerges with which the Nagorno-Karabakh question could and should have been solved.

II. Background: Soviet Caucasus as a Sociological Testing Ground

The war over Nagorno-Karabakh is deeply rooted in the federal history of the USSR. Therefore, to understand the present conflict, we must take a look at the origins of this peculiar statelet.

A. The Soviet Ethnofederal Model

The question of nationality was a key issue for the USSR since its very creation in the early 1920s. Having overthrown the Czar's imperial rule, the

[22] See, *inter alia*, L. Anderson, *Ethnofederalism: The Worst Form of Institutional Arrangement?*, 39(1) INT. SECUR. 165, 165-204 (2014); C. ZÜRCHER, THE POST-SOVIET WARS 23-32 (2007); and M. Beissinger, *Nationalism and the Collapse of Soviet Communism* 18(3) CONTEMP. EUR. HIST. 331, 331-347 (2009).

first communist State in the world was supposed to free the multinational peoples of the Russian Empire from any kind of oppression, including that of national minorities. Simultaneously, the USSR's goal was to spread communism everywhere. So, fearing counter-revolutionary national movements, it did not dare to grant independence to its subject peoples.

During the Russian Civil War (1917-1922), the Bolsheviks proclaimed the equality and sovereignty of all the people in Russia. Groundbreakingly, this included the right to self-determination and free development of national minorities and ethnic groups.[23] Following, in 1922 supposedly voluntary[24] Union Treaty[25] was signed between the four original constituent national units of the USSR – Russia, Belarus, Ukraine and the Transcaucasian Socialist Federative Soviet Republic (consisting of today's Armenia, Azerbaijan and Georgia). The Treaty proclaimed the USSR as a federal State of sovereign nations. Throughout history, the Treaty acted as a constituent basic norm,[26] providing legitimacy to the USSR and the ruling Communist Party.

In January 1924, the first communist State in the world again made history when its Constitution proclaimed the right to self-determination, including the

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[23] Council of People's Commissars of the Russian Socialist Federative Soviet Republic, *Declaration of the Rights of the Peoples of Russia* (Nov. 15, 1917).

[24] The voluntariness aspect was essential: under Marxist-Leninist ideological variant, any coerced domination of distant peoples by Moscow would have been otherwise unjustifiable.

[25] First Congress of the Soviets of the Union of Soviet Socialist Republics, *Treaty on the Creation of the Union of Soviet Socialist Republics* (Договор об образовании СССР) (Dec. 30, 1922). Treaty legalised the voluntary union of the original four constituent components of the Federation: Russian Soviet Federative Socialist Republic, Ukrainian Soviet Socialist Republic, Byelorussian Soviet Socialist Republic, and Transcaucasian Soviet Federative Socialist Republic.

[26] The concept of basic norm is based on a need to find a point of origin of all law, from which any laws and the Constitution gain their legitimacy More in-depth take on the basic norm concept can be found on with the *Grundnorm* analysis in H. KELSEN, GENERAL THEORY OF LAW AND STATE (1949).

right to secession for its federal subjects.[27] The 1936 amended Soviet Constitution[28] designed a unique federal structure known as "*ethnofederalism*."[29] The system acknowledged the territorial distribution of different ethnicities but ranked them in a hierarchical order based on their development level toward socialism. The four-tier ranking system gave more autonomy to higher-level units, and the two highest-ranking ones were even considered sovereign under the Soviet constitutional order.[30]

The highest level consisted of the allegedly independent nations of SSRs, such as Ukraine and Belarus. The SSRs were constitutionally considered sovereign and provided with the right to secession.[31]

The second level consisted of sub-State entities called the Autonomous Soviet Socialist Republics ("ASSRs"), located within the borders of the SSRs. These included Chechnya (in the SSR of Russia), Adjaria (in the SSR of Georgia) and Nakhchivan (in the SSR of Azerbaijan). While they lacked the constitutional right to secede, the ASSRs had a relatively strong autonomy and attributes usually attached to sovereignty.

The first Constitution (1924-1936) only acknowledged these two highest levels, but the 1936 Constitution created two more.

The third-level units were awarded the status of Autonomous Oblasts ("Aos"), which entailed a more limited autonomy within the host SSR. These included

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[27] CONSTITUTION OF THE UNION OF SOVIET SOCIALIST REPUBLICS, art. 4. In April 1925, the Constitution was amended to include two new federal subjects, the Socialist Republic of Turkmenia and the Uzbek Socialist Republic.
[28] *Id.*
[29] *supra* note 22.
[30] Lundstedt, *supra* note 12, 81.
[31] While the secession right was guaranteed in every Constitution, it was meant to be read through the ideological lenses of the government. According to the official ideology, the nations had achieved a higher form of self-determination under socialism.

NK (in the SSR of Azerbaijan), North Ossetia (in the SSR of Russia) and South Ossetia (in the SSR of Georgia). The last level units were called Autonomous Okrugs, with only minor cultural rights.

In addition, the Soviet leaders complemented the ranking system with even more sociological experimentation of nation-building. This included redrawing of borders, creating new ASSRs and AOs even in places where there had never been states, and forcibly relocating entire peoples. This divide-and-rule method was especially utilised by the second ruler of the USSR, Joseph Stalin – ironically, a native of the Georgian minority himself.[32] He was especially keen on redrawing the map of the Soviet Caucasus.

Soviet ethnofederalism seemed to provide a working model for other multinational states, such as Yugoslavia - and even democratic states, such as India. Indeed, the first prime minister of India, Jawaharlal Nehru, studied the Soviet model when designing the Indian federal system, and Moscow closely followed the Indian answer to its "*national question*."[33]

However, several key differences led to India not copying the Soviet model in the end. Since its independence, India has been operating under a liberal-democratic system. Hindi was not as dominant as Russian in the USSR system, and the independent Indian State has always had strong regional languages.

As a more decentralised and democratic federation, India has enjoyed relative peace throughout its independence. In contrast, when allowing any democratic

[32] Interestingly, different Soviet leaders seemed to have pet-projects in the areas where they were from. For example, Georgian Stalin took a great interest in redrawing the map in Caucasus, whereas his successor Khrushchev – born in a Russian village bordering Ukraine - was more concerned about the borders between Russia and Ukraine.

[33] A. Graziosi, *India and the Soviet Model: The Linguistic State Reorganization and the Problem of Hindi*, 35(1-4) HARV. UKR. STUD. 443, 443-472 (2017-2018).

competition and displaying national sentiments, both the USSR and the SFRY collapsed in dissolution.

All the accounted history possesses relevance today, as it contains the first part of the answer as to why international law and international mediation have failed regarding the conflicts in the post-Soviet space. The other part of this answer comes from the dichotomic either-or reading of the right to self-determination.

B. The Right to Internal Self-Determination of Nagorno-Karabakh

Since the second cycle of the utilisation of *uti possidetis* in the case of decolonisation of Africa and Asia (mainly in the 1960s), the right to self-determination has developed considerably.

In 1966, the UN General Assembly passed the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, which both contained identical Article 1(1):

> "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."[34]

[34] International Convention on Civil and Political Rights, 999 UNTS 171 (Adopted on Dec. 16, 1966) and International Covenant on Economic, Social and Cultural Rights, 999 UNTS 3 (Adopted on Dec. 16, 1966). The USSR had ratified both Covenants in 1973 and they entered into force in 1976.
The Covenants also made a clear distinction between peoples, to whom Article 1 is applicable, and minorities, whose legal rights are guaranteed under Article 27: "*[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language*."

Article 1(3) continues that the signatories

> "[S]hall promote the realisation of the right to self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

In 1970, the UN General Assembly passed what is commonly known as the Friendly Relations Declaration. It clarified the content of self-determination by stating that:

> "[b]y virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter."[35]

More precision followed in 1974 when the UN General Assembly included the right to self-determination in the Definition of Aggression resolution. It stated that it was the "*duty of states not to use armed force to deprive peoples of their right to self-determination, freedom and independence, or to disrupt territorial integrity*" and that "*[n]othing in this definition […] could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter*."[36]

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[35] UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, art. 1, A/RES/2625(XXV) (Oct. 24, 1970).
[36] UN General Assembly, *Definition of Aggression*, Preamble & art. 7, GA Res. 3314 (XXIX) (Dec. 14, 1974).

As all these international Conventions and treaties – as well as the previously mentioned Badinter Commission opinions[37] - continue to promote simultaneously both self-determination and territorial integrity, several renowned legal scholars - such as Rosas,[38] Hannum,[39] Thornberry,[40] Thürer,[41] and Borgen[42] - have advocated that for both the rights to be simultaneously applicable, there must exist a right to *internal* self-determination. In short, the internal form of self-determination refers to exercising it within an existing State, whereas the external form is the right of people to define their place within the international community - be that in the form of an independent State or joining another State.

Internal self-determination would then ensure that "*all peoples have the right to determine, without external interference, their political status and to pursue their economic, social and cultural development,*" but as this would be

[37] *supra* note 15-17.
[38] A. ROSAS, *Internal Self-Determination* in MODERN LAW OF SELF-DETERMINATION, 225-252, 246 (1993).
[39] H. HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 113 (1990).
[40] P. THORNBERRY, *The Democratic or Internal Aspect of Self-Determination with some Remarks on Federalism* in MODERN LAW OF SELF-DETERMINATION, 101-138, 120 (1993).
[41] D. THÜRER, *Self-Determination, 1998 Addendum* in 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 364-373 (2000).
[42] C. BORGEN, *Public International Law and the Conflict over Transnistria* in MANAGING INTRACTABLE CONFLICTS: LESSONS FROM MOLDOVA AND CYPRUS, 83-108, 89 (2013). For other proponents of the right to internal self-determination, *see* for example M. SHAW, INTERNATIONAL LAW 289-293 (2008); L. Medina, *An Unsatisfactory Case of Self-Determination: Resolving Puerto Rico's Status*, 33(3) FORDHAM INT'L L.J. 1048, 1048-1100 (2009); C. CHINKIN, *Expert Opinion by Christine Chinkin Accompanying the Ad-Hoc Committee of Canadian Women on the Constitution's Reply Factum* in SELF-DETERMINATION IN INTERNATIONAL LAW: QUEBEC AND LESSONS LEARNED 231-240, 236 (2000); J. Crawford, *Democracy and International Law*, 64(1) BR. YEARB. INT. LAW 113, 113-133 (1993); M. STERIO, THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW: 'SELFISTANS', SECESSION, AND THE RULE OF THE GREAT POWERS 18-22 (2013; M. Seymour, *Secession as a Remedial Right*, 50(4) INQUIRY 395, 395-423 (2007).

achieved via autonomy agreement, it would not break apart existing states and breach their territorial integrity.

By creating the internal and external self-determination division and the "*process of dissolution*" paradigm,[43] the application of *uti possidetis* has accounted for the development of the right to self-determination since the 1990s.

As a separate people living in Azerbaijan and possessing an autonomous AO status, NK certainly held rights that should have been recognised in the application of *uti possidetis*. Given the right of Azerbaijan to territorial integrity, such a right did not include the right to secession. However, the internal form of self-determination can bridge this gap. The content and limits of such internal self-determination in the form of autonomy are case-specific but easily reconstructable in the case of NK on the basis of the last applicable Soviet legislation.

III. The Conflict: Brief History of the Struggle over Nagorno-Karabakh

A. The Betrayal of the Soviet Inheritance and the Cycles of Conflict

The territory of NK has had an Armenian majority in all credible censuses conducted. For example, in 1823, five districts corresponding roughly to the modern-day NK were overwhelmingly Armenian.[44]

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[43] *See*, subchapter I.B.

[44] G. BOURNOUTIAN, A HISTORY OF QARABAGH: AN ANNOTATED TRANSLATION OF MIRZA JAMAL JAVANSHIR QARABAGHI'S TARIKH-E QARABAGH 18-19 (1994); Демоскоп Weekly - Приложение. Справочник статистических показателей., DEMOSCOPE, https://www.demoscope.ru/weekly/ssp/sng_nac_26.php?reg=2304 (last visited Dec 11,

The first armed conflict between Armenia and Azerbaijan dates to 1918, when the Armenians in Azerbaijan proclaimed Nagorno-Karabakh as a self-governing unit. When the Bolsheviks took over the area, Stalin, as the Soviet Commissar of Nationalities, decided to award the province to Azerbaijan but with significant autonomy given to NK.[45] The borders of the province were drawn so that it had a maximum number of Armenians with a minimum of Azeris. The AO of Nagorno-Karabakh came officially into existence in the Soviet constitutional framework on 7 July 1923.

As an AO, NK held reasonably significant autonomous rights in Azerbaijan. But the population, starting in the 1980s, increasingly felt that this was not enough and that the Azerbaijani SSR government was conducting forced "*Azerification*" of the region. With support from the neighbouring SSR of Armenia and due to the Soviet legislation of the late 1980s making it possible, the NK authorities started a political movement to have the AO transferred to the Armenian SSR.

On 20 February 1988, the Soviet People's Deputies in Karabakh (local parliament) voted 110 to 17 to officially request the transfer. This brought massive demonstrations of Armenians to the streets in NK and elsewhere in Azerbaijan, against which the Azeri authorities used violence. On 7 July 1988, the European Parliament passed a resolution that condemned the violence and supported the NK's unification with Armenia.

However, the only body that could legally settle the question under the Soviet

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2024). The Soviet census of 1926 counted the Armenians consisting of around 89% of the population of NK.

[45] In addition, Stalin made numerous other changes to the Soviet internal borders in the Caucasus.

constitutional order was the USSR Presidium, and they rejected the request.[46] The Presidium had a good reason to fear that if approved, the decision would cause an implosion of ethnic separatism all over the SSRs of the USSR. However, in the case of NK, the decision caused the escalation they had tried to prevent.

First, in 1989, the authorities of NK and the SSR of Armenia jointly proclaimed the transfer of NK to Armenia. Azerbaijan started to take its distance from Moscow and, in August 1991 unilaterally proclaimed independence. In September, NK proclaimed independence as the Nagorno-Karabakh Republic.[47] This was reaffirmed in December via a referendum boycotted by the Azeri population.[48]

On 26 November 1991, Azerbaijan abolished the Nagorno-Karabakh Autonomous Oblast and its autonomy entirely by law in November 1991.[49] However, Azerbaijan did not have a right to make this change unilaterally - according to the USSR Constitution, the abolition of an AO status could only be possible after submission by the Council of the People's Deputies of the AO concerned.[50] Moreover, Azerbaijan violated its own Law on Nagorno-Karabakh Autonomous Oblast of 16 June 1981, which prohibited changing

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[46] United Nations Security Council, *Resolution of the Presidium of the USSR Supreme Soviet regarding the decisions of the Supreme Soviets of Azerbaijan and Armenia on Nagorny Karabakh*, A/59/66-S/2004/219 (Jul. 18, 1988).
[47] Ministry of Foreign Affairs of the Nagorno Karabakh Republic, *Declaration on Proclamation of the Nagorno Karabakh Republic* (Sept. 2, 1991). Nagorno-Karabakh declared itself as a SSR of the USSR.
[48] ZÜRCHER, *supra* note 22, at 168.
[49] Law on Abolition of Nagorno Karabagh Autonomous Region, 1991 (Azerbaijan). The Law was based on Arts. 68 and 104 of the Constitution of the Soviet Socialist Republic of Azerbaijan, adopted on 21 April 1978.
[50] CONSTITUTION AND FUNDAMENTAL LAW OF THE UNION OF SOVIET SOCIALIST REPUBLICS, art. 86.

the AO's borders without its consent.[51] Finally, the USSR Constitutional Oversight Committee Resolution found Azerbaijan's abolishment of the AO's autonomy unconstitutional and called for the restoration of its previous status.[52]

Therefore, according to *uti possidetis*, at the moment of Azerbaijan's actual independence from the USSR on 26 December 1991, Nagorno-Karabakh continued to enjoy an AO status according to the applicable Soviet legislation.

Subsequently, the newfound Azerbaijani State had within its *uti possidetis* borders the Autonomous Oblast of Nagorno-Karabakh, with significant autonomous rights. The international community should have acknowledged this in their recognition decision – according to their own criteria.[53]

The recognition of Azerbaijan left the NK within those borders and at the mercy of its newly independent parent State. There were no real attempts at reconciliation or mediation of the autonomy issue. As an AO, NK held a relatively wide range of powers on local issues, including budgets, construction, judiciary etc., and guaranteed language rights. It had a right to veto any changes to its autonomy and a quota of 12 representatives at the Supreme Soviet (Parliament) of the SSR of Azerbaijan, which had a total of 360 deputies.

However, Azerbaijan decided to break this former contract. The first Constitution of independent Azerbaijan (1995) does not even mention Nagorno-Karabakh, and the province is left without any rights whatsoever.

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[51] S. AVAKIAN, NAGORNO KARABAGH: LEGAL ASPECTS 17 (2013).
[52] *Id.*
[53] *supra* note 17.

To summarise, in relation to its AO, Azerbaijan decided to break the Soviet ethnofederal arrangement in its entirety. The abolishment of the AO's autonomy changed the equation and demonstrated a grave breach of the right to internal self-determination of the people of Nagorno-Karabakh, as well as the applicable Soviet laws. Due to this, Azerbaijan did not pass the requirements listed in the EC Guidelines and the Statement on the USSR.[54] It transgressed the Guidelines' criteria concerning the right to self-determination,[55] the guarantees for the rights of ethnic and national groups in accordance with the CSCE framework,[56] the inviolability of all frontiers that

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[54] *supra* note 20.

[55] *supra* note 19, ¶ 3; Conference on Security and Cooperation in Europe ("CSCE"), *Helsinki Final Act* (Aug. 1, 1975), Chapter VIII: "*By virtue of the principle of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.*"

[56] *Id.* para. 4. CSCE, *Document of the Conference on the Human Dimension of the CSCE* (Jun. 29, 1990): According to Art. 5.2, the form of government has to be representative in character. Under the ethnofederal system, Nagorno-Karabakh had a quota of 12 deputies in the Azerbaijani legislature, which was unilaterally abolished by Azerbaijan on 26 November 1991. Art. 24 makes reference to the ICCPR of which Art. 1 states that "*[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*." A unilateral and unconstitutional abolition of the former autonomous status is in obvious contradiction to this commitment. According to Arts. 32-33, the "*persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will,*" and "*[t]he participating States will protect the ethnic, cultural, linguistic, and religious identity of national minorities on their territory and create conditions for the promotion of that identity*." Under Art. 35 "*[t]he participating States will respect the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities. The participating States note the efforts undertaken to protect and create conditions for the promotion of the ethnic, cultural, linguistic, and religious identity of certain national minorities by establishing, as one of the possible means to achieve these aims, appropriate local or autonomous administrations corresponding to the specific historical and territorial circumstances of such minorities and in accordance with the policies of the State concerned*." Finally, according to Art. 38 "*[t]he participating States, in their efforts to protect and promote the rights of persons belonging to national minorities, will fully respect their undertakings under existing human rights conventions and other relevant international instruments*." Azerbaijani actions obviously tried to assimilate

can only be changed by common agreement,[57] and the commitment to settle any State succession and regional disputes by agreement or by arbitration.[58]

Azerbaijan was widely recognised as an independent State within its *uti possidetis* borders between December 1991 and January 1992. However, as it did not fulfil the EC criteria for recognition, the European Community's recognition decision was premature.

During the last months of the USSR's existence, the Soviet central authorities tried to intervene with a proposal for enhanced autonomy for NK, but the federation was in such disarray at that moment that Armenia and Azerbaijan ignored the proposal and chose to fight instead. This came to be known as the first Nagorno-Karabakh War, and it lasted until May 1994, when a Russian-brokered ceasefire known as the Bishkek Protocol[59] came into effect. The Protocol left NK de facto independent and its self-proclaimed "*government*" in the "*capital*" Stepanakert intact but heavily dependent upon Armenia.[60]

As Armenia and the province of NK do not share a land corridor, to supply NK and keep favourable defensive positions, Armenian troops occupied Azeri

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the people of NK against their will by abolishing their autonomy and breached their right to participate in public affairs. Via the USSR's commitments, Azerbaijan was bound by this CSCE framework, and its actions can only be seen as in violation of it.

[57] *Id.* ¶ 5.

[58] *Id.* ¶ 6. The borders of the AO of Nagorno-Karabakh were drawn and guaranteed by the federal centre, thus making this essentially a question of State succession - the USSR gave Nagorno-Karabakh to the SSR of Azerbaijan under the condition that it had a meaningful autonomy. Azerbaijan should have been conditioned to settle its dispute with Nagorno-Karabakh via mutual agreement or international arbitration. The latter is currently taking place in the format of the OSCE Minsk, but without the recognition leeway.

[59] BISHKEK PROTOCOL, *https://www.peaceagreements.org/viewmasterdocument/990* (last visited Oct. 1, 2024).

[60] Center for Preventive Action, *Nagorno-Karabakh Conflict*, GLOBAL CONFLICT TRACKER (Oct. 1, 2024), https://www.cfr.org/global-conflict-tracker/conflict/nagorno-karabakh-conflict#:~:text=The%20first%20Karabakh%20war%2C%20from,percent%20of%20Azerbaijan's%20geographic%20area.

territories between Armenia and NK as well as to the South and North of NK – comprising altogether 20% of the legal territory of Azerbaijan. The Protocol called for the withdrawal of Armenian troops, but they refused to leave.

B. International Mediation of the Karabakh-Conflict, 1992-2023

Since the First Karabakh War in 1992, there was only one international body that was given the task by the UN to mediate the conflict over NK – the OSCE[61] Minsk Group.

The original initiative was to convene an international "*conference*" in Minsk in the spring of 1992 and reach a peaceful settlement then and there.[62] However, the conference was indefinitely postponed and those countries that were supposed to do the preparatory work for it evolved into a more permanent negotiation platform called Minsk Group for the next 31 years.

In this time span, the Group presented three proposals for the solution of the conflict: the Package Deal (1997), the Step-by-Step Deal (1997), and the Common State Deal (1998). In addition, it was able to make the parties agree on the Madrid Principles (2007, updated in 2009).

After Russia had managed to broker a ceasefire in NK in the Spring of 1994, the OSCE Budapest Summit established the Minsk Group on a permanent basis until the conflict would be solved.[63] In 1997, a permanent "*Troika*" of co-chairs, consisting of Russia, the USA and France, was formed. The other

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[61] The Organization for Security and Co-operation in Europe was called the Convention of Security and Co-operation in Europe until 1 January 1995.
[62] CONCILIATION RESOURCES, https://www.c-r.org/accord/nagorny-karabakh/role-osce-assessment-international-mediation-efforts (last visited Oct. 1, 2024).
[63] OSCE, *Budapest Summit marks change from CSCE to OSCE* (Dec. 5, 1994), https://www.osce.org/event/summit_1994 (last visited Oct. 1, 2024).

permanent members of the Group were Belarus, Germany, Italy, Sweden, Finland, Turkey, Armenia, and Azerbaijan.[64]

Representatives of Azerbaijan on the one side and Armenia (representing both the Armenian State's interests and those of Karabakh Armenians) on the other side held numerous inconclusive peace talks throughout the years under the auspices of the Minsk Group. The main stances of the parties never moved. Azerbaijan never compromised on the absolute inviolability of its territorial integrity, i.e., that NK cannot get independence or join Armenia. For Armenia, it was the opposite, with preference over outright independence for NK[65] or its integration into Armenia changing over the years.

In this regard, the negotiation process could not escape the same trap that haunted the UN-led Kosovo Final Status Negotiations throughout the 2000s. In this prolonged international mediation effort, after years of useless negotiations between Serbian and Kosovo Albanian representatives in the early 2000s, finally, a UN Special Envoy – former president of Finland Martti Ahtisaari – was given the task to force the parties to agree on a final status for Serbia's breakaway province of Kosovo in 2005. The unbridgeable gap here was again the non-negotiable position of the Serbs for anything but independence for Kosovo and the equally unrelenting position of Kosovars to accept nothing short of independence. After two years of going nowhere, the Special Envoy, in his Report, suggested independence for Kosovo. However, notably, Ahtisaari insisted that "*Kosovo is a unique case that demands a unique solution. It does not create a precedent for other unresolved*

[64] OSCE, *Who we are*, https://www.osce.org/minsk-group/108306 (last visited Oct. 1, 2024).
[65] The separatists preferred to use the term "*Artsakh*" for Nagorno-Karabakh, but I use the more neutral and internationally more commonly used term.

conflicts."[66] The Special Envoy's recommendation was quickly followed by a unilateral declaration of independence and Kosovo's subsequent recognition by the majority of the UN member states.

In the Minsk Group negotiations, there was always an additional problem of representation. The Karabakh Armenians always demanded the status of an equal negotiating party, which was strongly rejected by Azerbaijan. The Minsk Group assumed that Armenia could influence the NK into compliance with any peace deal reached, thereby removing the need for their separate representation for the NK.[67]

However, the peace process demonstrated repeatedly throughout the years that this was not the case and NK was willing and able to reject unilateral proposals negotiated by Armenia – supposedly on its behalf. They were the ones facing the consequences of any agreement, so it's only logical that in the absence of support from the actual inhabitants of the territory in question, peace-making is likely to fail.

Despite its lack of success in bringing peace since 1992, in 1997, the UN Security Council proclaimed the Minsk Group the undisputed international authority to mediate peace in Nagorno-Karabakh.[68] The Group, under the auspices of OSCE, was seen as a more suitable arena due to its regional focus and expertise than the UN, although Armenia and NK favoured the latter.

The Group tried to step up its efforts, as every year there were fatalities on

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[66] United Nations Security Council, *Report of the Special Envoy of the Secretary-General on Kosovo's future status*, S/2007/168 (Mar. 26, 2007).
[67] *infra* note 72.
[68] T. De Waal, *Remaking the Nagorno-Karabakh Peace Process*, CARNEGIE EUROPE, (Aug. 01, 2010), https://carnegieendowment.org/posts/2010/08/remaking-the-nagorno-karabakh-peace-process?lang=en.

both sides due to ceasefire breaches, but with little success. One always present factor was mutual xenophobia, displayed even by the highest Armenian and Azerbaijani officials.[69] The late 1990s saw the most promising period of mediation, with three separate agreement proposals.

The Package Deal (July 1997) tried to circle the square of mutual suspicion by dividing the agreement into two parts: the first part called for peace and the removal of all Armenian occupation forces from Azerbaijan. To make Armenia and NK agree on this, the second part then called for the creation of an autonomous entity within the *uti possidetis* borders of the former AO of Nagorno-Karabakh.[70] However, the proposal was rejected by Armenia (due to the pressure from NK) because of the defenceless position it would leave NK before part two of the agreement was functioning.

A few months later a new proposal called the Step-by-Step Agreement[71] was put forward by the Minsk Group. The "*steps*" were, in essence, the two parts of the Package Deal but now negotiated one by one. The idea was that after first agreeing on the removal of nearly all Armenian troops from Azerbaijan, the final status of the NK would be agreed upon in the later step. As an extra

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[69] *See*, *Nagorno-Karabakh: Timeline of the Long Road to Peace*, RADIO FREE EUROPE/RADIO LIBERTY (2006), https://www.rferl.org/a/1065626.html. On 16 January 2003 former president of Armenia Robert Kocharian said that Azerbaijanis and Armenians were "*ethnically incompatible*" and it was impossible for the Armenians of Karabakh to live within an Azerbaijani State.
The mutual xenophobia has been confirmed in several international documents, such as UN Committee on the Elimination of Racial Discrimination, *The Concluding observations of the UN Committee on the Elimination of Racial Discrimination*, CERD/C/AZE/4 (Apr. 14, 2005), and several times by the European Commission against Racism and Intolerance reports (Jun. 28, 2002, Dec. 15, 2006, Mar. 23, 2011 and Mar. 17, 2016), and the Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities opinions (May 22, 2003 and Nov. 9, 2007).
[70] The OECD, *Minsk Group proposal* ("package deal") (Jul. 18, 1997).
[71] The OECD, *Minsk Group proposal* ("step-by-step deal") (Dec. 19, 1997).

guarantee, NK would gain an internationally recognised "*interim status*" at this point.[72]

The Step-by-Step agreement was a success in the sense that for the first time, both Azerbaijan and Armenia accepted it in principle. Yet, the deal was rejected by the NK authorities (and, by extension, Armenia) because agreeing on the first step would make NK lose their most valuable bargaining chip for the final status negotiations, the occupation of Azerbaijani territory.

The last of the three main proposals came in November 1998 with the Common State Deal.[73] It was designed by the Russian Foreign Minister Yevgeni Primakov, and it envisioned a common State of two equals – Azerbaijan and NK – with horizontal relations between them.[74]

While excluding independence, the proposal would have given NK its own constitution, flag, seal, anthem, legislative, executive, and judicial institutions, as well as its National Guard and police, and the right to establish direct relations with any State, regional or international organisation in the fields of economy, science, culture, sports, and humanitarian affairs. The laws, regulations, and executive decisions of Azerbaijan would be effective in NK only if they would not oppose its constitution and laws. NK would also have a right to participate in the execution of Azerbaijan's foreign policy if it is related to its interests and include its experts in the delegation of Azerbaijan to take part in any negotiation that touches on its interests.

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[72] S. Abilov, *OSCE Minsk Group: Proposals and Failure, the View from Azerbaijan*, 20(1) INSIGHT TURK. 143, 143-163 (2018).
[73] The OECD, *Minsk Group proposal* ("common State deal") (Nov. 18, 1998).
[74] Karen Harutyunyan, *A recap of the 7 plans proposed for the settlement of the Karabakh conflict*, CIVILNET (Oct. 23, 2021), https://www.civilnet.am/en/news/637117/a-recap-of-the-7-plans-proposed-for-the-settlement-of-the-karabakh-conflict/.

Neither Azerbaijan nor NK would have had a right to change the provision of a common State unilaterally.

Azerbaijan rejected the proposal on the grounds of the violation of its territorial integrity and of the principles agreed by the OSCE 1996 summit in Lisbon.[75]

All three agreements had in common the failure to reconcile self-determination (of NK) with territorial integrity (of Azerbaijan). The OSCE itself is founded on the 1975 Helsinki Final Act which promotes the right to self-determination but only in conformity with the territorial integrity of states.[76] The Final Act deems lawful any decision on frontiers "*by peaceful means and by agreement*." So basically, under international law and OSCE mandate, any settlement of NK status needs to be within Azerbaijan unless there is an agreement arrived at by peaceful means.

By the mid-2000s, the pressure started to build upon the illegal occupation of Azerbaijani territories: for example, in January 2005, the Parliamentary Assembly of the Council of Europe ("PACE") adopted resolution 1416,[77] which condemned ethnic cleansing and forced displacement of Azeris in the Armenian held territories and NK. In March 2008, the UN General Assembly demanded "*the immediate, complete and unconditional withdrawal of all*

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[75] The principles were 1) territorial integrity of the Republic of Armenia and the Azerbaijan Republic; 2) legal status of Nagorno-Karabakh defined in an agreement based on self-determination which confers on Nagorno-Karabakh the highest degree of self-rule within Azerbaijan; and 3) guaranteed security for Nagorno-Karabakh and its whole population, including mutual obligations to ensure compliance by all the Parties with the provisions of the settlement. OSCE, *Lisbon Document*, Annex 1, DOC.S/1/96 (Dec. 3, 1996).

[76] *supra* note 55.

[77] COUNCIL OF EUROPE, https://web.archive.org/web/20101128005101/http://assembly.coe.int/Main.asp?link=%2FDocuments%2FAdoptedText%2Fta05%2FERES1416.htm#_ftn1 (last visited Oct. 1, 2024).

Armenian forces from all occupied territories of the Republic of Azerbaijan."[78]

Behind the scenes, there was a series of negotiations known as the Prague Process between 2002 and 2007, where the presidents of Armenia and Azerbaijan met altogether 21 times.[79] The process culminated in the proclamation of the Madrid Principles in November 2007.[80] This was the only document since the 1994 ceasefire that both parties managed to sign.

In this document, the issue came arguably closest to a final settlement, as the parties were able to agree on several – yet contradictory – principles of the final settlement of the Nagorno-Karabakh status question.

The document tried to balance out the principles of territorial integrity and self-determination of peoples by agreeing to the following principles: an interim status for NK, with guarantees for self-governance; future determination of the final legal status of NK through a legally binding expression of will (referendum); the right of all internally displaced persons and refugees to return; and international security guarantees, including a peacekeeping operation.

Once the interpretations of the principles had once again hit the standstill between the right to self-determination and territorial integrity, the Madrid Principles were updated on 10 July 2009.[81] The changes were small yet significant. Instead of the phased withdrawal of Armenian forces, the updated Principles removed the term "*phased*," which pleased Azerbaijan. On the other

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[78] United Nations General Assembly, *The Situation in the Occupied Territories of Azerbaijan*, G.A. Res. 62/243 (Mar. 14, 2008).
[79] CONFLICT STUDIES RESEARCH CENTRE, https://www.files.ethz.ch/isn/87489/05_may.pdf (last visited Oct. 1, 2024).
[80] The OSCE Minsk Group, *Madrid Document* (Nov. 29, 2007).
[81] Statement by the OSCE Minsk Group Co-Chair countries (July 10, 2009) (on file with the OSCE Newsroom).

hand, instead of a "*referendum*" to determine the final status of NK, the updated principles speak of a "*legally binding expression of will.*"

If followed through, the Madrid Principles could have brought a peaceful end to the conflict. However, the principles contained problematic parts for both the parties. Armenia could have accepted the principles relating to the right to self-determination, but the demand for it to evacuate its troops from the occupied areas would leave NK defenceless against a possible Azerbaijani attack. This was the very same problem Armenia had faced in the 1997 proposals.

For Azerbaijan, the principles were too much, favouring the right to self-determination over territorial integrity. Even with the return of the internally displaced Azeris to NK, any kind of "*expression of will*" by the population would, in all probability, produce a majority for independence or joining Armenia. Thus, neither side was, in the end, willing to follow through with their promises.

In March 2008, Azerbaijan and Armenia managed to agree on a Nagorno-Karabakh Declaration, where they stated their intention to contribute to regional security by a political settlement of the Nagorno-Karabakh Conflict on the basis of the principles and norms of international law adopted in the framework of decisions and documents.[82] The Declaration did not offer anything new, and its significance is limited to it being the last one that the parties were able to agree upon.

Frustrated with the Minsk Group's inability to end the Armenian occupation,

[82] Kremlin, *The Declaration of the Republic of Azerbaijan, Armenia, and the Russian Federation* (Nov. 02, 2008), http://kremlin.ru/supplement/232.

Azerbaijan tried to push the NK issue for a more favourable international body, PACE, which had in the past shown sympathy for Azerbaijan. On 26 January 2016, PACE produced a draft report suggesting a change of format of the negotiations away from the Minsk Group. While the draft was rejected by PACE, it still made the Minsk Group issue their own statement, reminding PACE and any other international body, of the Minsk Group's undisputed mandate that others should not interfere with.[83]

The never-ending Minsk negotiations continued, with neither side compromising on their contradictory positions. Azerbaijan was already preparing for war by building up its armed capabilities. The only thing standing in its way was Russia, which, through first the Collective Security Treaty[84] and since 2002 through a Collective Security Organization ("CSTO"),[85] has pledged to protect Armenia in case of an attack. In addition, Russia has an active military base in Armenia´s Gyumri region.

However, the CSTO commitment was to protect Armenia proper, not the territories it was illegally occupying in Azerbaijan – or the self-proclaimed State of Nagorno-Karabakh. Azerbaijan and Armenia were unsure how Russia would react to an attack that was limited to areas within Azerbaijan's *uti possidetis* borders.

Calculating that it could overpower Armenians alone, Azerbaijan saw a chance to test the Russian resolve with the COVID-19 pandemic. On 27 September 2020, Azerbaijan launched a significant attack that, in 44 days, left

[83] Press Release by the Co-Chairs of the OSCE Minsk Group (January 22, 2016) (on file with the OSCE Minsk Group).
[84] Collective Security Treaty, No. 32307 (Adopted on May 15, 1992).
[85] Charter of the Collective Security Organization, UNTS v. 2235 (Adopted on Oct. 7, 2002).

thousands dead and wounded on both sides. This Second Karabakh War ended with Azerbaijan's victory and a trilateral ceasefire agreement (between Armenia, Azerbaijan, and Russia).[86] Under the terms of the agreement, Armenia had to withdraw its occupation in almost 40% of the areas held previously by NK separatists or Armenia, including the second biggest city of NK, Shusha. NK could now only be supplied by Armenia through a narrow corridor protected by Russian peacekeepers. Its defensive position was very vulnerable, and the Russian inaction was only making Azerbaijan hungrier.

Perhaps the greatest failure of the Minsk Group was to waste another 16 months - after the Second Karabakh War but before the Russian full-scale invasion of Ukraine - doing nothing. It is understandable that the relations with the Western states of the Group and Russia were tense, but there had been many times before as well, even when the situation on the ground in NK had not been so bad since the early 1990s. After the attack on Ukraine in February 2022, the Group's inaction naturally became permanent, the whole Minsk process became defunct, and the Third Karabakh War became a matter of time.

Three years after the Second Karabakh War, there was the final Azeri offensive, a *coup de grâce* to the remaining Nagorno-Karabakh statelet. In only 24 hours, there was a total Azerbaijan victory that resulted in the destruction of the NK self-government. In the following months, almost the entire Armenian population had fled from the NK, as confirmed by the UN observation mission on the ground.[87] Before and during the exodus, there were

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[86] President of Russia, *Statement by the President of the Republic of Azerbaijan, the Prime Minister of the Republic of Armenia and the President of the Russian Federation* (Nov. 10, 2020), https://peacemaker.un.org/sites/default/files/document/files/2024/05/statement20by20azerbaijan20armenia20and20russia.pdf.

[87] Joint Statement on the Situation in Nagorno-Karabakh (Oct.11, 2023) (on file with the U.S. Mission Geneva).

reported clashes with the armed forces of Azerbaijan that killed hundreds of people, including civilians.[88]

Following, on 1 January 2024, the self-proclaimed State of Nagorno-Karabakh was officially dissolved by the separatists.

While the battle over NK seems over, the danger of a larger war looms over Armenia as Azerbaijan has been making threatening remarks concerning Armenia's Southern province of Syunik that cuts the Azerbaijani access to its province on Nakhchivan bordering Turkey.[89] To counter this threat, Armenia suspended its participation in the obviously defunct CSTO and put its fate into the hands of international law and the international community by ratifying the Rome Statute.[90]

The goal is to make Azerbaijani military leaders face potential war crime charges by the International Criminal Court, thus curbing their taste for international aggression – this time, the attack would be inside Armenian internationally recognised borders and not the "*grey area*" of the unrecognised Nagorno-Karabakh.

The next section demonstrates what was lacking in the proposals. Due to the tragic situation on the ground, the proposals are by themselves no longer applicable in terms of NK. However, the formula itself remains relevant for

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[88] David J. Scheffer, *Ethnic Cleansing is Happening in Nagorno-Karabakh. How Can the World Respond?*, COUNCIL ON FOREIGN RELATIONS (Oct. 4, 2023), https://www.cfr.org/article/ethnic-cleansing-happening-nagorno-karabakh-how-can-world-respond.

[89] Nikola Mikovic, *How to prevent another war between Armenia and Azerbaijan*, DIPLOMATIC COURIER (Oct. 1, 2024), https://www.diplomaticourier.com/posts/how-to-prevent-another-war-between-armenia-and-azerbaijan.

[90] Reuters, *Armenia freezes participation in Russia-led security bloc - Prime Minister*, REUTERS (Feb. 23, 2024), https://www.reuters.com/world/asia-pacific/armenia-freezes-participation-russia-led-security-bloc-prime-minister-2024-02-23/.

all the other unsolved post-Soviet conflicts, such as the one in Transnistria (Moldova).

IV. Missed Opportunity and How to Move Forward with Remaining Post-Soviet Disputes

In short, international mediation failed in NK - just like in Kosovo - because the mediators were unable to reconcile self-determination and territorial integrity. But a more nuanced reading of the right to self-determination, including its internal aspect, together with *uti possidetis*, would have produced a solution that had been accepted by the parties in the past and would have been in accordance with the contemporary international law framework.

Nagorno-Karabakh is a missed opportunity, but there are still a few key takeaways from the failures of Minsk Group mediation efforts and the entire peace process.

The Group's first proposal, the Package Deal (July 1997), failed mainly due to the lack of trust between Azerbaijan and Armenia. The Deal would have created an autonomous entity within the *uti possidetis* borders of NK, but since there were no clear security guarantees, the Armenian side could not accept it. The pragmatic solution would have been to enhance them with a UN Security Council resolution bringing UN peacekeepers to the ground. The wars over Karabakh could have ended then and there – and the solution would have been in accordance with international law. The relationship between the Security Council members - especially the Minsk Group Co-Chairs (USA, France and Russia) was less problematic in the 1990s, and this could have been a viable option.

Later, in 1997, the next Step-by-Step Deal would have given NK an internationally recognised "*interim status*," thus protecting it from Azerbaijani

aggression. However, the Deal did not limit the final status to autonomy, thus solving really nothing and probably dooming the negotiation processes into a never-ending cycle in the same manner as in Kosovo.

The Common State Deal in 1998 proposed a confederal State between Azerbaijan and NK. This proposal went in some ways further than *uti possidetis*, as in addition to the territorial autonomy for NK, it would also have limited Azerbaijan's foreign policy by giving NK substantial powers there.

Finally, the Madrid principles were the pinnacle of the process: by providing an internationally recognised interim status for NK with guarantees of security and self-governance and combining this with a promise of a final status referendum, this could have solved the case and prevented two more wars over Nagorno-Karabakh. However, the failure here was not excluding independence from the referendum, thereby ensuring that when the referendum finally takes place, the population will opt for independence, which would prevent Azerbaijan from moving forward with the plan.

However, the solution was always there: the Minsk Group should have simply applied *uti possidetis* to the NK question, which would have produced a compromise in accordance with international law.

A. ***Uti Possidetis* in the Post-Soviet Context: Key Takeaways for the Remaining Endemic Territorial Disputes**

In short, *uti possidetis* was used as a decolonisation rule in the dissolution of the USSR. This was inadequate as the developments concerning the right to self-determination were not taken into account. When *uti possidetis* was applied, neglecting this fact, a series of endemic territorial conflicts were created all over the post-Soviet space.

When *uti possidetis* turns the "*photograph*"[91] of former administrative borders into a blueprint for the new borders of an emerging State, the key detail to solve is: which administrative borders? As demonstrated in Section II, the USSR had a unique policy called ethnofederalism, whereby different peoples would be entitled to different levels of self-determination rights.

Thus, under the Soviet constitutional order the right to self-determination was not an either-or but came in many different shapes.

The Western interpretation of the post-Soviet picture only recognised the 15 SSRs and failed to consider the multilayered Soviet understanding of the right to self-determination. Subsequently, the lower-level borders were photoshopped out of the picture entirely. In the case of Azerbaijan, this breached the right of Nagorno-Karabakh to internal self-determination in the form of autonomy.

Here is the catch: using the leeway of international recognition – that Azerbaijan was desperately seeking by the end of 1991 – the international community could have forced Baku to accept the continuation of NK's autonomy. If *uti possidetis* had been updated in 1991, this would have most likely been the only legal conclusion.

The conceptual logic is that Azerbaijan, in its today's borders, had never existed prior to the Soviet times, and when it acquired these borders as an SSR, it had the AO of Nagorno-Karabakh within its borders since the very beginning. Therefore, Azerbaijan never held "*full*" sovereignty over the NK area, and if it wanted to keep its Soviet *uti possidetis* borders, it should have accepted the limits of those borders on the terms of NK.

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[91] *supra* note 4.

Unfortunately, the international community first missed this opportunity in the early 1990s recognition decision, and then they continued this failing policy throughout the 31 pointless years of Minsk Group mediation.

It is no longer realistic to suggest a meaningful autonomy for NK based on *uti possidetis*. Even if such a solution would be acceptable to Azerbaijan, an unlikely scenario, it would be very hard for the NK Armenians to trust that the Azeri authorities will respect any autonomy agreement in the future. Therefore, it does not seem plausible that the NK Armenians would return.

That being said, it is useful to see how the case could and should have been solved using *uti possidetis*. There remain many other active post-Soviet conflicts that could use new ideas in meditation,[92] given that the self-determination and territorial integrity impasse is ever present and a guarantee for failure. Here is a summary of the updated *uti possidetis* principle, published in a lot greater detail elsewhere.[93]

B. A Model Framework to Mediate a Post-Soviet Territorial Dispute

Any mediation attempt in the post-Soviet space should start from the premise that the former autonomous unit is unlikely to accept a position less than a corresponding internal self-governing status similar to that of the Soviet era. The logic is that Azerbaijan's legislative and administrative rights over the province of NK were always compromised, so it never had "*full*" sovereignty over it. Conversely, the NK was, throughout the Soviet era, a constituent part

[92] The most important ones are Abkhazia (ASSR) and South Ossetia (AO) in Georgia, Crimea (ASSR) in Ukraine and Transnistria (former ASSR, in 1990 declared itself SSR) in Moldova.

[93] T. Lundstedt, *How to End the Territorial Conflicts in Georgia: An International Law Based Mediation Proposal for Abkhazia and South Ossetia*, 11(1) GROJIL 1, 1-22 (2024).

of the territory of Azerbaijan – thus limiting its rights to territorial autonomy within Azerbaijan.

According to a more consistent interpretation of *uti possidetis* in the early 1990s, the international community should have extended its application into the lower-level ethnofederal borders, including those of NK. It should have recognised the right to internal self-determination for the Armenian minority in the ethnofederal unit of NK and Azerbaijan's limited sovereignty over the area. The international recognition of Azerbaijan's independence within its *uti possidetis* borders should have been conditioned on it recognising that it has an ethnofederal unit within these borders.

Recognition of NK's borders would have given it a constitutionally guaranteed territorial autonomy with the corresponding level of consociation within Azerbaijan's governance. The extent of this autonomy should not include the right to otherwise disrupt the activities of the host State, as was the case with the Minsk Group's Common State Proposal (1998). This is very important.

In some rare cases, meaningful autonomy could contain a right to have an appropriate - but never decisive - say in the running of the State. This could be accomplished by qualified majorities in the host State's parliament in some specific policy areas that are important for the subunit. These qualified majorities could be predetermined or triggered according to a procedure. The aim is to give the subunit a limited veto power only in areas that could be seen as essential to a functional autonomy arrangement.[94]

[94] One could use as an example here of the 2007 Kosovo Status Settlement Proposal that envisioned a double-majority requirement for changing the subunit's Constitution and adopting laws of "*vital minority interest*." This should not be an expansive category. The key to a workable autonomy arrangement is that it does not paralyse the functioning of the State. Bosnia-Herzegovina could be seen as a cautionary example of this.

C. The Details for a Model for Nagorno-Karabakh

In practice, a mediation proposal based on *uti possidetis* would have suggested the following:

NK should continue to enjoy similar territorial self-governance as it did at the moment of dissolution of the USSR,[95] including a relatively wide range of powers on local issues[96] and guaranteed language rights.[97] Notably, this should include a veto right over changes to its status[98] but should not include overrepresentation in the field of external relations of the host State. This would have involved stepping into the grey area of "*more than autonomy, less than independence*,"[99] which is a dangerous yet necessary road to take to build a lasting peace and a working autonomy agreement.

Due to historical factors, consociation is another highly important and delicate matter.

Under the Soviet system, NK had 12 representatives in the Supreme Soviet (Parliament) of the SSR of Azerbaijan, which had a total of 360 deputies.[100] A

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[95] According to *uti possidetis*, the area should correspond with the borders of the AO of NK as they stood in December 1991. It would also be advisable to accommodate territorial autonomy with the minority's own police force and symmetrical representation in the civil service, as was done in Kosovo.

[96] For example, the former ASSR of Ajara was given rights over such areas as local education, science, culture, tourism, agriculture, and infrastructure. GEORGIA CONST., art. 7.

[97] For example, under the UN administration in the 2000s and in the 2008 Constitution, Kosovo developed a regime protecting its minorities, including through legally secured equal citizenship and language rights.

[98] Finally, any genuine power-sharing agreement should reach the field of the judiciary, and quota representation (with possible double majority requirements) should be considered for the highest Courts.

[99] B. Knoll-Tudor & D. Mueller, *At Daggers Drawn: International Legal Issues Surrounding the Conflict in and around Nagorno-Karabakh*, EJIL: TALK! (Oct. 1, 2024), https://www.ejiltalk.org/at-daggers-drawn-international-legal-issues-surrounding-the-conflict-in-and-around-nagorno-karabakh/.

[100] i.e., 3,33%. Nagorno-Karabakh also had five deputies in the USSR Supreme Soviet, whereas the ASSRs had 11 and SSRs 32.

mutually acceptable compromise should maintain this level.[101] For instance - and not by coincidence - Tajikistan chose to uphold the exact representational quota and the right to a legislative initiative for its AO of Gorno-Badakhshan, and this agreement has held since.[102]

NK would likely have viewed the continuation of its representation quotas as legitimate, decreasing support for separatism. Moreover, the continuation of its self-governing status would have affected Azerbaijan's domestic policies only in a limited manner and even less so in the field of foreign policy.

In terms of external guarantees, if Azerbaijan had continued the legal status of NK, there would not have been the ethnic conflict that has produced the lack of trust between the parties.[103] Furthermore, Armenia would probably have reacted if Azerbaijan had unilaterally breached its Constitution and tried to abolish the autonomy of NK.

Therefore, the continuation of the constitutionally guaranteed autonomy for NK in the early 1990s would probably not have needed explicit international guarantees. That being said, if Armenia (representing NK) and Azerbaijan would come to an agreement in the 2020s, any subsequent autonomy arrangement would likely need extensive external guarantees.[104]

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[101] The current Parliament of Azerbaijan (*Milli Majlis*) has 125 deputies. The retention of the Soviet-era representation for NK would be four deputies.

[102] Under the Constitution of Tajikistan, Gorno-Badakhshan has one deputy in the 33-member Upper Chamber (Majlisi Milli) of Tajikistan, which constitutes exactly the same percentage (~3%) that the AOs had representatives in the Supreme Soviet of their host SSR in the Soviet-era. Similarly, under the 1998 Constitution, Crimea had ~2,7% representation in the Parliament of Ukraine.

[103] Azerbaijan has proposed to raise Nagorno-Karabakh's status to an autonomous republic with a significant self-governance, conditioned on it renouncing its claim to full statehood. This compromise would certainly need extensive international guarantees.

[104] This could be done by designating Guarantor States, which was suggested in the case of Transnistria in 2003, by international multilateral agreement, signed by the co-chairs of the

Furthermore, a fair and accountable dispute resolution framework should be put in place. A useful model for this could be the Council for Interethnic Relations in Macedonia, which guarantees representation for each of the nationalities and offers proposals for inter-ethnic issues that the Macedonian Assembly is obliged to take into consideration.

Finally, while the settlement of the NK conflict in the early 1990s would likely not have required any special provisions, a settlement in the 2020s would need to uphold the 2007/2009 Madrid Principles. These include an interim status for NK providing guarantees for its security and self-governance; a corridor linking Armenia to NK; future determination of the final legal status of NK through a legally binding referendum after all internally displaced persons and refugees have been given a chance to return to their former places of residence; and international security guarantees that would include a peacekeeping operation.[105]

The solution by an updated version of the *uti possidetis* doctrine could have solved the conflict via the leeway of international recognition policy (led by the EC in the early 1990s). As this opportunity was missed, it could have still been utilised in the international mediation efforts (dominated by the OSCE's Minsk Group) between the First and Second Karabakh Wars (1994-2020) and perhaps still between the Second and Third wars (2020-2023).

D. Every Missed Opportunity is a Tragedy

The often-heard lamentation is that due to the fundamental contradiction of

Minsk Group (France, Russia and the US), by a UN Security Council resolution, or by a temporary international administration over the conflict area, such as the UNMIK in 1999.

[105] Basic principles for a Peaceful Settlement of the Nagorno-Karabakh Conflict (Jul. 10, 2009) (on file with the OSCE Minsk Group).

the right to self-determination (of peoples) and the right to territorial integrity (of states), conflicting territorial claims cannot be solved under international law. This mantra is easy to remember, and it seems to make sense, but it is not the whole picture, as demonstrated in this article.

In the specific cases where a new State has been created due to State dissolution or secession, and there has been territorial autonomy in place, the fundamental contradiction can be solved.

Therefore, the post-Soviet conflicts can be divided into two groupings. There are so-called legitimate territorial claims (under *uti possidetis*), which include, i.e., Crimea in Ukraine, Abkhazia and South Ossetia in Georgia and Transnistria (in Moldova). If there is goodwill between the conflicting parties, these contradicting claims can be solved with international mediation by utilising *uti possidetis*.

Of course, realpolitik plays its role in terms of what is actually feasible. Unfortunately, the case of NK seems like a missed opportunity, and it is hard to see how Armenians could return in great numbers. The compromise over the end of Russian occupation and the return of meaningful autonomy for Crimea is technically easier to accomplish – but, at least as long as the criminal aggression by Russia is taking place in Ukraine, there cannot be any meaningful negotiations on the future status of Crimea.[106]

It is important to separate the above-mentioned *uti possidetis* conflicts that are partially the fault of the international community's recognition policy and

[106] The Crimea status question can be solved after the end of the war, if there is enough goodwill between the parties. T. Lundstedt, *How to Resolve the Territorial Conflicts in Ukraine: Uti Possidetis Juris and an International Law-based Proposal for Power-sharing*, 41 PYIL 163, 163-191 (2022).

illegitimate imperial pursuits of Russia in Ukraine's Eastern Oblasts of Kherson, Zaporizhzhia, Donetsk, and Luhansk. These conflicts have no basis under international law, and there should be a collective non-recognition policy of the annexations, economic sanctions, and other remedies for as long as it takes for them to be returned to their rightful sovereign, that is, Ukraine.

In terms of solving territorial conflicts, international law could regain legitimacy and relevance by being consistent and clear about the nature of these conflicts. There are indeed grounds to negotiate and increase the autonomy of places such as Abkhazia in Georgia and Transnistria in Moldova. In contrast, the naked imperial aggression and illegal annexations under the justification of "protecting" the inhabitants is an entirely separate question.

The approach and response to these things should be different as well. With illegal annexations, the collective non-recognition and sanctions can be a long waiting game, yet worth it. But in terms of the never-ending mediation impasse of the post-Soviet *uti possidetis* conflicts, the passage of time works against finding a lasting solution.

The framework for finding a mutually acceptable and legally justifiable compromise is there. Now, there needs to be only an increase in political determination to push the mediation efforts over the finish line. The affected people deserve better than this.

India Should Introduce an Insolvency Law for the Municipalities and Local Bodies

Devendra Mehta*

Abstract

Municipalities have to undertake massive capital expenditure to build infrastructure and fulfil their obligations to the citizens as envisaged in the Constitution. However, they are faced with dwindling revenues, high administrative expenses, deteriorating credit profiles, borrowing restrictions, and conditionalities on receipt of the grants. As a result, municipalities need to find novel methods to enhance their revenue-generating and fund-raising capabilities. Introducing legislation for the insolvency of municipalities and similar local bodies will help spur infrastructure financing. Though the Constitution will determine the bounds of such an insolvency law, an insolvency law will bring transparency, mitigate risk, lower borrowing costs, garner a wider pool of capital, delineate principles between public interest and creditor rights, and signal to lenders that debt restructurings will be predictable. Additionally, certain novel methods, which are currently sparsely used, may see wider usage by municipalities to bolster their financial position on introducing such a law. Concurrently, numerous best practices and precedents established in the corporate insolvency resolution process can be transitioned into a municipal insolvency law, enabling a smoother implementation.

I. Background

Village Panchayats, the rural local governing bodies, have been functioning in India since ancient times and have continued to be in existence under the

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Mughals and the British, in some guise. The urban local bodies have been in existence for two hundred years. The Municipal Corporation of Chennai (Madras) was set up in 1688, and that of Kolkata (Calcutta) and Mumbai (Bombay) in 1726.[1]

Post-independence, the assimilation of local governing bodies, the third tier, in the mainstream government was initiated with the enactment of the Seventy-Third and Seventy-Fourth Amendments to the Constitution; Part IX, consisting of Articles 243 to 243O pertains to The Panchayats and Part IXA, consisting of Articles 243P to 243ZG deal with The Municipalities.[2]

This paper primarily deals with The Municipalities[3] ("TMs"). Article 243W, in conjunction with the Twelfth Schedule of the Constitution, delineates eighteen functions/duties that a State Government may assign to TMs. These functions, apart from public duty, may also have the potential to generate revenue for TMs: land use and construction of buildings, management of roads and bridges, water supply, solid waste management, and urban amenities, etc. In consonance with the aforesaid functions, vide Article 243X, the State may authorise and/or assign TMs to levy, collect or appropriate taxes, duties, tolls, and fees. In addition, the Constitution also provides that the Finance Commission ("FC") should review the financial position of TMs, an aspect briefly discussed later in the paper. However, the duties and the funding required to perform those duties have not marched in tandem, the latter

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[1] Snehashish Mishra & Nilanjan Gupta, *Netaji's mayoral tenure: People-centric administration through nationalistic ethos*, ORF (Jan. 24, 2024), https://www.orfonline.org/expert-speak/netaji-s-mayoral-tenure-people-centric-administration-through-nationalistic-ethos.

[2] INDIA CONST.

[3] *Id;*The Municipalities include Nagar Panchayat, Municipal Council and Municipal Corporation as defined in Article 243Q of the Indian Constitution. The definition excludes Cantonment Boards on grounds of national security. Furthermore, the rural urban bodies have been kept out of the purview of the paper.

perpetually falling short. Out of the 18 functions to be performed by municipal bodies, less than half have a corresponding financing source.[4] Prudent financial principles require that every line item of expenditure should be backed by its revenue stream. Revenue could be either by TMs own revenue or by Central/State grants. In the absence of matching revenue, paucity of funds leads to sub-standard services and poor infrastructure for the populace at a time of growing urbanisation.

II. The Municipalities and Urbanisation

India has been urbanising rapidly on the back of a growing economy wherein the population is transitioning out of the farmlands. Numerous methodologies and classification systems are in existence to define urbanisation: the census criterion, metropolitan regions, urban agglomeration, megapolis, metropolitan city etc. Irrespective of the classification one adopts, at the very minimum, one-third of India's population is urban and is expected to increase to 43% by 2035.[5]

From a governance perspective, a Nagar Panchayat is for the areas transitioning from rural to urban, a Municipal Council is for a small urban area, and a Municipal Corporation is for a large urban area.

The absolute numbers of urbanisation are often understated due to political resistance. "*Often the rural local governments themselves are reluctant to go urban because local politicians are apprehensive that they would not have*

[4] Reserve Bank of India, *Report on Municipal Finances* (2022), https://m.rbi.org.in/scripts/PublicationsView.aspx?id=21357.
[5] United Nations Human Settlements Programme (UN-Habitat), *World Cities Report 22 – Envisaging the future of cities* (2022), https://digitallibrary.un.org/record/3984713?ln=en&v=pdf.

access to large amounts of funds for rural development schemes; they also fear regulations which urbanisation brings with it."[6]

It is a truism that the development of urban infrastructure in India has not kept pace with urbanisation. The need will further aggravate as the existing infrastructure deteriorates or requires rebuilding due to adverse climatic events like rising sea levels, floods, heat islands, and sandstorms. To cater to the infrastructure needs, the TMs need to enhance their revenue-generating and fund-raising capabilities in conjunction with capacity building and institutional support from the State and the Central Government.

III. State of Municipal Finance in India

Municipal revenues in India from own sources, consisting primarily of property tax, water tax, and toll tax, have been low, at 0.43% of Gross Domestic Product ("GDP"), and the total municipal revenues/expenditures have stagnated at around 1% of GDP for over a decade. In contrast, municipal revenues/expenditures account for 4.5% for Poland, 6% for South Africa, 7.4% for Brazil, 13.9% for the United Kingdom and 14.2% for Norway.[7]

The composition of municipal revenues varies across countries in accordance with their respective constitutions. Local governments in Australia, Belgium, Canada, France, New Zealand, Spain and Switzerland largely depend on their own revenue, whereas the ones in Austria, Greece, Ireland, Luxembourg, Turkey and the United Kingdom rely on general government grants.[8]

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[6] Isher Judge Ahluwalia et al, *State of Municipal Finances in India – A study prepared for the Fifteenth Finance Commission* 1 (2019), https://fincomindia.nic.in/archive/writereaddata/html_en_files/fincom15/StudyReports/State%20of%20Municipal%20Finances%20in%20India.pdf.

[7] *Id.* at 7.

[8] Reserve Bank of India, *Report on Municipal Finances* 12 (2022), https://m.rbi.org.in/scripts/AnnualPublications.aspx?head=Report%20on%20Municipal%20Finances.

Ease and efficiency of business dictate that certain taxes like income taxes and value-added taxes should be levied centrally. The latter, in all situations, will result in some loss to the local exchequer and similar was the case with the introduction of Goods and Services Tax ("GST") in India. However, one solution to obviate such situations is to work out a distribution mechanism from the Central pool to the local authorities based on some preset criterion, for e.g., population, area or any country-specific appropriate metric.

A. Goods and Services Tax was detrimental to Municipal Finance

The revenue-generating capacity of TMs in India has suffered with the introduction of GST. Local and consumption taxes like octroi,[9] local body tax, entry tax and advertisement tax, which were the prerogative of TMs, have been subsumed within the GST. To make matters worse, the proceeds of GST are divided between the Centre and the State with no constitutional provision providing for sharing with the third tier i.e., TMs. In contrast, many countries across the world have provided for sharing such taxes with their urban local bodies.[10] For example, Brazil shares its tax revenues between its 25 states, the federal district and 5,500 municipalities. Similarly, South Africa also shares an equitable share of nationally raised revenues with its local government.

In India, property tax, accounting for approximately half of tax revenues, is the primary source of revenue.[11] Limited revenue sources increase the

[9] Maharashtra Goods and Services Tax (Compensation to the Local Authorities) Act, 2017, Maharashtra Act No. 41, 2017 provides for compensation on account of octroi to all 27 municipal corporations in Maharashtra. A few other states too have taken some measures but none as robust as that of Maharashtra.

[10] Ahluwalia, *supra* note 6, at 4.

[11] Reserve Bank of India, *Report on Municipal Finances* 12 (2022) https://m.rbi.org.in/scripts/AnnualPublications.aspx?head=Report%20on%20Municipal%20Finances.

dependence of TMs on the transfer of funds from the upper tiers, i.e., the State and the Central Government (30% - 35% of revenue receipts), resulting in a lack of financial autonomy.[12] Further, these transfers are not with regular periodicity but are based on the whims and fancy of the State Government. Moreover, Members of the Legislative Assembly ("MLA") possibly favour erratic transfers, if at all, to showcase their power.

Thus, TMs not only have to claw back the revenue lost but also improve the efficiency of existing revenue streams to reduce dependency on transfers. In addition, TMs should find incremental sources of revenue and funds to provide requisite services.

B. Archaic Laws and Conventions govern Municipal Finance

TMs in India are required to balance their budget by law; indirectly creating a ceiling on the expenditure. Also, TMs treat all expenditures as similar, irrespective of the nature of expense; revenue, or capital.[13] This antiquated accounting convention needs to change considering the capex requirements of infrastructure that needs to be built. Further, most TMs cannot borrow without the permission of the respective State governments, which in turn may prescribe conditions on the types of instruments, limits, and tenors of repayment;[14] a handful of States have rolled out a policy within which TMs are allowed to borrow.

Municipal borrowings in India are concentrated at a few large corporations and are negligible at less than 0.05 per cent of GDP cumulatively for all TMs. More than half of the borrowings are from banks, financial institutions, and

[12] *Id.*
[13] Ahluwalia, *supra* note 6, at 5.
[14] Reserve Bank of India, *supra* note 11.

loans from Centre/State governments. Capital markets bond issuances are less than a tenth of the total borrowings, of which the majority has been used for capital expenditure.[15] Bonds of 14 municipalities are listed on Stock Exchanges: Pune, Greater Hyderabad, Ahmedabad, Surat, Indore, Lucknow, and a few others.

A study of 37 large municipal corporations revealed that revenue expenditure was 63% of total expenditure. Within revenue expenditure, administrative expenses accounted for 57%.[16] Thus, the TMs do not have the requisite capacity for the much-needed capital expenditure. Further, deteriorating revenue in conjunction with high administrative expenses leads to an adverse credit profile, making it difficult for TMs to borrow.

The abolition of the Planning Commission also resulted in a gap on account of capital expenditure, as the same was earlier a plan outlay.[17]

Thus, a suitable mechanism needs to be devised that makes it attractive for lenders to lend, against requisite security, to TMs. This will enable TMs to fulfil their obligations to citizens in the face of insurmountable odds.

C. Other impediments to Municipal Finance

Competitive electoral politics has been responsible for the deteriorating fiscal position of the States, and the situation may worsen further. The adverse fiscal position will make it increasingly difficult for the States to allot additional funds to TMs. Moreover, a hike in property tax rates or user charges for

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[15] *Id.*
[16] Ayush Khare et al., *Finances of Municipal Corporations in Metropolitan Cities of India – A study prepared for the Fifteenth Finance Commission* 21 (2019), https://fincomindia.nic.in/asset/doc/commission-reports/15th-FC/reports/studies/Finances%20of%20Municipal%20Corporations%20in%20Metropolitan%20cities%20of%20India.pdf.
[17] Ahluwalia, *supra* note 6, at 5.

services provided by TMs is also frowned upon by politicians, even though the property values, as recorded by the TMs, are always lagging behind the market value. A study of the six largest municipalities revealed that TMs faced challenges in aligning the value of properties to market and levy tax accordingly.[18] Also, an increase in user charges requires the permission of the State, which is loath to grant the same due to public opposition.[19] The aforesaid low base gets further eroded in case of a poor macro-economic environment; Brihanmumbai Municipal Corporation's ("BMC") property tax collection for the fiscal year 2023-24 at INR 32 Bn was substantially below its target of INR 45 Bn.[20]

In addition, TMs give several exemptions to religious and charitable institutions, public properties, educational institutions, senior citizens etc. Central Government properties too are exempt from municipal taxes.[21] Furthermore, the freedom to realise better revenue through unlocking property value is restricted. For example, a higher FSI in Mumbai will yield higher property taxes, but the power to increase FSI vests with the State Government.[22] All of the above create challenges for TMs to enhance revenue.

Kyoto, a city in Japan, which was on the verge of bankruptcy is an example wherein similar problems were encountered and provides a partial template for the likely solutions.

Kyoto's temples and shrines, which are legally registered religious corporations, are exempt from property taxes. To preserve the city's traditional

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[18] Khare, *supra* note 16, at 25.
[19] *Id*. at 13.
[20] Richa Pinto, *At ₹3k cr, BMC records lowest property tax mop up in 10 years*, TIMES OF INDIA (Apr. 2, 2024), https://timesofindia.indiatimes.com/city/mumbai/at-rs-3k-crore-bmc-records-lowest-property-tax-mop-up-in-10-years/articleshow/108960561.cms.
[21] Khare, *supra* note 13, at 27.
[22] *Id.* at 33.

atmosphere, the height of buildings is limited, resulting in lower property taxes. Also, due to demographics, some residents pay low or no property tax; 10% of Kyoto's residents are college students, and about 28% of residents are over 65.[23] In addition, the city took on some projects which never achieved the forecasted revenues, primarily the Tozai subway line;[24] an aspect discussed later in the paper vis-à-vis China.

Kyoto thus had to prepare a restructuring plan that called for trimming the bureaucracy, raising the minimum age of those eligible for discounts, and cutting subsidies.

Rio de Janeiro in Brazil declared a State of public calamity[25] in 2016, the primary reason being the decrease in tax collection, especially regarding goods, services, royalties, and special interests in oil. One of the reasons for the decrease was excessive tax incentives.[26] This again demonstrates that too many tax incentives may be popular in the short run but are disastrous for fiscal health in the long run.

D. Role of Finance Commissions in Municipal Finance

Article 280(c) of the Constitution casts a duty on the Finance Commission to recommend measures needed to augment the Consolidated Fund of a State to supplement the resources of TMs.[27]

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[23] Eric Johnston, *Kyoto is facing bankruptcy. What happens now?*, THE JAPAN TIMES (Sep. 21, 2021), https://www.japantimes.co.jp/news/2021/09/20/business/kyoto-bankruptcy-tourism/.
[24] Lucy Kraft, *Kyoto, Japan's beautiful imperial capital, is going broke fast*, CBS NEWS (May 20, 2022), https://www.cbsnews.com/news/japan-kyoto-tourism-city-faces-bankruptcy/.
[25] Abnormal situation arising due to disasters, damages or losses resulting in postponement of payment of debt instalments, expenses etc.
[26] Catarina Ferraz, *When liquidation is not an option: A global study on the treatment of local public entities in distress* (Nov. 2022) (academic paper, INSOL International) (on file with Royal Holloway, University of London).
[27] INDIA CONST., art. 280(c).

Six Finance Commissions, from FC-X to FC-XV, have given their recommendations for local bodies. The grants for urban local bodies have increased from INR 1,000 crores of FC-X to INR 87,144 crores of FC-XIV, though the actual disbursements were 10% to 18% lower due to failure of local bodies to meet the conditionalities.[28] FC-XV has recommended a total grant of INR 1,21,055 crores.

The conditionalities prescribed for grants have varied from year to year. FC-X and FC-XI required that no grant amount was to be used for expenditure on salaries and wages. In addition, FC-XI suggested the usage of grants for the maintenance of accounts and audits, development of a financial database and balance for maintenance of core services like primary education, health care, safe drinking water, sanitation, etc.

The FC-XII recommended that priority be given to the creation of financial databases and maintenance of accounts using modern technology and management systems. Further, 50% of the grant should be used for solid waste management.[29]

The FC-XIII stipulated nine conditions to access 33% of the grants. These conditions primarily pertained to accounts, audits, budget documents, electronic banking, State finance commissions, property tax and delivery standards for essential services.

The FC-XIV recommended grants in two parts: an unconditional basic grant and a 20% conditional performance grant. The conditional performance grant required local governments to show an increase in their own source of revenue

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[28] XV Finance Commission, *Finance Commission in Covid Times – Report for 2021 – 26* 172 (2020), https://fincomindia.nic.in/asset/doc/commission-reports/XVFC%20VOL%20I%20Main%20Report.pdf.
[29] Ahluwalia, *supra* note 6, at 22.

and submit audited annual accounts. Municipalities, in addition, had to publish the service level benchmarks relating to basic urban services each year.

The FC-XV prescribed minimum entry-level conditions for the grants, web-based availability of annual accounts for the previous year and audited accounts for the year before as well as notification of minimum floor rates of property taxes. In addition, for million-plus cities, about 32% was tied to ambient air quality standards, and the remaining to meet service level benchmarks on drinking water supply, rainwater harvesting, water recycling, solid waste management and sanitation. For non-million-plus cities, 40 per cent of the grants are untied, and 60 per cent is tied to the national priorities of drinking water, rainwater harvesting, solid waste management and sanitation.

The common threads that run through the recommendations of finance commissions are that of more robust accounts, timely audits and meeting the service level benchmarks for essential services, all improving over the years, but not yet satisfactory. The importance can be seen from the fact that the Constitution, too, under Article 243Z, states that the State must make provision with respect to maintenance of accounts of municipalities and the auditing of such accounts.

E. The Way Forward for Municipal Finance

As articulated above, TMs must undertake massive capital expenditure to provide the services as provided in the Constitution but are faced with dwindling revenues, high administrative expenses, deteriorating credit profile, borrowing restrictions, conditionalities on grants of finance commission and the arduous task of balancing the budgets.

FC-XV has suggested more efficient property tax administration and rationalisation of professional tax to improve revenue. In addition, all levels of government should jointly explore the introduction of three three-tiered

GST. Moreover, TMs should have an unfettered right to vehicle taxes, parking taxes, green surcharges, local entertainment tax, land-based taxes, and unlocking of land value, including FSI, to augment municipal revenues.

As the examples of Kyoto and Rio illustrate, inefficiencies of revenue are a potential hazard for the long term. A similar fate awaits several municipalities/cities/councils in the United Kingdom. One in ten councils in England have warned that they will go bankrupt in the next twelve months.[30] Councils are handling the financial distress as befits them; Thurrock, Slough, Croydon, and Birmingham have raised local taxes by 10%,[31] Nottingham intends to raise prices of events, public toilets, and transport;[32] Middlesborough voted for maximum tax rise along with a charge for green waste;[33] Birmingham is dimming streetlights, resorting to less frequent waste collection and stopping expenditure on arts.[34] Across England, libraries, museums, leisure centres and parks are bracing for cuts.[35]

Thus, the municipalities must strike a fine balance of revenue enhancement without inconveniencing its populace; a stitch in time saves nine.

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[30] Patrick Butler, *Nearly one in 10 English councils expect to go bust in next year, survey finds*, THE GUARDIAN (Feb. 28, 2024), https://www.theguardian.com/society/2024/feb/28/nearly-one-in-10-english-councils-expect-to-go-bust-in-next-year-survey-finds.

[31] Eugenio Vaccari & Yseult Marique, *One in five councils at risk of bankruptcy – what happens after local authorities run out of money*, THE CONVERSATION (Feb. 14, 2024), https://theconversation.com/one-in-five-councils-at-risk-of-bankruptcy-what-happens-after-local-authorities-run-out-of-money-222541.

[32] *Id.*

[33] Naomi Corrigan, *Council budget to avoid bankruptcy approved*, BBC NEWS (Mar. 10, 2024), https://www.bbc.com/news/articles/cm5ry0v0190o.

[34] Tom Rees, *UK Town's are going Bankrupt. Here's what's gone wrong*, BLOOMBERG (Feb. 28, 2024), https://www.bloomberg.com/news/articles/2024-02-28/uk-towns-are-going-bankrupt-here-s-what-s-gone-wrong-quicktake.

[35] Open Access Government, *Local government's financial crisis: Are local institutions disappearing?* (Jan. 17, 2024), available at https://www.openaccessgovernment.org/local-governments-financial-crisis-are-local-institutions-disappearing/172428/.

Whilst the revenue enhancement mechanisms will take care of revenue expenditure and contribute partly to infrastructure enhancement, the States should liberalise borrowing thresholds for TMs for the capital projects, with appropriate caps and within defined financial ratios. Caps, ratios, and vigil on off-balance sheet borrowing, a prerequisite to avoid situations like that of China, are described later in the paper. Borrowings within the bounds of rationality will ensure that the creation of new infrastructure is not hindered due to lack of funds. Certain provinces in Canada, like Ontario, Quebec, Manitoba, and Prince Edward Island, allow municipalities to borrow only for capital projects, albeit with caps.[36]

Also, several large cities are being constructed across the globe, vying for the same pool of limited finance; ninety-one cities have been announced in the past decade, of which fifteen in the last year.[37]

This paper argues that the introduction of legislation for the insolvency of TMs will not only spur financing for the aforesaid infrastructure but also will bring about improvements in the conditions imposed by finance commissions, which in turn will bring transparency. The paper would rely on experience and concepts of other jurisdictions where applicable. An endeavour would be made to keep the law practical; the best model law is of little use if it is not implementable, as is usually talked about in the South African municipal insolvency law. The paper starts by answering the question, why an insolvency law?

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[36] Stephanie Ben-Ishai, *Local public entities in distress – a critical analysis of the Canadian approach* (Nov. 2022) (academic paper, INSOL International) (on file with Royal Holloway, University of London).

[37] *Boom: towns, why everyone is building new cities*, THE ECONOMIST, (Mar. 7, 2024), https://www.economist.com/finance-and-economics/2024/03/07/the-world-is-in-the-midst-of-a-city-building-boom

IV. Why an Insolvency Law for Municipalities?

Port Canning Municipality ("PCM"), established in 1862,[38] is the first and possibly the only municipality that went bankrupt in India. The municipality had grand plans for parks, wharves, jetties, tramways, railway stations, and dockyards which didn't materialise.

The origins of PCM are interesting. In 1853,[39] the Bengal Chamber of Commerce ("BCC") feared that the silting of the Hooghly River might result in Calcutta Port becoming unnavigable, and a search for an auxiliary port ensued. Matla estuary,[40] 45 km south-east of Calcutta, amongst Sunderbans, was chosen where the waters of Bidyádharí, Karatoyá, and Athárabánká rivers converged. Henry Piddington,[41] a storm expert, warned that the site is unsuitable for a port as a cyclone may destroy the port. Nevertheless, about 9000 acres of land were acquired: 8260 acres in the first instance[42] and 650 acres in the second.[43] The port was named after then-Governor General Charles Canning, who subsequently became the Viceroy. The municipality had taken loans and issued debentures worth INR 1 Mn.[44] A railway line from Calcutta to Port Canning was built for INR 6M.[45] A company, Port Canning Land Investment, Reclamation and Dock Company ("PCC"), was incorporated to undertake work essential to the port with exclusive concessions and rights. PCC thereafter issued equity, which had a premium of

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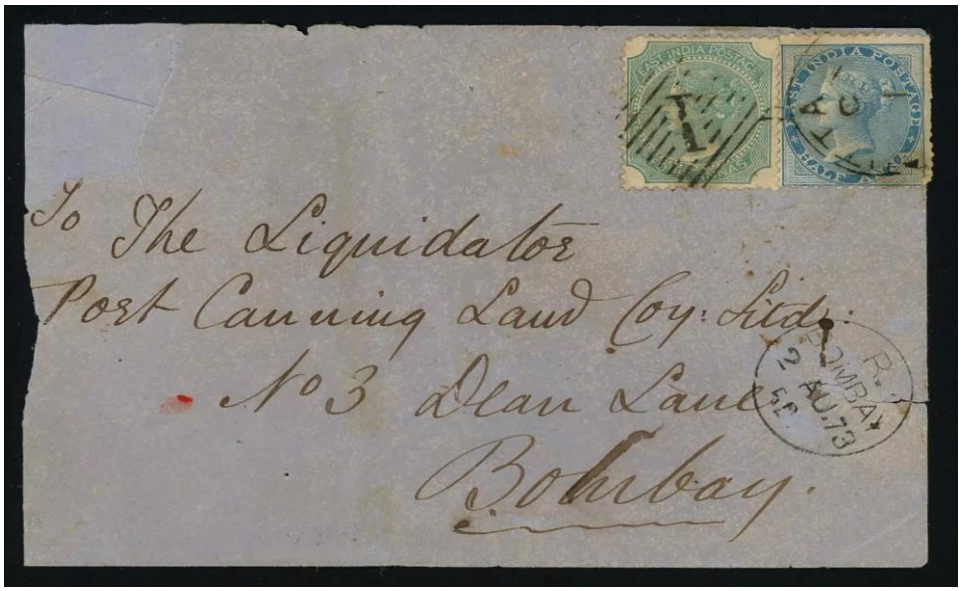
[38] F.E. Pragiter, *Cameos of Indian Districts – The Sunderbans*, 89 THE CALCUTTA REVIEW 280, 295 (1889).
[39] *Id.*, at 294.
[40] W.W. HUNTER, THE IMPERIAL GAZETTEER OF INDIA, XI 216 (1886).
[41] Amitav Ghosh, *Remembering Henry Piddington, Meteorologist Extraordinaire, And His Prophetic Warnings*, READER'S DIGEST (May 23, 2020).
[42] Pragiter, *supra* note 38, at 294.
[43] HUNTER, *supra* note 40, at 217.
[44] JOHN BESEMERES, PORT CANNING PROBLEM; A LETTER TO THE RIGHT HON. LORD STANLEY, M.P., REVISED AND REPRINTED FROM THE INDIAN EXAMINER 5 (1868).
[45] *Id.*

INR 12,000 in Bombay and INR 10,000 in Calcutta.[46] A number of reasons made the port unviable, and the final nail was a cyclone on November 2, 1867, which destroyed the port.

PCC was put into liquidation in 1870, and PCM faced bankruptcy; suits were instituted by debenture holders, property of the municipality was attached against a decree, debentures were commuted for freehold land rights, some were paid at 50% of value, and the Government declared that it had no obligation to fulfil the liability. The whole of Canning municipal estate was attached and put under the charge of the Collector.[47]



An 1873 envelope addressed to The Liquidator of the Port Canning Company

One hundred fifty years have passed since the Port Canning bankruptcy, but

[46] HUNTER, *supra* note 40, at 217.
[47] *Id.* at 219.

we still await a law on municipal insolvency. Friedrich Meili, a renowned Swiss law professor, put forward a detailed proposal for a law when four municipalities were on the brink of insolvency in Switzerland. He stated that the main benefit of such a law is that of legal certainty.[48]

The legal certainty arising out of the Insolvency and Bankruptcy Code ("IBC") is one of the reasons that has resulted in the phenomenal growth of private credit. Similarly, municipal insolvency laws, in the first instance, will act as a signalling exercise to lenders that debt restructurings will be predictable and equitable. Though a lack of insolvency law is not the only factor inhibiting lenders, it is an important one, in conjunction with the lack of robust accounts, as pointed out by various Finance Commissions, FC-XI to FC-XV, have been vociferous over the lack of accounts and have reiterated the fact in every report. In contrast to lenders, the law will signal to TMs that whilst they must maintain essential services, fiscal profligacy will have consequences.

Importantly, such laws also help to achieve macroeconomic goals. Effective insolvency laws and creditor rights systems lead to efficient capital markets, better risk management, lower borrowing costs, and availability of a wider pool of capital for credit; in effect minimizing systemic risk. This in turn, expands the fiscal space for infrastructure investments, promotes fiscal transparency, and deepens financial market reforms.[49]

In a circuitous way, capital markets help municipalities improve upon the deficiencies pointed out by the Finance Commissions. Guwahati Municipal

[48] Lili Liu & Michael Waibel, *Subnational Insolvency: Cross Country Experience and Lessons* 22 (Working Paper, Policy Research Working Paper) 4496 (2008). https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1400640.
[49] *Id.* at 33.

Corporation is adopting double-entry bookkeeping to access the capital markets.[50]

Good infrastructure will improve productivity in the economy and help India grow faster. On the flip side, bereft of good infrastructure, the cities over a period will start to decline as no one would want to stay in them. A recent example of a reaction to poor infrastructure is from the city of Bangalore, where people are contemplating a move out of the city due to water shortage. Similarly, the post-Covid world showed us glimpses of such an eventuality as the employees were reluctant to return to cities because of poor infrastructure: overcrowded buildings, congested roads, inadequate open spaces, sluggish progress of metro, increased commute times due to traffic congestion, reduced family time, soaring rents and increased cost of living.[51] It is true that most employees will return, given the current state of the job market. However, if such an eventuality takes place at any time in the future in a better macro environment, the prices of properties will start to decline, with a concomitant effect on the revenues of TMs.

Thus, the introduction of municipal law will help kick-start investments in urban infrastructure by giving confidence to lenders to lend at the risk adjusted borrowing costs. Further, in the eventuality of an insolvency, the laws will give confidence to creditors of structured equitable resolution, enabling TMs to re-enter capital markets.[52] Simultaneously, TMs are put on a sustainable path to deliver public services post-resolution.

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[50] *Climate change mitigation needs funding*, THE INDIAN EXPRESS (Sep. 13, 2024), https://indianexpress.com/article/india/climate-change-mitigation-needs-funding-9564785/.
[51] Ashish Kolvalker, *Why a complete return to office may not be the best approach for India Inc*., PEOPLE MATTERS (Jul. 6, 2023), https://www.peoplematters.in/article/employee-relations/why-a-complete-return-to-office-may-not-be-the-best-approach-for-india-inc-38339.
[52] Liu & Waibel, *supra* note 48, at 4.

However, before we embark on the nuances of municipal insolvency law, a brief overview of the peculiarities of TMs is essential.

V. Peculiar Characteristics of Municipalities in India

The boundaries of an insolvency law for municipalities are set by the Constitution. Article 243Q[53] specifies the modus operandi for constituting TMs, and Article 243R[54] mandates that the persons forming part of the TMs are to be chosen by direct elections.

In addition, the State may, by law, provide representation of persons having special knowledge or experience in municipal administration. Also, the State may, by law under Article 243X,[55] authorise TMs to levy, collect and appropriate taxes, duties, tolls, and fees.

As mentioned above, TMs are responsible for eighteen essential duties prescribed under Article 243W[56] read with the Twelfth Schedule[57] like urban planning, regulating land use and construction, water supply, health and sanitation, fire services, protection of the environment, urban poverty alleviation, slum upgradation etc. Though not specified in the Constitution or the State laws, whilst providing essential services, TMs may or may not charge a fair price, i.e., the cost of providing the services. Currently, the user charges vary across municipalities; at the lower end 8% of revenue expenditure for Chennai and 17% for Kolkata, whereas a high of 82% for Bangalore.[58]

Supreme Court, in the case of Hindustan Construction Company,[59] while

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[53] INDIAN CONST., art. 243Q.
[54] INDIAN CONST., art. 243R.
[55] INDIAN CONST., art. 243X.
[56] INDIAN CONST., art. 243W.
[57] INDIAN CONST., Schedule XII.
[58] Khare, *supra* note 16, at 31.
[59] Hindustan Construction Company Limited & Anr. vs. Union of India & Ors, (2019) SCC OnLine SC 1706.

referring to NHAI, had said that the development and maintenance of national highways is a government function that falls within Entry 23 of List I of the Seventh Schedule[60] to the Constitution of India. It further added that "*NHAI is a statutory body which functions as an extended limb of the Central Government and performs governmental functions which obviously cannot be taken over by a resolution professional under the Insolvency Code, or by any other corporate body. Nor can such Authority ultimately be wound up under the Insolvency Code.*" Partially, a similar reasoning may apply to TMs as per-se they cannot be liquidated.

Thus, a successful resolution/restructuring must be the outcome of insolvency; in-effect, a debtor-in-possession restructuring with an independent oversight. However, this paper also delves into "*municipality-like*" Public Private Partnership ("PPP") that may be amenable to liquidation in limited circumstances.

Also, strictly applying the aforesaid judgement may imply that a resolution professional may not be able to take over the management of TMs. However, as discussed later in the paper, based on current practice in TMs and the fact that TMs are fundamentally different from central statutory bodies, it is possible to take over the management of TMs by a resolution professional if the person simultaneously works under the directions of the State. Thus, a takeover of management, though not possible under IBC, is possible under a municipal insolvency law.

VI. Building Blocks of an Insolvency Law for Municipalities

INSOL International published a study on local entities in distress in 2022, recommending broad contours of insolvency law for such entities. The study

[60] INDIAN CONST., Schedule VII.

acknowledged the fact that laws pertaining to local public entities in distress are heavily influenced by local traditions, cultures, and history. There is no one-size-fits-all approach, and encouraged national legislators to devise principles based on their unique circumstances.[61]

Nevertheless, the study advocated that "*in determining the rules applicable to local public entities in distress, domestic legislators should pursue territorial solutions based on the uniform, traditional principles of collectivity and equality of treatment of creditors*." Furthermore, the law should be predictable, fair, transparent and allow the participation of all parties in the process to safeguard their respective interests.

In several other jurisdictions, the local entities are in distress because of growing demand from an aging and declining population resulting in dwindling revenues. However, India is not in the same economic cycle. India has a growing population, and a robust municipal insolvency law will impart confidence amongst creditors to lend to municipalities for capital expenditure. As explained, in India, the reasons for the decline in revenue are some of the taxes were subsumed into GST, low or no increase in property taxes and user charges, inability to levy new taxes, reluctance on the part of States to cede control over revenue streams and the general inefficiency of TMs.

Moreover, municipalities inherently deal with public interest; an aspect that has been accorded great importance in insolvency laws. Article 6 of the UNCITRAL Model Law on Cross-Border Insolvency specifically carves out an exception that prevents the Court from refusing to take an action if the action would be manifestly contrary to public policy.[62]

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[61] Ferraz, *supra* note 26.
[62] UNCITRAL, MODEL LAW ON CROSS-BORDER INSOLVENCY GUIDE TO ENACTMENT AND INTERPRETATION 146 (2013).

In accordance with the aforementioned limitations as defined by the Constitution, the public interest involved, and the broad guidelines by INSOL International, let us embark on creating the nuts and bolts of such an insolvency framework.

A. Who should be included in the definition of Municipality?

Nagar Panchayats, Municipal Councils, and Municipal Corporations constitute TMs by definition. In addition, any statutory body arising out of the District Planning Committee under Article 243ZD of the Constitution,[63] Metropolitan Planning Committee under Article 243ZE of the Constitution[64] and similar bodies under any State law should be included in the definition of TMs.

The rationale for the inclusion of Article 243ZD and Article 243ZE is provided by the Constitution, as the two Articles are embodied in Part IXA[65] of the Constitution, which deals with TMs. *Vis-à-vis* the other bodies that are to be included in the definition of TMs, a two-fold test can act as an appropriate yardstick; firstly, it is a statutory body, and secondly, it is providing any of the services specified in the Twelfth Schedule of the Constitution. An affirmative answer would result in an inclusion. This is because the aforesaid bodies, though in name not municipalities, are performing similar functions. The example of the Yamuna Expressway Industrial Development Authority illustrates this fact.

Jaypee Infratech Limited ("JIL") was part of the first twelve cases that were referred under IBC. However, the case took long to resolve; it had been

[63] INDIAN CONST., art. 243ZD.
[64] INDIAN CONST., art. 243ZE.
[65] INDIAN CONST., Part IXA.

meandering through the Courts, with multiple visits to the Supreme Court.[66] The presence of a municipal insolvency law may have resulted in a quicker resolution.

In brief, the relevant facts of the case are as follows. Yamuna Expressway Industrial Development Authority[67] ("YEIDA") was to acquire land from farmers for the development of industrial, commercial and residential areas. In accordance with its mandate, YEIDA signed a lease agreement for the construction of an expressway and commercial exploitation of adjoining land with Jaiprakash Associates Limited, subsequently assigned to JIL. Farmers whose lands were acquired were demanding fair compensation. On orders of the State Government, YEIDA agreed to the demands of the farmers. Meanwhile, JIL was admitted to insolvency. The resolution applicants in insolvency treated compensation payable to YEIDA as an unsecured operational debt and assigned a paltry sum to the claim in their resolution plans; an amount of INR 1 Mn was assigned to YEIDA against its claim on account of additional compensation of INR 16.89 Bn.[68] YEIDA had consistently been challenging such treatment of its claim by the resolution applicants. Thus, the resolution plan, though approved on March 23, could not be implemented for over a year. The State Government did not consent to the resolution plan of the successful resolution applicant.[69]

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[66] IDBI Bank Limited v. Jaypee Infratech Limited, Company Petition No. (IB)-77(ALD)/2017 of 2023 (NCLT, Allahabad).

[67] UP Government has enacted the UP Industrial Development Act 1976, to ensure planned development of industrial and allied activities in the State. Yamuna Expressway Industrial Development Authority has been created under this Act for systematic development of notified area abutting Delhi.

[68] Yamuna Expressway Industrial Development Authority v. Monitoring Committee of Jaypee Infratech Ltd and Suraksha Realty, Company Appeal (AT) (Insolvency) No. 493 of 2023 (NCLAT Delhi).

[69] *Id.*

YEIDA's role was akin to that of TMs; TMs operate for the benefit of their local municipal area, whereas YEIDA mandate covered a larger geographical footprint; the first duty prescribed under the Twelfth Schedule is that of "*urban planning including town planning*." However, the resolution applicants and the Courts were searching for a solution within the four walls of the CIRP. A municipal insolvency law would have safeguarded the rights of YEIDA as resolution plan applicants would not have treated the debt as an operational debt and assigned the claim a higher value. Eventually, in May 2024, after the successful resolution applicant agreed to pay INR 13.34Bn to YEIDA on account of compensation, did the resolution plan moved forward.[70] In case the rights of YEIDA would have been protected under a municipal insolvency law, *ab initio*, it is likely that the insolvency would have been resolved faster; litigation by YEIDA may have been avoided. Moreover, it is likely that YEIDA would have accommodated the successful resolution applicant with an additional Floor Space Index ("FSI") to make the project viable.

Similarly, providers of services specified in the Twelfth Schedule in a PPP, irrespective of the corporate structure, should be subjected to the rules of Municipal Insolvency. This is because such service providers, in several cases cannot be liquidated; express consent of the municipality should be sought for such liquidations. The only caveat should be that the legal rights of the municipality, ex-post, should be the same as ex-ante in case of insolvency and restructuring; municipalities' share, whether in equity or in kind, should continue *in toto*. The private service provider should either rejig the debts or a new more efficient service provider should be brought in as in a Corporate Insolvency Resolution Process ("CIRP").

[70] *Id.*

Mumbai Metro One Private Limited ("MMOPL") is one such example. State Bank of India, IDBI Bank and Indian Bank had filed separate applications for insolvency against MMOPL for nonpayment of bank dues. Reliance Infrastructure Limited ("RIL"), at the time of filing of insolvency application, was a 74% shareholder, and Mumbai Metropolitan Regional Development Authority ("MMRDA") held the balance 26%.

The company operates the Versova to Ghatkopar metro line, and the ridership is high. In the case of a CIRP, in the absence of a resolution applicant, the company would undergo liquidation and will inconvenience a lot of passengers. MMRDA was aware of this fact and recently got a valuation done of Reliance Infra's share to explore the possibility of buying the same. The negotiations between MMOPL and MMRDA have been going on since 2020; MMOPL is claiming a valuation of INR 40.26 Bn, and MMRDA is pegging the same at INR 23.56 Bn.[71] Eventually, the State cabinet allowed MMRDA to purchase an RIL stake for INR 40Bn in March 2024.[72] This led to the disposal of insolvency applications by the Courts. However, the banks were in a quandary as the cabinet reversed its decision to purchase in June 2024.[73] Instead, the cabinet has advised MMRDA to consider a one-time settlement at INR 17Bn.[74] Bereft of a municipal insolvency law the State has to spend its

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[71] Priyanka Kakodkar, *Panel values R-Infra's 74% stake in Metro-I corridor at 4000 cr*, SUNDAY TIMES OF INDIA (Mar. 10, 2024), https://timesofindia.indiatimes.com/city/mumbai/panel-values-r-infras-74-stake-in-metro-1-corridor-at-4000cr/articleshow/108367278.cms.

[72] Priyanka Kakodkar, *Cabinet okays buyout of R-Infra stake in Metro-1*, TIMES OF INDIA (Mar. 12, 2024), https://timesofindia.indiatimes.com/city/mumbai/cabinet-clears-purchase-of-r-infra-stake-in-metro-1-corridor/articleshow/108415038.cms.

[73] Manthan K Mehta, *3 months on, cabinet does U-turn on buyout of R-Infra stake in Metro-1*, TIMES OF INDIA (Jun. 29, 2024) https://timesofindia.indiatimes.com/city/mumbai/panel-values-r-infras-74-stake-in-metro-1-corridor-at-4000cr/articleshow/108367278.cms.

[74] Manthan K Mehta, *State not to buy Metro1 but clear its INR 1.7K cr debt*, TIMES OF INDIA (Jul. 5, 2024).

precious resources on a settlement. A municipal insolvency law would have resulted in the restructuring of the private partner's share.

The case of Seven Hills Hospital,[75] specifically in the context of the Mumbai hospital,[76] is another example. In case a municipal insolvency law was in existence, as proposed in this paper, the case may have been resolved by now, which has been in limbo for six years. The proposed resolution plan, in CIRP, had not only impinged on the rights of the Municipal Corporation of Greater Mumbai ("MCGM") by creating a charge for further borrowings but also was overriding MCGM's right and its public duty and thus was rejected.

In summary, the definition of who is to be subjected to the municipal insolvency law should be clear without any ambiguity.

B. Who can file an application for Municipal Insolvency and the Jurisdictional Courts?

United States ("US") has stringent requirements for filing an insolvency application by the municipality. Clause 109(c) of the United States Bankruptcy Code states that the municipality should be bankrupt, specifically authorised by its State law, to file for insolvency and desire to effect a plan to adjust its debts.[77] Insolvency, as per clause 101(32) of USBC, means that the municipality is either not paying its debt as it becomes due, unless disputed, or unable to pay its debt as it becomes due.[78]

In India too, when a municipality is filing on its own, it should have the authorization of the State. The State is responsible for all related matters like

[75] Municipal Corporation of Greater Mumbai vs. Abhilash Lal & Ors, (2020) 13 SCC 234.
[76] The Vizag hospital was resolved under insolvency in July 24. MGM Healthcare submitted a resolution plan 0f INR 1.71Bn against outstanding creditor claims of INR 13.62Bn.
[77] United States Bankruptcy Code, 11 USC §109(c) (U.S.A.) [hereinafter 'USBC'].
[78] *Id.*, §101(32).

earmarking different municipal areas, assignment of taxes, devolution of duties, nominating members to council etc.

However, given the political-economy scenario, it is going to be the rarest of rare occasions when the TMs will seek such permission, and the State will grant the same. This will result in a delay, which will make matters worse for the municipality. Detroit's bankruptcy experience shows that the longer one waits for intervention, the harder it is. *"For 50 years, Detroit's economy, its physical infrastructure, and its social structure had been on a steady decline. And the political system did nothing whatsoever about it.*"[79] England requires local authorities' CFO to issue a section 114 notice whenever the accounts are in imbalance; however, the fact that the incumbent management will be replaced acts as a disincentive for delaying the notice.[80]

Thus, to circumvent the aforesaid agency problem, in addition, financial and operational creditors[81] too should be allowed to file for insolvency of a municipality in case the dues are unpaid for a long, maybe a longer period of outstanding, post overdue date, can be prescribed, (say 120 days – 180 days) as municipalities may have seasonality in their revenue cycle. Moreover, such filings will help municipalities that may have inefficiencies. It is explained later in the paper that these inefficiencies can be reduced by the appointment of a resolution professional/administrator, resulting in both improved financial and operational performance.

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[79] The Pew Charitable Trusts, *After Municipal Bankruptcy – Lessons from Detroit and other local governments.* (2015), https://www.pewtrusts.org/-/media/assets/2015/08/after-municipal-bankruptcy-pdf.pdf.

[80] Eugenio Vaccari & Yseult Marique, *When liquidation is not an option: A global study on the treatment of local public entities in distress* (2022), available at https://pure.royalholloway.ac.uk/en/publications/when-liquidation-is-not-an-option-a-global-study-on-the-treatment.

[81] Operational creditors are the ones who provide goods and services to the municipality.

The threshold of default for operational creditors can be further classified into two buckets. A lower amount for medium, small, and micro enterprises ("MSME"), say INR 5 Mn and a higher for others say INR 50 Mn. This is because MSMEs will face stress bereft of adequate working capital.

i. Project-wise Applications should be Encouraged.

One should take a leaf out of the real estate insolvencies and allow project-wise filing where the lenders have lent, or the creditors have supplied goods/services against a particular project. In a similar vein, where a municipal bond issued by the municipality has a charge on a particular project, an insolvency application should be restricted to that project. The application will lie against the municipality only where the borrowing is of a general nature and cannot be ascribed to a single or a group of projects. This will ensure that the working of the full municipality is not disturbed, and at the same time, resolutions can take place in pockets where the distress emanates.

ii. Jurisdictional Courts for Filing of Insolvency Application.

The tribunals for municipal insolvency should be the same as under the IBC. Municipal insolvencies are not likely to be a frequent phenomenon, and thus, having any kind of special tribunals will add to the cost of the exchequer.

C. Control/Oversight of Municipal Affairs

There are two scenarios in which the question of control/ oversight arises when TMs go bankrupt; in the first scenario, the municipality itself is insolvent and in the second, where either a project of the municipality or a public-private partnership performing duties on behalf of the municipalities is insolvent.

i. The Municipality is Insolvent.

Constitutionally, there is no bar to appoint a Resolution Professional/Administrator to look after the affairs of TMs in case the States choose to appoint the person and designate as an "*Administrator*."

In March 2024, the Brihanmumbai Municipal Corporation ("BMC") that controls the city of Mumbai completed two years under an administrator rule, the longest it has functioned without elected representatives in its history. Further, the elections are not expected before October 2024 till the time State elections are over. In this period of two years, bereft of elected representatives, the city issued work orders for INR 1,500 Bn;[82] the liabilities of BMC were at an all-time high of INR 1,900 Bn.[83]

The aforesaid is not an aberration. In fact, all of Maharashtra's 27 municipal corporations are being run by State appointed administrators since the tenure of elected representatives expired amidst COVID-19. The combined budget of these 27 municipal corporations is INR 1100 Bn.[84] Further, Bengaluru Mahanagara Palike has been without an elected body since late 2020; it did not have one between 2006 and 2010. Chennai was without an elected body between 2006 to 2010.[85]

The above incidents clearly depict that an administrator can be appointed by the State to oversee the affairs of the municipality. Thus, an amendment may be carried out to grant insolvency Courts the power to appoint such an Administrator/Resolution Professional, on the advice of the State, of requisite qualification, compulsorily in case debt and default are proven to the Court.

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[82] Pratip Acharya, *Longest period without elected representatives: BMC completes two years under administrator rule,* THE INDIAN EXPRESS (Dec. 30, 2023).
[83] Richa Pinto, *Mumbai: Mega Infra projects push up BMC's liabilities to a record high of 1.9L cr*, THE TIMES OF INDIA (Dec. 14, 2023), https://timesofindia.indiatimes.com/city/mumbai/mumbai-mega-infra-projects-push-up-bmcs-liabilities-to-a-record-high-of-rs-1-9l-cr/articleshow/105971621.cms#:~:text=MUMBAI%3A%20The%20financial%20liabilities%20of,in%20the%20last%20five%20years.
[84] *The Tyranny of Back-Door Governance*, MINT (Jan. 30, 2024), https://www.livemint.com/news/municipal-corporations-and-the-tyranny-of-backdoor-governance-11706531614204.html .
[85] *Id.*

Furthermore, the Constitution does not provide an outer limit of time till which date the municipality can function without an elected body, though our endeavour should be to define a timeline for the purpose of insolvency resolution.

A few other jurisdictions, including the United States and Australia, have in their armoury the concept of appointing an Administrator in case of municipal distress. The Indian insolvency regime has developed its own concept of an Administrator for insolvencies of financial institutions wherein the Reserve Bank of India ("RBI") nominates an Administrator who is endorsed by the Tribunal to act as Resolution Professional. We can model the municipal Administrator on the same lines wherein instead of RBI, the State nominates the person.

In addition, in the insolvency of a financial institution, RBI also appoints a panel of experts to assist the Administrator as these insolvencies are complex. The Constitution already has a provision for the appointment of experts under Article 243R[86] wherein "*the State may provide for the representation in Municipality of persons having special knowledge of experience in Municipal Administration.*"

Thus, the Administrator, in conjunction with knowledgeable experts, can be roped in to advise on the affairs of the municipality when TMs default. The mandate of the Administrator should be to roll out a plan within a defined period (say one year, extendible by another six months) that will obviate the distress of the municipality. In addition, a five-year plan should be prepared. It should be noted that currently, annual budgets of TMs are prepared without

[86] INDIA CONST., art. 243R.

a medium-term or long-term time horizon. Thus, forecasts of infrastructure requirements and the associated capital requirements do not exist.[87]

Some of the other immediate steps of the Administrator will be like that of a CIRP: taking control and custody of assets, collating claims, appointing professionals, and forming a CoC. In addition, identify wasteful expenditures that can be slashed and embark on the preparation of a resolution plan. The Administrator, along with experts, can identify sources of distress and alleviate them in multiple ways. A few of the common actions that may be taken are described below; the truly innovative and novel solutions will belong to the realm of experts in a particular situation.

a) Increasing the Number of Public-Private Partnerships

More than a hundred years ago, before Chapter 9 of USBC came into being in the case of *Kaufman v City of Tallahassee*,[88] the Supreme Court of Florida commented that "*a city's functions have become more and more ministerial, in that its duties consist largely, if not entirely, in the management of public utilities such as waterworks and sewerage systems, electric lighting and power plants, gas plants, telephones, and street railways for the financial advantage and profit of the city. According to the Court, it took very little stretching of this doctrine to say that no municipal function is governmental, a city is not a political subdivision of the State, not a government but purely a business, commercial, proprietary management of local public interests*." This was a

[87] Fifteenth Finance Commission, *A Municipal Finance Blueprint for India* (2022), https://www.janaagraha.org/files/Municipal-Finance-Blueprint-for-India-Janaagraha.pdf.
[88] Randal C. Picker & Michael W. McConnell, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*; 60 UNIVERSITY OF CHICAGO LAW REVIEW 425 (1993).

revolutionary assertion for the time, though no Courts acted on the aforesaid doctrine.[89]

However, a century later, the assertion that cities have become ministerial does seem to be true. Thus, some of the services provided by TMs may be suitably structured as a business, commercial-oriented PPP, with TMs holding a 26% share. The service providers will have to adhere to strict Service Level Agreements ("SLAs"). In case the existing service providers are from the private sector, better SLAs may be designed or more efficient service providers sought. In fact, some of the areas where the private sector may have better capabilities can be completely outsourced/privatised.

Liberalisation of service delivery, in some but not all areas, will bring the role of markets to the fore, which will not only enhance the level of service but also keep prices in check. As an example, the Delhi discoms were privatised in 2002, 51% being held by private players and 49% by the Delhi Government. The aggregate technical and commercial losses, which were 50% at the time of privatisation, have come down to about 5% today. PPP/privatisation will also help eliminate subsidies and charge a fair price, a task often rendered difficult for politicians in an electoral democracy when TMs are directly providing the service. Moreover, citizens are more amenable to paying a service charge to private players as compared to the Government. The reason all service areas would not be considered under PPP is that some authors[90] have argued that, in the long run, services suffer if the core capabilities are outsourced.

In addition, PPP's will shift the financing burden to private players freeing up

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[89] *Id.*
[90] MARIANA MAZZUCATO & ROSE COLLINGTON, THE BIG CON (2023).

municipal resources; the lenders can create a specific charge on such assets as security. Similarly, the administrative overheads too will be reduced on account of a section of activities moving out of municipalities' direct remit.

Furthermore, for the services under PPP, robust audited accounts will be available in accordance with the conditionalities of the finance commissions which can be rolled up into municipalities accounts to the extent of its share.

b) Carve out Areas as Industrial Districts

Though Jamshedpur was not in any distress, the city illustrates how certain areas can be carved out of the municipalities in distress by the Administrators to achieve cost reduction.

In the last week of December 2023, a notification by the Jharkhand government declared that Jamshedpur would be known as Jamshedpur Industrial City. Further, a Jamshedpur Industrial Township Committee ("JITC") will be formed with up to 27 members of which 11 were to be from Tata Steel.[91]

The Constitution, in the proviso to Article 243Q,[92] states that "*a municipality under this clause may not be constituted in such urban area or part thereof as the Governor may, having regard to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as he may deem fit, by public notification, specify to be an industrial township*."

Tata Steel had been providing all the amenities in the township for over a century. However, the requisite legal status evaded them as the Jharkhand

[91] Abhishek Angad, *Confusion over legality of Jamshedpur Industrial City Notification*, THE INDIAN EXPRESS (Dec. 30, 2023), https://indianexpress.com/article/india/confusion-legality-jamshedpur-industrial-city-notification-9088292/.
[92] INDIA CONST., art. 243Q.

Government had not notified the area as an industrial township under the provisions of the Constitution.

Now that the same has been carried out, post receipt of all approvals, State and Centre, Tata Steel will formally take over the township.[93] Carving out such areas will reduce the administrative burden and the associated costs for the municipality.

c) Expansion of Municipal Areas for Efficiency

At the other end of the spectrum from carving out is the expansion of municipal areas. A combination of municipalities has both pros and cons. The cons are increased bureaucracy, reduced spirit of competitiveness amongst municipalities and reduced local empowerment.[94] The pros mostly translate into financial metrics, which are important for a distressed municipality: economies of scale, lower administrative overheads, greater financial and technical ability to solve complex problems, specialisation resulting in lower costs, better debt-raising capacity and better service delivery.[95]

In 2006, ten municipal councils were merged into the Ahmedabad Municipal Corporation ("AMC") in Gujarat, and in 2020, another was added to the mix. In 2010, three municipalities were merged into the Coimbatore Municipal Corporation. Similarly, in 2021 Pune Metropolitan Region Development Authority and in 2022, the Howrah Municipal Corporation were expanded.[96] A recent example is the merger of three municipalities of Delhi. Hyderabad,

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[93] Pavan Burugula, *Tatas may get admin control of Jamshedpur again*, MINT (Dec. 19, 2023), https://www.livemint.com/companies/news/tatas-may-control-jamshedpur-admin-as-State-gives-nod-11703006726577.html.
[94] Ramanath Jha, *Assessing the merger of Delhi's Municipal Corporations*, 362 OBSERVER RESEARCH FOUNDATION 10 (2023).
[95] *Id.* at 10.
[96] *Id.* at 6-7.

too, is planning to merge all municipal corporations and municipalities into the Hyderabad Greater City Corporation.

In case the rural areas are included in the expansion, it may also help enhance revenue due to taxes as well as by higher land value attributed to land in the municipality's possession. This land use change, discussed in a later section, in times of deep distress, can act as a solace to the lenders. In the last decade, many cities, such as Prayagraj, Ahmedabad, Vadodara, Surat, Coimbatore, Chennai, Pune, etc., have merged villages into their municipal boundaries.[97]

Though studies have not been conducted on the effect of such mergers, a 2019 paper infers a positive outcome. It states that "*programs originally meant to generate affordable housing in peripheral areas of the large Indian cities of Mumbai and Chennai have, 20 years later, resulted in thriving communities.*"[98] A similar exercise of merging municipal areas is in favour in England, too based on independent reports that advocate efficiency and lower costs from merging local entities, as well as by reports commissioned by the Levelling Up, Housing and Communities Committee.[99]

d) Exploring the possibility of expansion in Prime Areas

A variation of the aforementioned expansion theme could be the Administrator requesting the Central Government to release part of the cantonment land to TMs. The request may or may not be granted by the Centre, but an effort can be made. Cantonment land in most cities is now prime land, which can fetch

[97] *Id.* at 6.
[98] Anjali Mahendra & Karen Seto, *Upward and Outward Growth: Managing Urban Expansion for More Equitable Cities in the Global South* 37 (Washington, DC: World Resources Institute, 2019), https://www.wri.org/research/upward-and-outward-growth-managing-urban-expansion-more-equitable-cities-global-south.
[99] *supra* note 64, at 166.

handsome revenue. Recently, as a matter of policy, not because of distress, the Central Government released 20,000 acres of cantonment land to State and local bodies.[100] Municipalities can explore joint development with the Ministry of Defence where such a possibility exists without jeopardizing the security needs.

Similarly, several public sector units ("PSUs") established in the earlier years of independence have extra land in the heart of urban centres. Also, in some cities, single/double railway tracks pass through the city centre. The Administrators and TMs can request the Centre and the ministries in control of PSUs for joint development of such land parcels; the rail tracks can be rerouted.

Such actions will not only result in one-time windfall gains to tide over temporary crises but also will result in a constant stream of property taxes in future.

e) Exploring hitherto unexplored revenue streams in conjunction with savings in recurring costs

Numerous studies, articles and reports have indicated that people at the bottom of the pyramid are the most vulnerable to climate change. The research shows that financial inclusion is one of the best ways to build resilience against the effects of climate change; savings, credit, insurance, money transfers and new digital delivery channels provide a financial buffer as well as aid in recovery and reconstruction.[101] However, we are still struggling to find answers *vis-à-*

[100] Harikishan Sharma, *Land portions from 10 cantonment boards to be run by local bodies*, THE INDIAN EXPRESS, (Apr. 8, 2024) ,https://indianexpress.com/article/india/land-portions-from-10-cantonment-boards-to-be-run-by-local-bodies-9257140/.
[101] Inclusive Green Finance work stream and Inclusive Green Finance working Group, *Inclusive Green Finance: A Survey of the Policy Landscape* (2020), https://www.afi-global.org/wp-content/uploads/2020/10/Creative-CV.pdf.

vis the process to be adopted for inclusion as well as the time period. How to deal with the devastation brought by climate change if it is an annual event in certain seasons?

A mere seven per cent of all climate finance goes toward adaptation purposes. Moreover, much of the effort is focused on "*planned adaptation*", i.e., building resilient infrastructure.[102] Also, the business cases are harder to make for financing investments in adaptation; they do not yield an immediate return; preventing damage is consumption, which does not generate revenue and is not amenable to easy cost-benefit analysis since resilience is the absence or reduction of climate-induced damage.[103]

To compound matters further, a recent judgment[104] by the Supreme Court expounded on the fundamental rights of citizens. The Court stated that "*the people have a right against the adverse effects of climate change*." It is difficult to provide this right in a geographic location where destruction due to climate change is a frequent phenomenon.

Municipalities can play a hitherto unexplored role in the aforesaid scenario, which also takes into account the rights of citizens. They can play the role of "*feet-on-street*" for the digital finance providers. Being at the scene, TMs are in a position to judge which adaptation investments will be resilient in the years to come and where they will fail in the next climate calamity. TMs can charge a fee to the digital finance providers for such assessment. Moreover, TMs can explore the possibility of "*planned shifting*" in the expanded areas of

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[102] Peter Zetterli, *Climate Adaptation, Resilience, and Financial Inclusion: A New Agenda*, Focus Note, Washington, D.C., CGAP (2023), https://www.cgap.org/sites/default/files/publications/FocusNote_ClimateSynthesis_Final.pdf.

[103] *Id.*

[104] MK Ranjitsinh & Ors vs Union of India & Ors; Supreme Court of India, Writ Petition (Civil) No. 838 of 2019 with Civil Appeal No. 3570 of 2022 (Supreme Court).

the municipality, described above, where year-on-year havoc is near-certain, and the cost-benefit analysis indicates such an outcome. This would not only curtail periodic expenditure but also be an effort to make another adjacent area a thriving economic hub in a planned manner. In addition, it will be in consonance with the directions of the Supreme Court.

f) Costs of the Insolvency Process

The question of costs will arise on the appointment of the Administrator and the support team. It is a fact that the remit of duties under TMs would require a large team which will be expensive if consultants are employed; Chapter 9 proceedings buttress the fact that proceedings with outside consultants tend to be expensive.

It may not be possible to completely dispense with the consultants. However, in addition other avenues may be explored. One such idea could be to indulge in lateral hiring, which has been tried in a number of government departments across the country. The core team may be hired to work on the municipal payrolls with a market-benchmarked salary for a minimum period of two years. This team can work in conjunction with existing employees.

It would be argued that qualified people will not join for such a short-tenured post as there will be uncertainty post-completion of the assignment. However, this may not be true; all the administrators appointed by RBI for financial sector insolvencies were there for the short term. Moreover, exposure to municipal insolvency will result in an increase in the market value of such individuals as, post the assignment, they will bring to the table a unique set of government institution-related skills. This can be seen from the fact that

boards of private sector banks are full of personnel from RBI, Indian Administrative Services, and public sector banks.[105]

ii. <u>The Public Private Partnership is Insolvent.</u>

In case a PPP is insolvent the process should be like CIRP with a few modifications. Firstly, in case any portion of the debt of PPP is guaranteed by TMs, an insolvency application cannot be filed without the consent of the municipality. Croatia follows such a practice.[106]

Secondly, the rights and obligations of the municipality in PPP, should remain the same post resolution. In case it is decided to liquidate a PPP, either prior consent of the municipality must be obtained or a recommendation for the same by the municipality when the insolvency is initiated; in such instances, any rights of the municipality too would cease. In Croatia, a filing of insolvency against such entities is usually carried out with the consent of the municipality, or local public entity, as called in Croatia.[107]

Thirdly, the municipality must get a seat in the Committee of Creditors ("CoC") to evaluate the resolution plan from a technical perspective. This is because the proposed successful resolution applicant may have been barred or blacklisted earlier by the municipality for poor service or may not be capable of performing the service. However, the resolution professional, CoC and TMs may jointly decide to waive blacklisting or any other deficiency with appropriate guarantees and negotiation.

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[105] Gopika Gopakumar, *The silent rise of public sector banker in private bank board*, MINT (Mar. 6, 2024), https://www.livemint.com/industry/banking/the-silent-rise-of-the-public-sector-banker-in-private-bank-boards-11709725583988.html.
[106] Lidija Šimunović, *Local public entities in distress – a critical analysis of the Croatian approach, When liquidation is not an option: A global study on the treatment of local public entities in distress* (2022), available at https://www.royalholloway.ac.uk/media/27056/eugenio-pdf-doc.pdf.
[107] *Id.* at 143.

D. Committee of Creditors, their Rights, Voting and Deliberations

The rights of creditors will vary in accordance with the two scenarios described above. In case of a specific project or PPP being insolvent, the rights and duties will primarily be in accordance with CIRP alongside the tweaks described above-incorporated, i.e., no variation in rights alongside a seat on CoC for TMs.

However, if the municipality itself is insolvent, novel ideas need to be explored, though certain basics will stay the same as in CIRP: moratorium, priority to interim finance and insolvency costs, cram-down (51% or 66% as the case may be), authorised representative in case of bondholders or debenture holders, similarly situated creditors to be treated equally, etc.

The outcome of a municipal insolvency must be a restructuring, which implies that bereft of a benchmark on market-determined valuation it is difficult to ascertain what is the quantum of distribution the creditors are entitled to. "*The bankruptcy procedures lower the downside risk of borrowing whereas a higher bankruptcy exemption for essential public services could lower the supply of financing. There is thus a trade-off. Where to draw this line is a crucial question in the design of such legislation*."[108]

The conflicting requirements of maintaining essential services and the creditor's contractual rights imply that the pain of insolvency needs to be shared between lenders and debtors. The insolvency mechanism needs to balance these competing interests.[109]

The lesson from the Detroit bankruptcy was similar. All stakeholders – unions,

[108] Liu & Waibel, supra note 48, at 15.
[109] Liu & Waibel, supra note 48, at 19

bondholders, pensioners, city employees, nonprofit foundations, business leaders, State and local lawmakers, and the 690,000 residents accepted cuts; "*Grand Bargain, a collection of settlements that emphasised the policy of cooperation and shared sacrifice*."[110] This is something that all stakeholders in India too should imbibe.

The base document and the plan for an equitable distribution should be prepared by the Administrator and his team. They should prepare a five-year forecast, as anything beyond that is difficult to forecast with the certainty of revenue, expenditure, capital expenditure, and restructuring of operations with a view to identify PPP opportunities and carve out industrial districts. The forecasts should factor in the effects of climate change on infrastructure and financing and iteratively be discussed with the CoC for their input in the periodic meetings. However, the decision of the Administrator would be final and binding.

Implementation of the aforesaid plan will release free cash over the ensuing years that can be paid to both the financial and operational creditors in instalments over an extended period, five to seven years, or as decided by the Administrator in conjunction with the CoC. Unlike a CIRP, where operational creditors are usually paid liquidation value, in municipal insolvency, they should be paid as per the plan. This is because some of the vendors may not be able to provide goods/services for the essential public services in case of a drastic reduction of their receivables, as their working capital limits from banks will reduce on cancellation of their receivables.

Beyond the aforesaid distribution of the free cash, depending on the situation at each municipality some innovative steps need to be carved out to

[110] *supra* note 79.

additionally recompense the financial creditors. A few of such possibilities are detailed below.

i. Refinancing and Restructuring by Sustainability Linked Bonds.

Refinancing is amongst the first port of call for any professional restructuring of the capital structure. However, in the case of TMs, an added avenue may be tried for reducing the finance cost further, i.e., sustainability linked debt. Many multilateral and financial institutions are willing to provide sustainability linked debt with interest reset on specific performance of an environmental benchmark or on bettering the same. Considering that Indian cities have often grown at the cost of the environment massive opportunities exist to avail such financing. This will save extra cash beyond what would have been achieved by a plain vanilla refinancing.

ii. Bundling of a Slice of Debt with Privatised or PPP Projects

The administrator, whilst carving out projects for privatisation or PPP, can assign a portion of the debt, with the consent of the lender, to such projects when the request for quotation for such projects is prepared. This will ensure the servicing of the debt obligation. Also, the potential loss to the financial creditors will be reduced, as from the overall debt exposure, a slice of the debt will be regular.

iii. Assignment of Land in an Expanded Municipal Territory

If the financial creditors are institutions and not individual bondholders, and if the geographical location of the municipality permits, it may explore the possibility of including abetting rural areas into itself, acquiring and allocating land in such rural areas to creditors. The land cost post-incorporation into the municipality would increase. This manoeuvre may save the municipality's prime land while at the same time fulfilling the commitment of the creditors.

Moreover, if the financial institution decides to use the land for its own purpose, it will help build infrastructure in another area, decongesting the city. Relevant incentives may be given to such creditors to encourage them to use such land.

Resolving stress by granting land in a resolution plan is not a novel method. It has taken place in CIRP in the case of Jaypee Infratech, wherein 2,594 acres were allotted to financial creditors.[111]

iv. Other Key Points

There should be a definite timeline for approval of the plan, say six months from the date the final draft is prepared. In addition, a representative of the State should also sign off on the plan; not only as a key stakeholder bound by it but also to give added assurance to creditors who are to receive deferred payments.

E. Post Bankruptcy Monitoring

In conjunction with the five-year plan prepared by the Administrator an updated five-year plan needs to be prepared, from the date of resolution, for monitoring the commitments.

Detroit exhibited the importance of post-bankruptcy monitoring. The State of Michigan compelled Detroit to create a financial review commission to oversee the post-bankruptcy plan. The nine-member panel, which includes the Detroit mayor and City Council president, were granted powers to approve contracts and borrowing.[112]

Any variation from the plan beyond a specified limit, whether in physical or monetary terms, should require the approval of an independent committee.

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[111] *supra* note 68.
[112] *supra* note 79.

The committee should have the Administrator as one of its members, provided, he/she consents for the same.

VII. The Perils of Excessive Leverage for Building Infrastructure

India is on a growth path as China was a few decades ago. The similarities extend to the size of the population and rapid urbanisation. However, there is one crucial difference, the private sector plays a crucial role in India; China is predominantly State-owned enterprises. Nevertheless, the story of China holds important lessons for what not to do whilst allowing municipalities to borrow.

China's tax reforms of 1994, by then-premier Zhu Rongji, centralised taxes, reducing local governments' share of tax revenues, akin to the introduction of GST in India. This is despite the fact that China is the world's most decentralised nation in terms of subnational spending. According to International Monetary Fund research, China's local governments are responsible for 85 per cent of general budgetary spending, bearing significant fiscal duties in areas such as pensions, medical care and unemployment insurance."[113] To fulfil the responsibilities, local governments primarily became dependent on land use rights transactions.

In 2021, local governments earned 40 per cent of their total revenue from the sale of land-use rights. Local governments artificially increased the price of land, which was used as collateral, for credit from banks for infrastructure projects, some of them unviable.[114] Chinese officials categorise 14 provinces

[113] Di Lu, *China's local government credit dilemma*, EAST ASIA FORUM (Nov. 3, 2023), https://eastasiaforum.org/2023/11/03/chinas-local-government-credit-dilemma/#:~:text=The%20depletion%20of%20local%20governments,and%20confidence%20of%20Chinese%20households.

[114] Junhua Zhang, *The bankruptcy of Xiconomics*, GIS REPORTS ONLINE (Oct. 23, 2023), https://www.gisreportsonline.com/r/china-xiconomics-bankrupt/.

as being in financial crisis of the thirty-one provinces and municipalities; in some areas salaries of teachers and employees have not been paid.[115]

Goldman Sachs estimates the debt at USD 23 trillion.[116] The International Monetary Fund estimates that the total outstanding off-balance-sheet government debt is around USD 7 trillion to USD 12 trillion, including corporate bonds issued by local-government financing vehicles ("LGFV"), which borrowed money to build roads, bridges and other infrastructure. No one knows what the actual total is, but debt levels have become unsustainable. Domestic banks' total exposure to LGFV at the end of 2022 was equivalent to USD 6.9 trillion, 13% of the banking sector's total assets.[117]

The national goal of high GDP growth and the promotion of officials linked to the achievement of growth targets further exacerbated the problem. This was compounded by the global financial crisis, wherein 70% of the USD 547 billion fiscal stimulus package was raised by the local government.[118] Simultaneously, investment returns on many projects fell sharply due to overbuilding. For example, the return on assets in the power and heat supply sector fell from around 4% in 2015 to 1.5% in 2022.[119]

Economists say $400 billion to $800 billion of debt is at high risk of default.[120] China's government is undertaking a host of measures to obviate the crisis; special bond issuance, debt swaps, loan rollovers, dipping into the

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[115] *Id.*
[116] *Id.*
[117] Rebecca Feng & Cao Li, *China's colossal debt problem is coming to a head*, THE WALL STREET JOURNAL (Dec. 5, 2023), https://www.wsj.com/world/china/chinas-colossal-hidden-debt-problem-is-coming-to-a-head-83a34dc0.
[118] Lu, *supra* note 113.
[119] Nathaniel Taplin, *China's Teetering Local Debt Mountain*, THE WALL STREET JOURNAL, (Oct. 13, 2023) , https://www.wsj.com/finance/chinas-teetering-local-debt-mountain-in-six-charts-d050700f.
[120] Feng & Li, *supra* note 117.

central budget.[121] Local governments are issuing special refinancing bonds to replace some of their off-balance-sheet debt; since October 2023, thirty Chinese provinces and cities have raised the equivalent of around USD 200 billion.[122] Also, local governments have been ordered to halt problematic PPPs and all the PPPs henceforth will be reviewed by Government authorities in Beijing.[123]

However, all these measures are just kicking the can down the road. China will have to moderate its growth expectation and the vicious circle of more debt for infrastructure spending to boost GDP. Simultaneously, it should delink the perverse performance incentive linked to GDP growth for its officials.

The lesson for India is that borrowing is needed to build infrastructure but unbridled borrowing for the same will bring misery; a balance is needed from the current .05% of the GDP on one hand to the extreme case of China on the other.

Also, a watch needs to be kept on any creative practices like the artificial land prices of China. BMC's liabilities are an example of the slippery path we are treading. BMC has liabilities of INR 1,900 Bn against a fixed deposit in the bank of INR 870 Bn[124] and an annual budget of approximately INR 600 Bn, of which INR 280 Bn is revenue expenditure.[125] BMC claims that the

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[121] Kevin Yao & Ziyi Tang, *China orders local governments to cut exposure to public-private projects as debt risk rise*, REUTERS (Nov. 14, 2023), https://www.reuters.com/markets/asia/china-orders-local-governments-cut-exposure-public-private-projects-debt-risks-2023-11-14/.
[122] Feng & Li, *supra* note 117.
[123] Yao & Tang, *supra* note 121.
[124] Pinto, *supra* note 83.
[125] Mustafa Shaikh, *Mumbai civic body announces annual budget with focus on health and infrastructure*, INDIA TODAY (Feb. 3, 2024), https://www.indiatoday.in/india/story/mumbai-civic-body-announces-annual-budget-with-focus-on-health-and-infrastructure-2496979.

liabilities can be clawed back from future revenues as the projects being executed are long-term in nature.[126] It would be prudent to strictly monitor such an overreach.

Thus, whilst liberalising municipal borrowing, detailed assessments of projects are imperative, or else we will be spending resources on roads and bridges to nowhere and metros and subways connecting ghost cities and colonies. Multiple level checks and balances should be incorporated when municipalities embark on borrowing, both whilst budgeting and when monitoring or auditing.

VIII. Conclusion

The most important function of the municipal insolvency law will be a signalling exercise both for the lenders and municipalities. Clear rules for insolvency are likely to lower borrowing costs through lower interest rates, longer maturity, or both, and thereby increase market access.[127]

The solution for the resolution of insolvency for each municipality will depend on their peculiar circumstances. However, the Administrator will have to balance the tension between the contractual rights of creditors and the need to maintain public services. It is also true that some of the actions described above can be taken whilst TMs are not under stress. However, often, the politico-economic situation makes it difficult to take such actions during normalcy.

India is currently blessed with favourable demographics, where the working population is growing, is expected to peak around 2050[128] and the cities are

[126] Pinto, *supra* note 83.
[127] Liu & Waibel, *supra* note 48, at 17.
[128] Esha Roy, *India's population growth rate on a steady decline since 90's,* THE INDIAN EXPRESS (Apr. 21, 2023), https://indianexpress.com/article/india/india-population-growth-rate-8567426/.

expanding. This gives a golden opportunity to take debt of five-to-twenty-year duration, build infrastructure, repay the debt, and thereafter limit spending to maintenance when the depopulation phase begins.

Delay in creating infrastructure will result in premature decay of TMs, further accentuating the problem of revenue and creating a vicious circle. The timely introduction of municipal bankruptcy law will act as a stimulant for infrastructure economic growth and will let cities blossom.

Through the Lens of Occupational Health and Safety: Developing a Regulatory Framework for Platform-Based Work in India

Jasoon Chelat*

Abstract

In recent years, regulatory attention has shifted to work done via platforms, with 'platform work' included in the Code on Social Security, 2020, followed by State-level legislations on platform-based workers enacted in Rajasthan and proposed in Karnataka, Telangana, and Jharkhand. Globally, in many jurisdictions, the discussion around platform-based work has centred around the establishment of an employment relationship which guarantees labour rights such as minimum wages, collective bargaining, and social security. In India, where most of the workforce is informal and outside the ambit of labour law protections, the discussion on expanding the contours of an 'employment relationship' is an important question for informal work in general and not unique to platform-based work. This paper argues that the regulatory discourse on platform-based work should include labour law entitlements that consider the specificities of such work. Drawing on the history of occupational health and safety legislation in India and contemporary accounts of health and safety in platform-based work, the paper proposes that occupational health and safety provisions are an important pathway to developing a regulatory framework for platform-based work. The paper recommends that such a framework should focus on automated decision-making systems that formulate incentive structures for platform-based workers that determine working conditions, pay, working time, and the pace at which work is done. The paper illustrates the methods in which such a mechanism may be put in place, using examples from State-level labour legislations for platform-based work, as well as conventional labour law in other areas of work.

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I. Introduction

In India, the platform economy has shown rapid growth and has been the subject of much academic discussion in different areas of law. NITI Aayog, the Indian Government's public policy think tank, estimates that by the year 2029-30, the number of workers engaged in gig work will increase to 235 lakh workers from the 77 lahks estimated to be currently engaged in such work.[1] Platform-based services (such as ridesharing, e-commerce platforms, and delivery services) have existed in India since the early 2010s, but regulatory attention has shifted to the work done via digital platforms only in recent years. Apart from non-binding guidelines in the transport industry, which recommended considerations for granting licenses to aggregators (defined as digital intermediaries who connected passengers with drivers) in 2020, there were no other references in legal instruments in India to platform-based work. This changed when the Indian Government, as part of the exercise of revamping labour laws, came up with four different 'Codes' on different matters relevant to labour: wages, social security, industrial relations, and occupational health and safety. The Code on Social Security Code, 2020 referred to gig and platform work for the first time and provided for the establishment of social security schemes for gig and platform workers, along with those for informal or unorganized workers. Subsequently, there have also been some State-level legislations, largely restricted to the provision of welfare and social security, that have ventured into the regulatory territory of digital platforms. Recently, there have been proposals for minimum wages,[2]

[1] NITI Aayog, *India's Booming Gig and Platform Economy* (2022), https://www.niti.gov.in/sites/default/files/2022-06/25th_June_Final_Report_27062022.pdf.
[2] Nikhila Henry, *In Telangana draft for gig workers, minimum wage, maternity benefits*, THE INDIAN EXPRESS (Jun. 3, 2024), https://indianexpress.com/article/india/in-telangana-draft-for-gig-workers-minimum-wage-maternity-benefits-9368376/.

information rights,[3] and the right to fair contracts[4] for platform-based workers. Broadly, these developments involve identifying protections that are available in labour law (as well as other protections available in other areas of law, such as data privacy) and extending them to platform-based work.

This paper contributes to the regulatory discourse by looking at platform-based work through the lens of occupational health and safety, which includes regulations on hours of work, working conditions, and compensation in case of accidents or occupational diseases. This is a relatively under-researched aspect of platform-based work, despite reports of psychosocial harms and workplace accidents consistently reported in such work, especially in the case of on-demand, location-based services. This paper argues that occupational health and safety regulations for platform-based workers are a useful starting point for thinking about labour law for digital platform-based work.

First, the paper looks at the current regulatory landscape related to gig and platform work, demonstrating the exclusion of gig and platform work from existing frameworks of labour law. The section delineates the kinds of work that may be most suited for labour law-based regulations, indicating that for effective regulations, labour law entitlements need to be tailored to work arrangements in platform-based work.

Secondly, the paper situates the discussion of occupational health and safety in platform-based work within the history of labour legislation in India, and the broader discussions around developing occupational health and safety in informal work. The argument made is two-fold: first, regulations on working conditions and occupational health and safety have been the first and

[3] The Karnataka Platform-based Gig Workers (Social Security and Welfare) Bill, 2024 (Karnataka).
[4] *Id.*

important area of legislative intervention in labour law in formal work and are relevant in platform-based work. Second, the existing gaps in occupational health and safety law in India are mapped onto the issues present in platform-based work, indicating that addressing these issues involves greater, more effective protections for all workers, including those outside of platform-based work.

Finally, the paper looks at specific health and safety issues in platform-based work, including psychosocial harms that are a result of the way in which digital intermediaries manage work done via platforms. The paper illustrates how specific areas of platform-based work, such as technologically determined incentives or quotas, may be effectively regulated using the mechanisms in labour laws in areas of work outside the platform economy, where similar protections have existed and developed through labour jurisprudence.

II. 'Gig and Platform Work': The Current Regulatory Landscape

A. Platform-based Work and Contemporary Labour Law

The Code on Social Security, 2020 defines gig work and platform work differently but considers both to be outside of the traditional employer-employee relationship. This means that any rights that are accrued to gig work and platform work should come from specific entitlements that are prescribed for such work by legislation, and it is unlikely that they will be able to access any other rights that are understood in labour law to be part of an employment relationship. Currently, in the case of formal work, labour law entitlements include laws relating to wages, working hours, working conditions, collective bargaining, and occupational health and safety. Predictably, there has been

much discussion around the legal categorization of gig and platform work as falling outside of the traditional employer-employee relationship.[5] This is similar to the path in which discussions around platform-based work have taken place in other jurisdictions: around the status of worker, which gives individuals access to certain rights that are centred around employment. In India, however, the context is different: the vast majority of work in India is informal or unorganized work that is unprotected. The issue of worker status is thus not a problem that is unique to gig or platform workers and is equally important in other kinds of informal work already existing in India. As such, although a useful starting point, it is not capable of giving us a comprehensive regulatory framework for gig work or platform work. Mere inclusion into the legal category of work may be ineffective if the law is not framed in accordance with the sector of work it is intended for.

To illustrate, the Code on Wages, 2019 takes away the system of minimum wages that applies only to scheduled employment and ostensibly expands minimum wage protections to all employees. However, there is no explicit provision that relates to gig or platform work. It does not elaborate on how the system of minimum wages may be made applicable to platform-based work, in which wages are set by an algorithm. As such, although it has been interpreted as applying to gig work,[6] it does not effectively bring it into the ambit of protection.

The Code on Wages, 2019, also indicates that a worker should fall under the

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[5] SC Srivastava, *Employment Status of Digital Platform Workers*, 59 EPW 9 (2024).
[6] Ministry of Labour and Employment, *Starred Question No. 308 To Be Answered On 20.12.2021 Minimum Wage For Gig Workers*, SANSAD (Dec. 20, 2021), https://sansad.in/getFile/loksabhaquestions/annex/177/AS308.pdf?source=pqals#:~:text=(a)%3A%20The%20Code%20on,day%20or%20by%20the%20month. (last visited on Aug 31, 2024).

ambit of the term employee, which depends on whether they are in an employment relationship. It also requires the worker to be employed in an establishment, an expression that has been interpreted by the Courts within the context of industrial employment.[7] As such, it introduces a level of ambiguity to the application of the provisions of the Code in other kinds of work: this includes not only gig work but contract work, domestic work, and home-based work. The nature of control (described as primary[8]or effective and absolute control)[9] needed to establish an employment relationship as established by labour jurisprudence may be difficult in many kinds of contractual or temporary work.[10]

In the case of social security, where there has been an explicit inclusion of the term gig and platform work under the Code on Social Security, 2020, still presents some issues. The provision (Section 45) that refers to social security schemes for gig and platform workers is an enabling provision, not a mandatory one. Other social security schemes in India remain largely dependent on the establishment of an employment relationship[11] and are thus unlikely to apply to a vast majority of informal workers, where there is an absence of an identifiable employer, or in the case of self-employed work. In the case of a gig or platform worker, the situation is different: even if there are instances of work which might otherwise fall into an employment relationship, they have been explicitly excluded from that ambit of an employer-employee relationship under the Code on Social Security, 2020. The other two codes,

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[7] Saurabh Bhattacharjee, *Universalization of Minimum Wages as a Pipe Dream,* 16 SLR 1 (2020).
[8] International Airport Authority v. International Cargo Workers Union, (2009) 13 SCC 374 (Supreme Court).
[9] Balwant Rai Saluja v. Air India Ltd, (2014) AIR SCW 6387.
[10] Saurabh Bhattacharjee, *supra* note 7.
[11] Saurabh Bhattacharjee, *Adapting Social Security To 21st Century Indian Economy: A Case for Universalisation,* 1 NUJS JOURNAL OF REGULATORY STUDIES 1 (2016).

the Code on Industrial Relations, 2020, and the Code on Occupational Health and Safety, 2020, do not extend themselves to gig or platform work, either explicitly or implicitly.

i. Platform-based work conducive to labour law regulations

While the expansion of the term employment relationship is an important and necessary question in labour law, the issue presents itself differently in platform-based work. In the Code on Wages, 2019, where there is an implicit inclusion of platform-based work, the lack of specific provisions that are based on the way platform-based work is structured makes it ineffective in practice.[12] Gig and platform work is explicitly included in the Code on Social Security, 2020, with the qualifier "*outside of the employer-employee relationship*." This separates the term from other kinds of work and puts it outside the ambit of an employment relationship. This precludes the possibility of at least some arrangements in platform-based work qualifying for inclusion under the ambit of an employment relationship based on the nature of work and the relationship between the digital platform and the worker.

Outside of legal instruments, the term gig work is often used to refer to work performed via digital platforms or intermediaries. However, broadly, they can be read as similar to other informal or non-standard work arrangements.[13] The terms "*platform-based*" gig worker or "*platform work*" used in legislations in India corresponds to a subset of gig work where work is managed through digital platforms. Within this category, there are two different kinds of work: crowd work, which refers to work arrangements that are not location specific,

[12] Alok Prasanna Kumar, *Code on Wages and the Gig Economy*, 54 EPW 10 (2019).
[13] Valerio De Stefano, *The Rise of the 'Just-In-Time Workforce': On-Demand Work, Crowd Work and Labour Protection in the 'Gig-Economy'*, 37 COMPARATIVE LABOR LAW AND POLICY JOURNAL 471 (2016).

and on-demand, location-based work, which involves more traditional kinds of work such as transport, delivery, domestic work and cleaning services. On-demand, location-based work as a category of work, by nature, tends to be similar to temporary, contractual work, where the platforms are the intermediary that manages the relationship between the worker and the entity that requests the work or service.[14] Comparatively, it is the latter kind of work that has generated the demand for labour law regulations.

Under the Code on Social Security, 2020, gig work is defined as "*a person who performs work or participates in a work arrangement and earns from such activities outside of traditional employer-employee relationship.*" As such, it may include work outside of digital platforms. Platform work, on the other hand, is defined as a work arrangement "*in which organisations or individuals use an online platform,*" which may be "*notified by the Central Government.*" As such, the definition of platform work is limited to those conducted via digital intermediaries, whereas gig work is not. The Rajasthan Platform-Based Gig Workers (Registration and Welfare) Act, 2023, also defines gig worker on similar lines and defines platforms as an "*online transaction-based arrangement of work*." The Karnataka Platform-Based Gig Workers (Social Security and Welfare) Bill, 2024 defines a gig worker simply as a person who performs work with a "*given rate of payment*" on terms "*laid down in a contract*" and does not contain the term "*outside of the traditional employer-employee relationship.*" Both legislations seek to lay down provisions for platform-based gig workers. As such, when it comes to legal

[14] R. Collier et al., *Labor Platforms and Gig Work: The Failure to Regulate* (IRLE Working Paper, No. 106-17, 2017), http://irle.berkeley.edu/files/2017/Labor-Platforms-and-Gig-Work.pdf.

definition, there is a difference between gig work, which can mean a broader set of arrangements, and platform-based gig workers.

B. On-Demand Platform-Based Work: The Need for Specific Entitlements

Gig work is heterogeneous and involves several kinds of arrangements. Apart from the term "*outside of a traditional employment relationship*" in the Code on Social Security, 2020, the fact that an employment relationship is an important consideration for the application of labour law does not affect all kinds of platform-based gig work similarly. Tests on control and supervision, which are the foundation of an employment relationship, have been expanded to involve different kinds of control dependent on the nature of the work[15] and can also include economic control.[16] It is not difficult to demonstrate that similar levels of control exist in platform-based gig work, especially those that are most similar to traditional employment, such as food delivery, ride-sharing, errands, and domestic work. The control in platform-based work, works through incentive-based systems that are managed by the digital platforms.

In the case of on-demand, location-based work, the assumption is that workers can log into the app at any point and receive requests that they may choose to take up. This model is important for the aggregators' claim that those who work via platforms are independent contractors and not employees since they decide when to work and how to perform the work. In this scenario, it can be argued that the aggregator is only an intermediary that connects someone who wants the service to another who is willing to provide the service. A closer scrutiny of the involvement of digital platforms in this exchange reveals a

[15] Dharangadhara Chemical Works Ltd v. State of Saurashtra, (1957) AIR 264.
[16] Hussainbhai, Calicut v. Alath Factory Thozhilali Union, (1978) AIR 1410.

different picture. Generally, workers are under no compulsion to log on to the platform at any point in time. However, they are incentivized to stay logged in on the platform for longer hours and at specific times during the day.[17] Mechanisms like surge-pricing or delivery quests are time-limited and seek the participation of workers through the promise of greater returns on work done.[18] If the worker freely sets his hours according to his convenience, it is likely that he receives fewer requests for the time he is logged on to the app, and receives less compensation for the same amount of work. The payment structures offered by on-demand platforms are non-linear and not fixed according to criteria such as per-delivery, per-kilometre, or per-task but are subject to change on the basis of the automated decision-making systems in place. Since these payments constitute an important part of the earnings of a worker, the availability of these payments in determining whether a worker decides to log in to the platform or not is significant. In India, studies have shown that there are instances where digital platforms have gone further and introduced mandatory log-in times during holidays or during peak hours when demand for such services tends to be high.[19] Workers who do not refuse requests are treated favourably by the digital platform, and those who refuse orders are likely to receive fewer orders or even be removed from the app.[20] Other kinds of targets and quests, which ask workers to complete a set number of orders within a time period, often result in workers accepting more orders than they would otherwise. This is in addition to other employment-like requirements that aggregators routinely expect from those who work via platforms, such as wearing a uniform, instructions on how to interact with

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[17] Tammy Katsabian & Guy Davidov, *Flexibility, choice, and labour law: The challenge of on-demand platforms,* 73 UNIVERSITY OF TORONTO LAW JOURNAL 348 (2023).
[18] *Id.*
[19] Kavya Bharadkar et al., *infra* note 21.
[20] *Id.*

clients, and requirements related to the vehicle (such as leaving the AC on) or materials used in providing a service.[21] These elements of control may vary across digital platforms, but generally, digital platforms and the algorithmic management systems which allocate work and determine pricing, directly influence working conditions. For those who work via digital platforms, the choice of working time is constricted by the algorithm that sets prices and non-linear payment structures that include incentives. Any legislation that extends itself to platform-based workers, will have to engage with regulation that directly addresses the management of the work by the algorithm.

Many of the issues in the extension of labour protections to platform-based gig workers, are those that exist in informal work as well. Although the discussion on employment status is important for platform-based work, it is not unique to platform-based work. The expansion of employment rights to workers by bringing them into the ambit of employment status is important in many forms of informal work as well. In many jurisdictions, based on the nature of their arrangement, those in on-demand labour platforms have either been given employment status[22] or, at least, some rights associated with employment, such as minimum wages.[23]

The important question in the regulation of platform-based work is to formulate specific entitlements that are designed for the way platform-based work is managed. This is not an exercise that presupposes lesser rights for platform-based workers but part of a broader exercise that involves better

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[21] Kavya Bharadkar et al., *Is Platform Work Decent Work?*, (Occasional Paper Series 10/2020, 2021), https://www.nls.ac.in/wp-content/uploads/2021/09/OCCASIONAL-PAPER-SERIES-10-final.pdf

[22] *See* generally, Tammy Katsabian & Guy Davidov, *Flexibility, choice, and labour law: The challenge of on-demand platforms*, 73 UNIVERSITY OF TORONTO LAW JOURNAL 348 (2023).

[23] Uber BV v. Aslam [2021] UKSC 5 (U.K.).

labour protections for all workers, including those in different sectors of informal work. Although relatively under-discussed, a law on working hours and occupational health and safety is a useful doorway into such a formulation. By nature, they must engage with some of the most important aspects of platform-based work: working time, incentive systems, wage/price determination, and control via surveillance.

III. Tracing the Importance of Occupational Health and Safety: A History of Labour Regulations

A. Occupational Health and Safety and New Technologies at Work

Recent work on labour platforms indicates that the function of digital platforms can be understood as similar to machines in industrial production, which introduced unprecedented levels of labour control on workers.[24] The development of occupational health and safety standards is closely related to the introduction of new technologies into the management of work. Much of the law related to occupational health and safety standards evolved as a response to industrialization, which introduced machines into the management of work (such as Ford's conveyor belt), [25] which regulated and increased the pace of the work and demanded greater productivity on the worker through "*scientific management techniques*," enhancing the mechanical nature of work. This development was not only linked to greater accidents at work but also poorer mental health consequences for workers, leading to the introduction of laws that put limits on working hours and regulations on ensuring the safety of these machines. Labour history in the United States of

[24] Veena Dubal & Vitor Araújo Filgueiras, *Digital Labor Platforms as Machines of Production*, 26 YALE JOURNAL OF LAW & TECHNOLOGY 3 (2006).
[25] *Id.*

America and Brazil has demonstrated the parallels between the introduction of machinery in industrial employment and digital platforms in the world of work: both determine working conditions and are associated with a greater risk of occupational hazards, psychosocial harms and workplace accidents.

Unfortunately, similar material on the historical or socio-economic context under which labour laws were enacted in India is comparatively scarce.[26] Much has been written about labour law in India, but this is limited to subject-specific articles and not comprehensive accounts that take into account the historical and political context in which the law was enacted. Academic literature has been sceptical of identifying the real nature of policy behind enactments in labour law[27] while insisting that they can be deduced from both policy declarations and practice. An examination of early legislations on labour law in India around the advent of factory-based occupations involving machinery demonstrates important parallels to this experience. Historical accounts of the enactment of the first version of the Factories Act, enacted in 1881 (replaced by the Factories Act, 1891, and later, 1911), acknowledge the link between a change in the kind of employment to a mechanised, industrial model of wage employment, marked by elements of increased labour discipline and control.[28] The use of new technology in determining working time can be seen as early as 1905, when the introduction of electric lighting extended working hours and resulted in labour unrest.[29]As a response to this,

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[26] Richard Mitchell et al., *The Evolution of Labour Law in India: An Overview and Commentary on Regulatory Objectives and Development*, 1 ASIAN JOURNAL OF LAW AND SOCIETY 413 (2014).
[27] Van D. Kennedy, *The Conceptual and Legislative Framework of Labor Relations in India*, 11 ILR REVIEW 487 (1958).
[28] Valerian DeSousa, *Modernizing the Colonial Labor Subject in India*, 12 COMPARATIVE LITERATURE AND CULTURE 1 (2010); *See* also Akash Jadhav, *The Role of British Legislations and The Working Class Movement In Bombay: A Historical Study Of The Factory Acts Of 1881 And 1891 In India*,
[29] *Id.*

the Report of the Indian Factory Labour Commission in 1908 recommended "*greater control and discipline*" for the factory worker, along with care for the "*health and body of the worker*." The Factories Act, 1911 was enacted as a result of the Commission's recommendations, limiting the working hours of a worker in a factory to twelve hours a day and introducing a rest time of half an hour. The Commission's Report was premised on maintaining the efficiency of an industrial worker (shifting the focus from a rural, agricultural worker who worked on land) and not on extending protections to workers.

The shift from a focus on efficiency to protection for workers in industrial employment can be traced to the work of labour movements, which was a significant factor in enacting these legislations. In the period following the First World War, there were frequent strikes and widespread labour unrest due to the abysmal working conditions in factories. The colonial government went through another renovation of laws related to industrial employment. The first of these legislations that were introduced by the colonial government to introduce labour protections were related to working hours, rest, health and safety, and compensation for workplace injuries.[30] These legislations are the Factories Act, 1922 (which reduced working hours in factories from twelve to ten hours), the Mines Act, 1922, and the Employee's Compensation Act, 1923, which introduced the system of compensation for workplace injuries. Historical accounts of these legislations, along with similar provincial legislations in the same time period, also directly link them to the growth of industrialization and work done through machinery, which was a qualifying factor for application.[31] Significant provisions included limits on working

[30] Richard Mitchell et al., *supra* note 26.
[31] Rajani Kanta Das, *Labour legislation in Indian States*, 38 INTERNATIONAL LABOUR REVIEW 794 (1938).

hours, weekly holidays, and provisions for the safety of machines, and protection from hazardous operations.[32]

From historical records, the development of the law related to working hours and occupational health and safety can be associated with two factors: the introduction of machinery and new technologies that affected working conditions, the resistance of industrial workers to such changes, and the subsequent adoption of protective legislation. In the case of platform-based work, the introduction of AI and automated decision-making systems means that the potential of a kind of new technology to influence worker behaviour through surveillance is at a level that is unmatched in existing forms of work.[33] These factors make a case for introducing similar, if not better, protections for introducing occupational health and safety measures in platform-based work.

Irrespective of how platform-based work may be conceptualized, the discussion on the regulation of platform work seems to be veering towards questions of working time, from that to employment relationship. Several jurisdictions have already moved on to describing platform-based work as an employment relationship and are in the process of laying down specific entitlements for platform-based work.[34] Several of these entitlements depend on the question of the quantification of working hours: in the case of regulation related to wages, what constitutes working time is important, as platform workers spend time on the platform while being engaged in work, but also otherwise, as available labour. Platform-based services are only effective when there are workers who are on standby, ready to be assigned work when

[32] *Id.*
[33] Valerio De Stefano & Simon Taes, *Algorithmic management and collective bargaining*, 29 EUROPEAN REVIEW OF LABOUR AND RESEARCH 21 (2023).
[34] Tammy Katsabian & Guy Davidov, *supra* note 17.

required by the requester of the service. The availability of workers on the platform at a given point in time is important for the feasibility of platform work[35] since they maintain the supply of labour on demand. Platforms use automated decision-making systems to incentivize workers to stay longer on the app to ensure this availability and not necessarily engage in productive work.[36] More time workers spend on platforms is also associated with greater workplace stress and accidents.[37]

The law on working hours was based on an industrial model of employment and, therefore, is limited in its application to informal work. At the same time, the principles behind labour protections, where they can be discerned, indicate that a similar logic may be applicable to other kinds of work, where similar levels of labour control (as exerted by machines in industrial employment) apply.

B. Occupational Health and Safety: Contemporary Discussions on Inclusivity

In India, discussions around expanding laws on working conditions and occupational health and safety have focused on the exclusion of workers in the informal sector. As in the case of platform-based work, occupational health and safety measures in informal work in India practically do not exist despite a higher tendency for harm to workers.[38] The important legislation on working hours and health and safety, the Factories Act, 1948, has one of the lowest threshold levels for application among labour laws in India: set at ten workers

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[35] Veena Dubal, *On Algorithmic Wage Discrimination*, 123 COLUMBIA LAW REVIEW 1929 (2023).
[36] *Id.*
[37] Zhan Jing et al., *More reliance, more injuries: Income dependence, workload and work injury of online food-delivery platform riders*, 167 SAFETY SCIENCE 106, 264 (2023).
[38] Raymond Sinclair & Thomas Cunningham, *Safety activities in small businesses*, 64 SAFETY SCIENCE 32 (2014).

in a single establishment. However, this puts a majority of establishments outside the ambit of its protections, as the average number of workers in a single establishment in India is less than three.[39] In addition to exclusionary threshold levels for application, the systems in place for reporting accidents, the list of occupational diseases, and safety mechanisms are designed for industrial employment. There is no central agency that is responsible for occupational health and safety in informal work. In the case of occupational diseases, apart from reports of widespread incidents of silicosis and asbestosis in workers in the informal sector, there are no national-level statistics available to identify diseases or accidents that are related to informal work.[40] Taking into consideration the size of the informal workforce and the heterogeneity of work, the recommendation from international organizations such as the International Labour Organisation ("ILO"),[41] Indian agencies under the Ministry of Labour, the Directorate General of Factory Advice Service & Labour Institutes ("DGFASLI"),[42] and other government bodies (such as the Working Group of Occupational Health and Safety)[43] has been to devise occupational health and safety standards that are specifically designed for each sector of work, keeping in mind the unique characteristics, region, and socio-cultural factors.

In the case of platform-based work, the number of workers engaged in a single platform (if considered workers under law) typically exceeds threshold levels

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[39] Ministry of Statistics and Programme Implementation, *All India Report of the Sixth Economic Census* (2014), https://www.mospi.gov.in/all-india-report-sixth-economic-census.
[40] Ministry of Labour and Employment, *Report of the Working Group on Occupational Health and Safety* (2011), https://www.ilo.org/resource/policy/report-working-group-occupational-safety-and-health-twelfth-five-year-plan.
[41] DGFASLI & ILO, *Draft National Occupational Health and Safety Profile* (2017), https://www.ilo.org/media/271571/download.
[42] *Id.*
[43] Ministry of Labour and Employment, *supra* note 40.

under most labour legislations. The threshold level for application in labour legislations in India is typically set at 10 to 20 workers (including the Code on Occupational Health and Safety, 2020), and any online platform would require more workers to be engaged with it to perform a viable service. However, the lack of (national-level) data on occupational diseases and accidents holds true in platform-based work as well. Ideally, as in informal work, occupational health and safety standards need to be set with consideration to the specificities of work in platform-based work. This means that any system for occupational health and safety would need to consider the way platform-based work is managed, which is presently through digital tools such as automated decision-making systems that determine the worker behaviour with respect to time spent on the platform, the compensation received for services, the number of tasks undertaken by the worker, and the way in which work is performed.[44]

Since platforms rely on algorithms to manage work, the assignment of responsibility for work-related health concerns is attributed to the algorithm and not the platform as an entity. This has made developing a framework for occupational health and safety for platform-based work difficult.

IV. Framing Occupational Health and Safety Regulations for Platform-based Work

In India, there is no data maintained by the Government of India on the number of accidents of platform-based workers,[45] or for occupational diseases. However, the Government has acknowledged that there is a likelihood of several health and safety issues in platform-based work.[46] The NITI Aayog's

[44] Tammy Katsabian & Guy Davidov, *supra* note 17.
[45] Ministry of Labour and Employment, *Unstarred Question No. 2647 To Be Answered On 23.03.2023*, https://sansad.in/getFile/annex/259/AU2647.pdf?source=pqars.
[46] *Id.*

report suggests setting up Occupational Disease and Work Accident Insurance for platform-based workers under the Code on Social Security, 2020, acknowledging the incidence of accidents and other occupational health and safety concerns in platform-based work. In other jurisdictions, such as the UK,[47] Japan,[48] China,[49] Brazil,[50] and the EU,[51] research has consistently shown that there are occupational health and safety concerns in platform-based work. In India, regional studies have shown the vulnerability of platform-based workers to carcinogenic pollutants,[52] reports on heat exposure,[53] and violent attacks from clients.[54] The lack of national-level data on platform-based work is a significant challenge in laying down occupational health and safety standards in this sector. At present, there is no mechanism to track occupational diseases or accidents in platform-based work. Platforms do not have the responsibility to report occupational diseases or accidents to a relevant authority (as is the case in formal employment).

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[47] Nicola Christie, Heather Ward, *The health and safety risks for people who drive for work in the gig economy*, 13 JOURNAL OF TRANSPORT AND HEALTH 115 (2019).
[48] Yusaku Morita et al., *Relationship between occupational injury and gig work experience in Japanese workers during the COVID-19 pandemic: a cross-sectional internet survey*, 60 INDUSTRIAL HEALTH 360 (2022).
[49] Zhang Jing *supra* note 37.
[50] Veena Dubal & Vitor Araújo Filgueiras *supra* note 24.
[51] Pierre Bérastégui, *Exposure To Psychosocial Risk Factors In The Gig Economy: A Systematic Review* (2021), https://www.etui.org/sites/default/files/2021-01/Exposure%20to%20psychosocial%20risk%20factors%20in%20the%20gig%20economy-a%20systematic%20review-web-2021.pdf.
[52] Abinaya Sekar et al., *Health risk associated with exposure to particulate matter and volatile organic compounds among two-wheeler delivery personnel in Ghaziabad, India*, 14 ATMOSPHERIC POLLUTION RESEARCH 101, 806 (2020).
[53] Aditi Madan, Arjun Dubey, *Heatwave vulnerability: The plight of gig workers in India*, OBSERVER RESEARCH FOUNDATION (Jul. 16, 2024), https://www.orfonline.org/expert-speak/heatwave-vulnerability-the-plight-of-gig-workers-in-india.
[54] Anjana Karumathil, *India's platform workers being flexed to death*, EAST ASIA FORUM (Oct. 28, 2023), https://eastasiaforum.org/2023/10/28/indias-platform-workers-being-flexed-to-death/.

As far as the occupational health and safety of platform-based workers is concerned, the digital platform that sets pricing for services is significant. Research on the occupational health and safety of platform-based workers shows that the more there is reliance on platforms for income, the greater the psychosocial harm for workers.[55] The uncertainty and lower rates of payment associated with digital labour platforms are directly attributable to the algorithmic management of work.[56] This, in turn, causes workers to work for longer hours and accept more tasks, increasing the pace of the work done. In India, most workers on digital platforms work for more than eight hours a day[57] (the limit on daily working time in the Factories Act, 1948, is nine hours a day and 48 hours a week). There is no data that has been made available by aggregators in India that shows that workers on platforms are paid more than minimum wage levels. Harms from platform-based work are related to low wages and working hours, automatic terminations, and workplace injuries,[58] all of which can be linked to the management of the work through algorithms. As such, any specific occupational health and safety measures intended towards work done via platforms necessarily include provisions related to such management.

Already, regulations around platform work have started to move in this direction. The EU Platform Work Directive, the first of its kind, states that platforms should "*evaluate the risks of automated monitoring or decision-making systems*," especially related to workplace accidents and psychosocial harms, and take preventive measures to avoid them. They also refer to the

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[55] Zhan Jing *supra* note 37.
[56] Veena Dubal & Vitor Araújo Filgueiras *supra* note 24.
[57] The Hindu Bureau, *85% of gig workers work for more than 8 hours: study*, THE HINDU (Mar. 8, 2024), https://www.thehindu.com/news/national/85-of-gig-workers-work-for-more-than-8-hours-study/article67926096.ece.
[58] Veena Dubal & Vitor Araújo Filgueiras *supra* note 24.

digital platform's duty not to put undue pressure on platform workers and to take steps to prevent harassment and violence. The directive categorically prohibits the digital labour platform from processing personal data related to the "*emotional or psychological State*" of a platform-based worker, which is important with respect to practices related to influencing worker behaviour. The Directive also contains provisions related to information: digital platforms are required to let workers know how automated-decision-making systems work and which parameters are used to determine the allocation of work and other decisions relevant to working conditions, and influence workers' behaviour. Such requirements are important to reduce uncertainty in platform-based work, which contributes to workplace stress and injuries. However, the Directive has also come under criticism for limiting itself to the requirement of providing information to workers on these aspects, and not regulating uncertain payments and poor working conditions directly.[59] Similar requirements have found their way into Indian legislation, such as the Karnataka Platform-based Gig Workers (Social Security and Welfare) Bill, 2024.[60] In Colorado, USA, there was an attempt to bring in requirements of disclosure to drivers regarding the payments that are made through the platform, reasons for termination, and rehiring.[61] In this legislation, the digital platform would have to inform the worker of any non-linear payment system (which included incentives, quests, and challenges) every week.

In India, occupational health and safety regulations for platform-based work have the potential to go further. The Rajasthan Platform-Based Gig Workers

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[59] *Id.*
[60] The Karnataka Platform-based Gig Workers (Social Security and Welfare) Bill, 2024. Cl. 14 (Karnataka).
[61] A Bill for An Act 101 Concerning Transparency for Drivers Who Connect With 102 Consumers Through the Use of a Digital Platform, 2023 (Colorado, USA).

(Registration and Welfare) Act, 2023, sets up a Central Transaction and Information and Management System ("CTIMS"), where every payment generated on the platform and made to the platform-based worker shall be recorded. Under Section 8 of the Act, the State Government shall maintain a database of all platform-based workers, and those who are onboarded on a platform are automatically registered with the State Government. Although this legislation is currently limited to social security and welfare, this mechanism carries significant potential for the development of occupational health and safety standards for platform-based work. Since the CTIMS makes it possible to track any payments generated on the platform (including those related to non-linear payments, such as incentives) a significant factor which contributes to working conditions on a platform is available with the State. Since platform workers onboarded on any single platform (even if the same worker is engaged in multiple platforms) are registered automatically, along with details of their employment,[62] this mechanism can provide a strong source for sector-specific health and safety standards. A mechanism similar to the CTIMS also finds a place in the draft Karnataka Platform Based Gig Workers (Social Security and Welfare) Bill, 2024. In platform-based work, this mechanism could make it easier to identify the platform the worker was engaged in at the time of a workplace injury or the one they were onboarded on for longer periods of time. To a certain extent, this would remove the complications in regulating occupational health and safety where there are multiple employers engaging the same worker.

It is also worthwhile for future legislations on platform work to include a reporting mechanism for accidents in the course of employment within the

[62] The Rajasthan Platform Based Gig Workers (Registration and Welfare) Act, 2023, Section 8(3), No. 29, Acts of Rajasthan State Legislature, 2023.

digital records maintained under the legislation, similar to the ones in industrial employment. For instance, Section 88 of the Factories Act, 1948, requires the factory manager to notify of accidents that prevent someone from working for more than 48 hours, to an authority prescribed under the Act.

When it comes to accidents and compensation, there is already a vast amount of jurisprudence related to the determination of compensation and kinds of injuries available in labour law under the Workmen's Compensation Act, 1923 (now referred to as the Employee's Compensation Act, 1923). As with other labour legislations, the Employee's Compensation Act, 1923 is also dependent on a contract of employment. As mentioned previously, this dependence may be an issue for some kinds of informal work. This may not be true for several kinds of platform-based workers where contracts can be read as contracts of employment, depending on the extent of control exerted by the digital platform. However, there are other ways in which the legislation may be made available to platform-based workers, irrespective of whether platform-based workers will be deemed to have an employment contract. The definition of a workman under the Act is broad and works through a listing of employment in a schedule. Platform-based workers, especially those who are most similar to traditional employees, could be added to this schedule. In previous instances where there was reluctance on the part of the lawmakers to amend labour legislations to bring in atypical employment relationships under their ambit, other methods for inclusion have been used. For instance, in the case of sales promotion employees, the legislation simply extends the provisions of the Employee's Compensation Act, 1923 to sales promotion employees. Section 6 of the Sales Promotion Employees (Conditions of Service) Act, 1976, states that the provisions of the Employee's Compensation Act, 1923, shall apply to sales promotion employees as they apply to workmen within the meaning of the Employee's Compensation Act, 1923. Similar efforts to extend work

injury compensation to workers in food delivery or ridesharing services are already underway in other jurisdictions, such as Singapore.[63]

V. Conclusion

This paper argues that while the discussions on employment status for platform-based workers are necessary and important, the question of meaningful protections can only be realized through legal entitlements that are designed with the specificities of the management of work on digital platforms. This is especially true in India, where informal work forms the majority of the workforce and falls out of the ambit of labour legislations. The expansion of the understanding of an employment relationship is not unique to platform-based work but a pertinent legal question for informal work in general. What is unique in platform-based work is the management of work: the control of working conditions, workers' behaviour, and price determination through algorithmic methods or automatic decision-making systems, which work through incentive structures. As such, a law that caters to platform-based workers would necessarily have to take these aspects of the work into account.

Drawing on existing work on platform-based labour that correlates digital platforms to machinery in industrial employment and the history of occupational health and safety laws in India, the paper illustrates that occupational health and safety is an important, albeit under-researched area of labour rights for platform-based workers. When it comes to non-industrial employment, there is very little available both in terms of protections and regulatory mechanisms, and data on which they may be based. The consistent

[63] Sharanya Pillai, *Platform worker protections tabled in Parliament under new Bill*, THE BUSINESS TIMES (Aug. 6, 2024), https://www.businesstimes.com.sg/singapore/economy-policy/platform-worker-protections-tabled-parliament-under-new-bill.

response to the problem of occupational health and safety has been sector-based in each sector of work, keeping in mind the unique characteristics involved. In platform-based work, this strengthens the case for specific provisions related to the management of work through digital platforms via incentive structures, control of workers' behaviour, and surveillance. Finally, the paper suggests different ways in which existing protections and mechanisms for occupational health and safety may be extended to platform-based work: through the expansion of the function of Central Transaction and Information and Management System in State-level labour legislations to occupational health and safety measures, or a simple extension of the Employee's Compensation Act, 1923, to platform-based workers.

Who Judges the Judges? A Framework for Holistic Evaluation and Incentivization of Judicial Performance

[*] Priyamvadha Shivaji

Abstract

Judicial officers in India are evaluated through Annual Confidential Reports ("ACRs"), which grade judges on predetermined metrics, including case disposal statistics and assessment of written judgements. However, the judiciary lacks a uniform framework for ensuring a fair, objective, and comprehensive assessment of performance for the various functions performed and skills required to be displayed by judges. This essay delves into how ACRs have evolved over the years in India and examines the need for a more holistic approach towards defining judicial performance for an improved framework which will help judges identify areas of improvement for both individual judicial officers and the judicial system. Ultimately, this approach will result in ensuring that evaluations form a transparent basis for incentivising performance, ensuring accountability, and improving efficiency.

I. Introduction

Empirical studies of the judiciary have long been an enduring, if difficult, task for judicial researchers. Various attempts have been made to evolve quantitative metrics for evaluating judicial performance,[1] ranking judges on the basis of that performance,[2] and using these metrics to identify models for

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[1] Mitu Gulati, David E. Klein & David F. Levi, *Evaluating Judges and Judicial Institutions: Reorienting the Perspective*, 67 DUKE L.J. ONLINE 12 (2017-2019).

[2] Stephen J. Choi, Mitu Gulati & Eric A. Posner, *Judicial Evaluations and Information Forcing: Ranking State High Courts and Judges*, 58 DUKE L.J. 1313 (2009).

good performance.[3] One such metric used by the Indian judiciary for self-evaluation is the Annual Confidential Report ("ACR"). ACRs are prepared for judicial officers at the district level (reportable to their respective High Courts) and are used to assess the individual performance of judges, including their "*character, conduct, capabilities, and performance*" in the course of a financial year.[4] They are used as a primary criterion in ensuring recognition and rewards for judges,[5] for they provide objective metrics far removed from "*a reflection of personal whims, fancies, or prejudices*."[6]

Although ACRs pertain to individual judicial performance, the evaluating authorities, that is, the District & Sessions judges and the High Courts, may also use ACRs to evaluate the overarching performance of a particular Court Complex. Data regarding pendency, challenging cases, highlighting reasons for delay in disposal, etc., which may be revealed through the ACRs, helps to identify areas for potential intervention to improve the Court's efficiency.

ACRs, therefore, play a crucial role in holding judges accountable in the exercise of their authority, encouraging high-performance standards for the judiciary, and ensuring an objective basis for rewards and career progression. However, a close examination of ACRs shows a lack of comprehensive and holistic metrics which take into account the real performance of Indian judges,

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[3] Damon Cann, *Beyond Accountability and Independence: Judicial Selection and State Court Performance*, 90 JUDICATURE 226 (2007).
[4] Department of Personnel and Administrative Affairs Mizoram, *Presentation on Maintenance of Annual Confidential Report*, https://dpar.mizoram.gov.in/uploads/attachments/1ebfe0a488e588fafbbfe78a9e79ad0f/pages-51-presentation-on-maintenance-of-acrs.pdf (last visited on Oct. 06, 2024).
[5] Srikrishna Deva Rao, Dr. Rangin Pallav Tripathy & Ms. Eluckiaa A., *Performance Evaluation and Promotion Schemes of Judicial Officers in India: A Comparative Report* (2022), https://cdnbbsr.s3waas.gov.in/s35d6646aad9bcc0be55b2c82f69750387/uploads/2021/11/2021112470.pdf [hereinafter 'Srikrishna Deva Rao']
[6] Bishwanath Prasad Singh v. State of Bihar, (2001) 2 SCC 305.

who perform a variety of tasks on an everyday basis which is often ignored by conventional evaluation metrics. Further, although ACRs themselves are a commendable basis for measuring judicial performance, there is a need for ensuring greater institutional support through addressing additional judicial concerns to truly incentivise judges to meet higher performance standards.

Part II of this essay undertakes a preliminary review of the history of ACRs and notes key metrics currently being used to evaluate judges. Part III delves into the various indicators of judicial performance in light of the multiple duties and responsibilities of a judge and highlights the components which must be incorporated for a holistic performance assessment. Part IV discusses how an assessment of performance can be used to improve judicial efficiency through interventions for improving institutional support and feedback for judges. I conclude by offering suggestions for enhancing judicial performance standards for both individual judges and for the judiciary as a whole.

II. The Indian Scenario: Evaluation through ACRs

A. Brief History

The Supreme Court of India has repeatedly discussed the need for ensuring objective and fair evaluations of judicial officers, to encourage them and allow for smooth functioning of the district judiciary.[7] While the Supreme Court outlined general markers to be kept in mind for evaluating judges, such as the need to conduct regular inspections, take into account extenuating circumstances, and assess "*capability and integrity*",[8] specific guidelines for the manner in which ACRs must be recorded have been evolved and updated by High Courts over the years. For example, the High Court of Gauhati

[7] *Id; See*, High Court of Punjab & Haryana v. Ishwar Chand Jain, (1999) 4 SCC 579.
[8] High Court of Judicature at Allahabad v. Sarnam Singh, (2000) 2 SCC 339.

followed the Assam Service (Confidential Rolls) Rules (1990) until a revision in 2020 introduced changes to the ACR format.[9] Guidelines were introduced in 2015 in Chhattisgarh[10] and, more recently in 2023 in Karnataka.[11]

However, a perusal of the guidelines highlights key differences across states with regard to the information being collected and the manner in which it is analysed. Noting the implications of lack of uniformity on the morale of judicial officers and the integrity of the system, the Supreme Court called for a serious re-examination of ACRs in the *High Court of Patna v. Pandey Gajendra Prasad*.[12] The need to frame model guidelines to remove subjectivity and ensure transparency was again echoed by the Supreme Court's National Court Management Systems ("NCMS") Committees, which were set up in 2012 to examine recommendations made by the Law Commission of India and identify areas for improvement within the judiciary, by streamlining Court and case management processes.[13]

In April 2022, then Chief Justice of India N.V. Ramana constituted a Committee to examine the possibilities of evolving guidelines for Uniform ACRs across states ("Uniform ACR Report") to ensure a more comprehensive and holistic approach towards the evaluation of judicial performance. The Committee's report, in collaboration with the Centre for Research and

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[9] Gauhati High Court, *Annual Confidential Report of Judicial Officers of Assam Judicial Service* (May 06, 2020), https://ghconline.gov.in/General/Notification-06-05-2020-1.pdf (last visited on Oct. 06, 2024).
[10] Chhattisgarh Judicial Officers (Confidential Rolls) Regulations, 2015, Gazette of India Part III Section 4.
[11] Karnataka Judicial Services (Annual Confidential Record) Rules, 2023.
[12] High Court of Patna v. Pandey Gajendra Prasad, (2012) 6 SCC 357.
[13] National Court Management Systems Committee, *Policy and Action Plan*, (Sep. 27, 2012), https://main.sci.gov.in/pdf/NCMSP/ncmspap.pdf (last visited on Oct. 06, 2024) [hereinafter 'NCMS Policy and Action Plan'].

Planning, was submitted to Chief Justice of India D.Y. Chandrachud in July 2023.[14]

The Uniform ACR report provides suggestions for an overhaul of the ACR proforma being maintained by states and suggests seven model forms which may alternatively be used. These include self-appraisal forms for judicial officers, judicial officers on deputation at District Legal Services Authorities, trainee judicial officers at State Judicial Academies, and judicial officers on deputation at the Registry or other Departments; and appraisal forms to be filled by the reporting authority, reviewing authority, and the accepting authority. However, the suggestions in the Uniform ACR report have not yet been adopted by the Supreme Court.

In 2023, the Supreme Court re-constituted the NCMS Committees to review and update the recommendations made in the 2012 NCMS Reports. Additional suggestions for modifying ACR formats are forthcoming.

B. Key Features and Concerns with ACRs

While there exist variations in the details to be captured in the ACR proforma across High Courts, a recurring pattern of reliance on the quantitative metric of "*number of cases disposed*" and the qualitative metric of "*assessment of judgments written by a judicial officer*" can be identified.

i. Quantitative Metrics

The most common data point captured in all ACRs pertains to the numerical metrics of the performance of a judge over the course of a year - the number

[14] Hon'ble Mr. Justice Muralidhar et al., *Report on Uniform ACR Submitted to the Hon'ble Chief Justice of India* (July 2023) [hereinafter 'Uniform ACR Report'].

of working days, the number of cases heard, the number of cases still pending, and the number of cases disposed within that year.[15]

The maintenance of detailed data regarding a Court's performance is a recent development. Phase II of the Supreme Court's eCourts Project aimed for a move towards a more data-oriented judiciary.[16] The National Judicial Data Grid ("NJDG"), which was launched under the eCourts Project, captures numerical data pertaining to pendency and disposal for all district Courts.[17]

The mere re-iteration of the same numbers as part of ACRs, without context regarding reasons for delays, specific concerns at various stages of pendency, analysis of specific case-type pendency, etc., fails to add any real value to evaluating judicial performance. Over-reliance on quantitative metrics fails to take into account the additional subjective factors which play a crucial role in causing delays in the system. These include scheduling clashes due to the existing workload of the Court, unceasing requests for adjournments by lawyers, difficulties in ensuring effective delivery of the summons to missing parties, lack of coordination with government advocates/departments, etc.[18] The number of cases heard/disposed of by a judge is not primarily dependent on the judge alone and is a poor metric to assess the judge's competency.

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[15] Srikrishna Deva Rao, *supra* note 5.
[16] eCommittee Supreme Court of India, *Policy and Action Plan Document: Phase II of eCourts Project* (Jan. 08, 2014), https://eCourts.gov.in/eCourts_home/static/manuals/PolicyActionPlanDocument-PhaseII-approved-08012014-indexed_Sign.pdf (last visited on Oct. 06, 2024).
[17] The NJDG portal captures data relating to pendency, disposal, stage of pendency, primary reasons for delay, and age-wise breakup of cases. *See*, NATIONAL JUDICIAL DATA GRID, https://njdg.eCourts.gov.in/njdg_v3/ (last visited on Oct. 06, 2024).
[18] SHRUTI VIDYASAGAR, SHRUTHI NAIK & HARISH NARSAPPA (EDS.), JUSTICE FRUSTRATED: THE SYSTEMIC IMPACT OF DELAYS IN INDIAN COURTS (2020).

ii. Qualitative Metrics

Most states require the Inspecting Judges to examine a predetermined number of judgments authored by the judicial officers to assess their quality.[19] In some instances, these judgments are selected by the assessee judges themselves;[20] in other states, the Inspecting Judge is required to select certain judgments at random.[21]

The 2012 NCMS Sub-Committee on Human Resource Management Systems ("HRDS") questioned the basis for ascertaining the quality of judgments through a sample which would, in all likelihood, not be representative of the assessee judge's true abilities.[22] Justice Dipankar Datta noted the subjectivity inherent in such an assessment and highlighted the fact that a true picture of the circumstances of a case cannot be drawn merely from the final judgement authored by the judge but would additionally require a detailed examination of evidence, records, and submissions made by the parties.[23]

This concern becomes more evident in light of judgements which have been appealed against at a higher Court. If a district magistrate's judgment is overturned on the first appeal, the possibility remains that the appeal may yet be contested at the High Court and eventually at the Supreme Court. The time taken for a final or authoritative pronouncement is unfathomable and may

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[19] Srikrishna Deva Rao, *supra* note 5.
[20] For example, Kerala, Karnataka and Odisha ask judicial officers to submit samples.
[21] For example, Tripura and Jammu & Kashmir ask the reviewing authorities to examine judgements at random.
[22] Justice Dipankar Datta, *NCMS Baseline Report on Human Resource Development Strategy*, https://main.sci.gov.in/pdf/NCMS/Human%20Resource%20Development%20Strategy.pdf (last visited on Oct. 06, 2024) [hereinafter 'NCMS-HRDS Report'].
[23] *Id.*, at 12.

extend beyond the time period within which the district magistrate is eligible for assessments/promotions.

Additionally, the implication that the Inspecting Judges must ultimately comment on the merits of a judgement made by another judge, which may or may not have been appealed against, poses serious questions for the structure and integrity of our judiciary. While the supremacy of the appellate Courts is unquestionable,[24] and High Courts are vested with the authority to make administrative decisions for the district judiciary,[25] an independent judiciary requires all judges' decisions to be treated with equal validity. The "*subordinate*" nature of the district judiciary, which is the first point of contact for litigants with the justice system, is a misnomer.[26] Vitiating this through qualitative assessments of judgements rendered by these judges would be unpalatable.

The NCMS-HRDS Committee sought to subvert this by proposing an objective framework for assessing a judgment's quality. This framework examines the manner in which a judgement records the applicable facts and evidence, applies legal reasoning, and utilises "*lucidity and brevity of language.*"[27] These guidelines have been incorporated, with slight modifications, by other states.[28]

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[24] INDIA CONST., arts. 141, 227.
[25] INDIA CONST., art. 235.
[26] Padmakshi Sharma, *District Judiciary Should Not Be Called 'Subordinate' Judiciary: Supreme Court*, LIVE LAW *(*May 19, 2023), https://www.livelaw.in/top-stories/supreme-Court-shall-not-refer-to-district-judiciary-as-subordinate-judiciary-229110 (last visited on Oct. 06, 2024).
[27] NCMS-HRDS Report, *supra* note 22, at 12.
[28] For example, Jammu & Kashmir includes similar language in its ACR form; *See*, Jharkhand High Court, *Guidelines for Recording ACRs of Judicial Officers in the State of Jammu & Kashmir* (2016), https://jkhighCourt.nic.in/cir_old/acr_guidlines.pdf (last visited on Oct. 06, 2024).

However, ensuring the objectivity of any qualitative assessment is an impossible exercise. A critical application of mind would be required to deduce whether principles of legal reasoning have been correctly applied to a particular judgment. Additionally, in the absence of any guidelines regarding "*lucidity and brevity*" in judgment writing, the yardstick by which a judge's evaluation is conducted continues to differ.

III. Defining Judicial Performance

Ensuring uniform and holistic standards for the evaluation of judges requires us to examine what good judicial performance entails. The first step in this regard involves identifying the scope of duties and functions performed by a judge. Assessing their roles and responsibilities in light of the overarching requirements of the judicial system is crucial for evolving effective performance markers.

A. Judicial Duties

Former and sitting Indian judges have repeatedly highlighted the fact that individual judges are required to perform both judicial and non-judicial duties,[29] which results in the role of a judge extending beyond the typical "*10-5 work*."[30]

Judicial duties involve what many consider to be at the heart of "*judging*": hearing cases, examining witnesses and evidence, and passing orders and judgements.[31] However, a further question arises here over the 'proper' role of judges. The classical view considers that judges must remain "*disinterested*

[29] Nuno Garoupa & Tom Ginsburg, *Judicial Roles in Nonjudicial Functions*, 12 WASHINGTON UNIVERSITY GLOBAL STUDIES LAW REVIEW 755 (2013).
[30] NCMS-HRDS Report, *supra* note 22, at 3-4.
[31] John Marshall, *The Duties of a Judge*, 14 ALA. LAW. 223 (1953).

and disengaged" in the course of conducting their judicial functions and confine themselves to an application of mind and legal reasoning while writing judgments.[32] In this view, judges would be evaluated primarily on the basis of their judgement-writing quality, as described above.

A more modern view, mindful of the growing volume of cases entering the judicial system and subsequent burgeoning demands on judicial time, demands that judges actively participate during Court proceedings as "*managerial*" judges to expedite case disposal.[33] Such judges would be required to showcase skills such as case and Court management, demonstrate authority over their Courtroom, and nudge lawyers and parties to actively minimise delays.[34]

In the Indian context, such managerial judges are rare.[35] However, the NCMS Committee recognised the ever-expanding scope of judicial work, estimating that the volume of cases over the next three decades would expand significantly and require modified Court and case management systems to ensure "*quality, responsiveness and timeliness*" of justice.[36] It follows, therefore, that evaluation of judicial performance must look into these expanded duties performed by a judge.

B. Non-Judicial Duties

Evaluating individual judges in isolation fails to take into account the need to look at judges as part of the judicial system as a whole and their contribution

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[32] Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).
[33] Paul R.J. Connolly, *Why We Do Need Managerial Judges*, 23 JUDGES' JOURNAL 34 (1984).
[34] Steven Baicker-Lee, *Reconceptualizing Managerial Judges*, 65 AM. U. L. REV. 353 (2015-2016).
[35] Robert Moog, *Delays in the Indian Courts: Why the Judges Don't Take Control*, 16 THE JUSTICE SYSTEM JOURNAL 19 (1992).
[36] NCMS Policy and Action Plan, *supra* note 13, at 4-5.

towards the efficient and smooth functioning of Court processes over which they are considered to be the ultimate authority.[37]

The judicial system, burdened as it is with a high workload, primarily demands efficiency in the form of quick disposal rates. However, judges often find themselves with limited time to perform their judicial duties due to the increasing number of administrative tasks with which they are entrusted.[38] Such non-judicial duties include being part of Administrative Committees which oversee the appointment of all cadres of ministerial staff, take decisions with regard to Court infrastructure, and notably, undertake evaluations and promotions of fellow judicial officers.[39]

Various attempts have been made to ensure a clear demarcation between judicial and administrative tasks. For example, in 2010, a Scheme for Court Managers was implemented under the recommendations of the 13th Finance Commission to assist judges in "*perform[ing] their administrative duties, thereby enabling the judges to devote more time to their judicial functions*."[40] The Scheme sought to ensure that judges would no longer be required to perform, inter alia, non-judicial duties of policy-making, planning, compilation of judicial statistics, case management, access to justice, quality of adjudication, human resource management, system management and IT

[37] Geeta Oberoi, *The Curious Case of Court Management in India: From Its Creation to Its Desertion*, 9 IJCA 1 (2017).
[38] NCMS-HRDS Report, *supra* note 22, at 13.
[39] Justice Amitabh Banerji, *Management in Judicial Administration* (1991), https://www.allahabadhighCourt.in/event/management_of_judicial_administration.html#:~:text=He%20has%20to%20write%20bulk,dispose%20of%20the%20administrative%20work. (last visited on Oct. 06, 2024).
[40] Thirteenth Finance Commission, *Volume I: Report 221* (2009), https://fincomindia.nic.in/asset/pdf/commission-reports/13fcreng.pdf.

system management. Unfortunately, the Scheme saw little uptake on the ground and has largely been considered a failed experiment.[41]

The ACRs of all states are unfortunately silent regarding the time and effort spent in undertaking such administrative tasks. In some instances, these may serve as explanations for "*poor*" quantitative statistics about disposal rates or even add further context regarding the evaluation of a judge's "*character/conduct*." However, in the absence of an acknowledgement of these additional duties performed by judges, glaring variations occur in the grading systems used by High Courts when evaluating judicial performance.[42]

C. Evolving Holistic Performance Indicators for ACRs

In order to capture the variety of duties described above, it is clear that ACRs must be revamped to allow for a more holistic approach towards evaluation. A balance must be struck between the duties of an individual judge and their contributions towards systemic efficiency.

At a primary level, the addition of components within ACRs, such as details regarding administrative work and duties, noting disparities in case workload, etc., would go a long way towards ensuring that ACRs are more comprehensive in their approach. However, assessing qualities such as a judge's integrity, temperament, and communication skills requires a deeper change in the manner in which we conduct evaluations.

In this regard, the American Bar Association's Guidelines on Judicial

[41] Dinesh Kumar & Nidhi Suthar, *The Imagination and Reality of Court Managers in India*, 14 IJCA 1 (2023).
[42] Uniform ACR Report, *supra* note 14, at 28-35.

Evaluation[43] offer valuable indicators which could be adopted by the Indian system. The guidelines call for qualitative surveys to be filled by a range of respondents - judges, Court staff, lawyers, and litigants visiting Courts - to cover various aspects of judicial performance, particularly the "*soft skills*" of Courtroom management, professionalism, and diligence.[44] Dutch Courts have also used similar perception indicators to assess judicial quality, independence and impartiality, and expertise.[45]

However, the relative inexperience of the Indian system, coupled with its sheer breadth of judges and cases, might make it difficult to utilise such perception surveys and audits on a regular basis. Until the system matures, it is crucial that a peer-to-peer review be implemented to regulate the manner in which the subjectivity of experiences is assessed and address technological limitations.[46] The Uniform ACR Report already suggests standardisation of grades and markings by reporting and reviewing authorities.[47] Implementing an additional layer of comparative peer-based review would help to capture more of these nuanced qualities being assessed.

IV. Improving Incentives for Better Performance

A judicial officer's evaluation can "*make or mar*" their career. Therefore, the

[43] American Bar Association, *Black Letter Guidelines for the Evaluation of Judicial Performance* (2005), https://www.americanbar.org/content/dam/aba/publications/judicial_division/aba_blackletterguidelines_jpe.pdf (last visited on Oct. 06, 2024).
[44] Institute for the Advancement of the American Legal System, *Transparent Courthouse Revisited: An Updated Blueprint for Judicial Performance Evaluation* (2016), https://iaals.du.edu/sites/default/files/documents/publications/transparent_Courthouse_revisited.pdf (last visited on Oct. 06, 2024).
[45] Dr. Pim Albers, *Performance Indicators and Evaluation for Judges and Courts*, https://rm.coe.int/performance-indicators-and-evaluation-for-judges-and-Courts-dr-pim-alb/16807907b0 (last visited on Oct. 06, 2024) at 13.
[46] Silvio Roberto Vinceti, *Innovating Judicial Performance Evaluations: Toward Academic-Style Peer Review?*, 15(1) INTERNATIONAL JOURNAL OF COURT ADMINISTRATION (2024) 2.
[47] Uniform ACR Report, *supra* note 14.

conduct of evaluations should not be a mere check-box exercise; feedback and incentives should be put in place to ensure that judges are encouraged to consistently meet and exceed performance expectations. Evaluations should allow judges to identify and reward good performance, maximise their productivity and advance their careers.[48]

In early 2024, the Supreme Court mooted an initiative for incentivising "*super performing*" trial Court judges by increasing the ratio of district judges being elevated to the High Courts and Supreme Court.[49] For promotions to reflect and reward meritorious judges and encourage healthy competition without breeding resentment,[50] it is important to recognise that evaluation results are only the first step to identifying "*merit.*" To contextually analyse these results and identify areas for improved performance and systemic efficiency, additional institutional support is required.

A. Ensuring continuity in evaluations

A major structural concern with the manner in which evaluations are currently conducted is the fact that ACRs, by virtue of being an annual exercise, do not allow judicial officers to receive continuous feedback and support.[51] Judging is a lonely and isolating endeavour.[52] Additional support through the year, particularly with regard to managing challenging workloads or feedback

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[48] Richard Posner, *What Do Judges and Justices Maximize? (the Same Thing Everybody Else Does)*, 3 SUPREME COURT ECONOMIC REVIEW 1 (1993).
[49] Dhananjay Mahapatra, *Supreme Court Plans to Incentivise 'Super Performer' Trial Court Judges*, TIMES OF INDIA (Mar. 4, 2024), https://timesofindia.indiatimes.com/india/supreme-Court-plans-to-incentivise-super-performer-trial-Court-judges/articleshow/108186409.cms (last visited on Oct. 06, 2024).
[50] Alessandro Melcarne & Giovanni B. Ramello, *Judicial Independence, Judges' Incentives and Efficiency*, 11 REV. L. & ECON. 149 (2015).
[51] Uniform ACR Report, *supra* note 14.
[52] Linda Stewart Dalianis, *Judges Writing Journals: A Personal Perspective*, 38 JUDGES J. 13 (1999).

regarding their skills in judgement-writing or handling difficult cases, would be beneficial.

Further, the current ACR rules across most states are silent regarding the prescribed timelines which must be met for the overarching process to be completed.[53] In the absence of guidelines to ensure that the exercise is completed in a timely manner, the evaluation process often takes a long time, presenting an additional burden to their workload and leading to dissatisfaction among judicial officers.[54]

A move towards a bi-annual or quarterly exercise could be a potential solution. However, irrespective of the frequency of the actual evaluation, avenues must be created to ensure that judges are able to receive continuous feedback and support from their peers, as well as the evaluators. This requires that remarks/grades received in the ACRs be regularly communicated to judges, and opportunities be provided for allowing them to discuss the feedback received in detail.

B. Managing judicial workload

Ultimately, judges can only be evaluated on the basis of their capacity to handle the volume of workload and the nature of cases before them. The variations in Court capacities across district Courts in India[55] result in sharp differences in judges' experiences, which may not accurately test their skills in comparison with their peers. Implementing a quota for promotions based on evaluation results would, therefore, not be an ideal solution without

[53] Uniform ACR Report, *supra* note 14, at 58.
[54] All India Judges' Association v. Union of India, 2023 INSC 564 (Pending).
[55] *National Judicial Data Grid*, *supra* note 17.

additionally taking steps to ensure that systemic inefficiencies leading to greater burden on judges are reduced.

To address concerns raised by judges in their evaluations, institutional support must be provided to judges to help manage their workload. This would include reducing the burden of administrative duties,[56] ensuring greater efficiency during the time spent in Court by implementing solutions such as intelligent listing systems[57] and providing research support through trained stenographers and clerks.[58] Judicial performance can be bolstered through these initiatives, leading to higher benchmarks for the judge and the judicial system.

C. Implementing training and capacity-building programs

At the time of recruitment, judges undergo mandatory training periods at respective State Judicial Academies.[59] During the course of their service, however, training programs are limited to infrequent refresher courses. Although a perusal of the Judicial Academy curricula shows that components such as judgement-writing are a part of training, additional soft skills such as Courtroom management, Court administration, etc., are often not included even as part of refresher courses.[60]

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[56] Geeta Oberoi, *supra* note 37.
[57] Priyamvadha Shivaji & Atishya Kumar, *Strategies for Effective Case Management* (2024), https://jaldi-vidhilegalpolicy.in/jaldilab/projects/project?id=103&title=Civil-Litigation-Process-for-the-Digital-Age---Consultation-Series (last visited on Oct. 06, 2024).
[58] Comparisons can be drawn with judges in other jurisdictions regarding the need for institutional support. *See*, Carly Schrever, Carol Hulbert & Tania Sourdin, *The privilege and the pressure: judges' and magistrates' reflections on the sources and impacts of stress in judicial work*, 31(3) PSYCHIATRY, PSYCHOL. & L. 327 (2024).
[59] Prashant Reddy T., Reshma Sekhar & Vagda Galhotra, *Schooling the Judges: The Selection and Training of Civil Judges and Judicial Magistrates* (2019), https://jaldi-vidhilegalpolicy.in/overview-projects/capacity-performance/report?id=201 (last visited on Oct. 06, 2024).
[60] *Id.*

In particular, district judges are often deputed to Special Courts such as Protection of Children from Sexual Offences ("POCSO") Courts or tasked with handling cases pertaining to violence against women and children. This requires sensitivity training and mental health support to prevent burnout and vicarious trauma.[61]

Ensuring continuous elevated performance levels requires continuous training. By implementing a program for regular capacity-building and expanding the scope of training to include additional skills such as professional development and Court management,[62] better performance can be encouraged.

V. Conclusion

Judges are a vital cog in the judicial system. Over the years, their role has expanded beyond merely writing judgements and orders. Consequently, the definition of what judicial performance entails must also be expanded to capture the various functions and responsibilities they are entrusted with.

Evaluating judicial performance is an arduous task, and a perfect framework which accurately captures quantitative and qualitative analysis is elusive.[63] However, attempts must be made to ensure that the present system of ACRs is improved. Suggestions for a uniform set of guidelines have been repeatedly discussed by the Indian Courts; with further refinement, the time is ripe to implement these suggestions to ensure that a more holistic assessment of

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[61] Peter G. Jaffe et al., *Vicarious Trauma in Judges: The Personal Challenge of Dispensing Justice*, 54(4) JUV. & FAM. CT. J. 1 (2003).
[62] Such programs have been attempted in other jurisdictions. *See*, Sumit Bhattacharya & Shruti Jane Eusebius, *Training Program for Bangladesh Judges and Judicial Officers* (2021), https://nja.gov.in/Concluded_Programmes/2021-22/SE-01_2021%20Programme%20Report.pdf (last visited on Oct. 06, 2024).
[63] Mitu Gulati, David E. Klein & David F. Levi, *supra* note 2.

performance takes place. By creating an ecosystem which takes into account the various difficulties and shortfalls being faced by judges for evaluations, allows for targeted interventions to increase institutional support, and encourages better performance, both judges and the judicial system can be much improved.

Free Speech, Privacy & The Right to be Remembered Well: A Double Proportionality Framework for Reconciling Rights

Vini Singh*

Abstract

The proliferation of digital footprints in today's interconnected world significantly affects our personal, professional, and political lives. These digital traces, often beyond our control, shape public perception and can have long-lasting impacts. This paper explores the concept of the "right to be remembered well," emphasizing the need for individuals to manage their digital presence actively. In democratic societies, such control is crucial, as it safeguards individual dignity and autonomy. The interplay between free speech and privacy within the context of the right to be remembered well enhances the Internet as an information resource, promotes self-fulfilment, and ensures robust democratic participation. A lack of privacy can lead to a chilling effect on free speech, discouraging open dialogue and dissent. Thus, digital rights like the right to be remembered well are vital for fostering democratic engagement and holding governments accountable. Free speech and privacy share a complementary relationship, as privacy protections support free speech by preventing negative repercussions that could stifle expression. This complementary nature provides the foundation for applying the double proportionality framework, which assesses the suitability, necessity, and proportionality of measures like de-indexing search engine results. By examining the factors necessary for this balance, the paper recommends amending Section 12 of the Digital Personal Data Protection Act ("DPDPA") to include the right to be remembered well alongside guidelines for balancing these rights effectively. Such amendments will ensure that

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digital rights are aligned with democratic values, enhancing both individual agency and societal well-being.

I. Introduction

Advanced technologies such as smart devices, wearables, and generative AI have become deeply integrated into our daily lives, facilitating a wide range of activities from banking to social interactions. This pervasive use generates a copious amount of digital footprints that define our identities. These footprints encompass a diverse array of information, including social media posts, search history, online purchases, emails, and location data.[1] The vast amount of data collected from these sources can be aggregated to create a comprehensive picture of an individual's activities and behaviour.[2]

An individual's digital footprint can significantly impact their personal and professional lives.[3] For instance, potential employers or academic institutions may assess a candidate's suitability based on their social media posts. Similarly, a romantic partner may use location data from wearable devices to track their partner's whereabouts.

This is concerning since the relationship between individuals (data principals) and the entities that process their personal data (data fiduciaries) is characterised by an unequal power dynamic.[4] This imbalance arises from the fact that data fiduciaries have significantly more control over personal data

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[1] Kira Allman & Roxana Radu, *Digital Footprints as Barriers to Accessing E – Government Services*, 14 GLOBAL POLICY 84 (2023).
[2] Maja Ništevic, *Profiling Consumers Through Big Data Analytics: Strengths and Weaknesses of Article 22 GDPR*, 1 GLPR 104 (2020).
[3] Dan Levin, *Colleges Rescinding Admissions Offers as Racist Social Media Posts Emerge*, THE NEW YORK TIMES (Jul. 2, 2020), https://www.nytimes.com/2020/07/02/us/racism-social-media-college-admissions.html.
[4] JEF AUSLOOS, THE RIGHT TO ERASURE IN EU DATA PROTECTION LAW: FROM INDIVIDUAL RIGHTS TO EFFECTIVE PROTECTION 13 (2020).

than data principals.[5] They also have access to more information about the processing of the personal data of data principals as compared to the concerned data principals.[6] This power asymmetry can lead to a number of negative consequences for individual privacy and data protection. For example, social media platforms collect and process vast amounts of personal data about their users, including their names, addresses, contact information, browsing history, and social connections. This information can be used to target individuals with personalised advertisements, track their online behaviour, and even sell their data to third parties. Individuals, on the other hand, have limited control over their personal data and may not be aware of how it is being used. The Cambridge Analytica scandal is a clear example of this power asymmetry, where the personal data of several individuals was harvested without their consent and used to manipulate democratic choices.[7]

Despite these threats to individual privacy, going offline is not a feasible solution in today's interconnected world. While many jurisdictions have recognised a right to disconnect[8] and may, in the future, acknowledge a right to be offline,[9] such an approach would significantly hinder an individual's ability to participate fully in society. Essential services like online banking, healthcare, and amenities provided by the government increasingly require internet access. Additionally, the ability to pursue education, research, and civic engagement depends on being connected. Opting out of internet use may

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[5] *Id.* at 16-17.
[6] *Id.*
[7] Jane Wakefield, *Your Data and How it is Used to Gain Your Vote*, BBC NEWS (Nov. 27, 2021), https://www.bbc.com/news/technology-54915779.
[8] Paul M. Secunda, *The Employee Right to Disconnect*, 9(1) NOTRE DAME INT'L & COMP. L. 1 (2019).
[9] Bart Custers, *New Digital Rights: Imagining Additional Fundamental Rights for the Digital Era*, 44 COMPUTER LAW & SECURITY REVIEW 1 (2022).

also lead to social isolation, cutting individuals off from vital personal and professional networks. Therefore, going offline is not a practical or sustainable response to privacy concerns. Instead, it is imperative that individuals should have the ability to exercise control over their personal data that is collected, processed, and shared with others. This includes the right to access and be informed about the processing and use of personal data[10] and to update,[11] rectify,[12] erase,[13] and restrict the processing of personal data.[14]

The Court of Justice of the European Union ("CJEU") recognised this need in *Google Spain*[15] and upheld the "*right to de-index personal information*." The case arose in 2010 when Mr. Mario Costeja Gonzalez sought to remove a news item from 1998 regarding his bankruptcy from the website of the Spanish newspaper *La Vanguardia*. The news item was indexed by Google and consequently displayed whenever a Google search for his name was conducted. Mr. Costeja contended that the news item was damaging to his reputation, particularly now that the information was outdated. When the newspaper refused to remove the item, he approached Google. Google also refused his request to de-index the news item from search results pertaining to his name, stating that it was only making publicly available information accessible. The publisher, *La Vanguardia* was in the best position to decide if the said information must be removed.

Since the existing law did not provide any guidance, the National High Court

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[10] Daniel J. Solove, *The Limitations of Privacy Rights*, 98 NOTRE DAME L. REV. 975, 994 - 1003 (2023).
[11] *Id.* at 1009-1014.
[12] *Id.*
[13] *Id.* at 1014 -1018.
[14] *Id.* at 1026-1030.
[15] Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos and Mario Costeja González, Case C – 131/12, ECLI:EU:C:2014:317 (EU).

of Spain referred the matter to the CJEU, seeking a preliminary ruling on the obligation of internet search engines in such cases. The CJEU read Article 12(b) of the EU Data Protection Directive ("EU DPD"),[16] which confers the right to rectification, erasure, or blocking of data that is processed unlawfully, with Article 14(a) of the EU DPD,[17] which grants the right to object to the processing of personal data on legitimate grounds, and the obligation on Member States under Article 6(d) of the EU DPD[18] to ensure the relevance, accuracy, and currency of personal data, held that Google had an obligation to de-index search results based on an individual's name if the information is outdated, irrelevant, or inaccurate, and the individual's right to privacy and data protection outweighed the public's right to know and the search engine's commercial interest in the given context.[19]

Notably, while upholding the right to privacy, the CJEU emphasized the need to balance it with freedom of expression and access to information. It observed that, when considering a request to de-index, factors such as "*the public's interest in having access to the information, the data subject's role in public life, the sensitivity of the information, and the data subject's right to privacy*"[20] must all be taken into account. The meaning and weightage of these factors in the balancing exercise were further explained by the Article 29 Working Party Guidelines[21] and by the European Data Protection Board, which adopted these

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[16] Council of Europe, *Council Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data*, art. 12(b), O.J. (L281) 31 (1995).
[17] *Id.* art. 14(a).
[18] *Id.* art. 6(d).
[19] Google Spain, *supra* note 15.
[20] Google Spain, *supra* note 15.
[21] *WP225 Guidelines on the Implementation of the Court of Justice of the European Union Judgment on "Google Spain SL, Google Inc. v Agencia Española de Protección de Datos, Mario Costeja González" C131/12*, EUROPEAN COMMISSION (Oct. 6, 2024), https://ec.europa.eu/newsroom/article29/items/667236/en.

guidelines and offered additional guidance.[22] According to these guidelines, when a search engine considers a request for de-indexing a link, it must analyse whether including the said link in the search results for the data subject's name is essential to protect the public's interest in having access to the information.[23] The interests of the search engines are primarily economic as opposed to the original publishers, whose primary interest is their freedom of expression.[24] Hence, as a general rule, the data subject's privacy interests are given priority while balancing rights and interests in this context.[25]

Thereafter, in 2018, the DPD was replaced by the General Data Protection Regulation ("GDPR").[26] Article 17 of the GDPR guarantees the "*right to erasure/right to be forgotten*,"[27] allowing data subjects to request the deletion of personal information held by data controllers. However, this right is subject to certain exceptions and the protection of other rights and interests, such as freedom of expression.[28] Though the GDPR uses the term "*right to be forgotten*," it has been suggested that this right represents the human desire to be "*remembered well*."[29] For instance, recently, the Madras High Court opined that people do not wish to be remembered for their faults or wrongdoings. No individual desires to be humiliated or ostracised by fellow

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[22] European Data Protection Board, *Guidelines 5/2019 on the criteria of the right to be forgotten in search engine cases under the GDPR (part I)*, EDPB.EU (Oct. 6, 2024), https://www.edpb.europa.eu/our-work-tools/our-documents/guidelines/guidelines-52019-criteria-right-be-forgotten-search-engines_en.
[23] *Id.*
[24] Google Spain, *supra* note 155.
[25] *Guidelines 5/2019*, *supra* note 22.
[26] Council of Europe, *Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation)*, O.J. (L119) 1 (2016).
[27] *Id.* art. 17.
[28] *Id.*
[29] PAUL BERNAL, THE INTERNET WARTS AND ALL – FREE SPEECH, PRIVACY AND TRUTH 46 (2018).

human beings for their past actions. Every individual has a right to be remembered well and should, therefore, have the ability to control how others see and remember them.[30]

Individuals can exercise control over their digital footprint through various methods, such as de-indexing search results, which ensures that certain results do not appear when an individual's name is searched on a search engine. Similarly, de-ranking makes information less accessible by moving specific search results far down the list on a search engine. Various jurisdictions have modernized or are in the process of modernising their data protection laws to address the challenges to the fundamental rights of privacy, dignity, autonomy, reputation, personality, identity, freedom of speech, expression of information, and the right to equality. Most of these frameworks include all or some aspects of the right to be remembered well.

Enabling individuals to exercise this control entails the risk of limiting the free flow of ideas and information online. Critics argue that an overbroad right to be remembered well could be used to silence criticism of governments, public agencies, or powerful individuals and distort democratic discourse.[31] They also worry that it may have a chilling effect on freedom of speech and expression, as individuals may be hesitant to share their views or information for fear of it being removed from the internet.[32] It has also been suggested that this right may be misused to rewrite history and erase valuable information.[33]

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[30] Karthick Theodore v. The Registrar General, Madras High Court & Ors., W.A.(MD) No. 1901 of 2021, (Madras High Court).
[31] Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Results*, 8 J.L. ECON. & POL'Y 883 (2012).
[32] Jeffrey Rosen, *The Right to be Forgotten*, 64 STAN. L. REV. 88, 89 (2012).
[33] Eloise Gratton & Jules Polonetsky, *Droit à l'oubli: Canadian Perspective on the Global Right to be Forgotten Debate*, 15 COLO. TECH. L.J. 337, 347 (2017).

On the other hand, advocates of the right to be remembered well posit that it would enhance rather than restrict freedom of speech and expression. They claim that without the ability to manage our personal information, we live in a State of constant surveillance, akin to Bentham's panopticon.[34] This right would enable individuals to express themselves freely without the need for perpetual self-censorship.[35] It would also provide individuals and society with the opportunity to grow and evolve over time and ensure that the Internet remains an accurate and up-to-date resource.[36]

Except for erasure, which involves the removal of information, other measures for implementing the right to be remembered well, such as de-indexing, de-ranking, rectification, updating, and contextualization, simply make information less accessible or enhance its quality.[37] Therefore, if the right to be remembered well is tailored appropriately, it would further similar constitutional goals as freedom of speech, expression, and information. However, there cannot be a universal model for this right as different jurisdictions reconcile the rights of privacy and freedom of speech and expression differently, reflecting their unique constitutional values. Hence, some jurisdictions, like the State of California in the U.S., have offered the right to remember well but prioritise free speech by default. For instance, information like Court records that are already publicly accessible cannot be deleted under the California data protection legislations like the California Consumer Privacy Act, 2018,[38] and the California Delete Act, 2023.[39] At the

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[34] VIKTOR MAYER – SCHONBERGER, DELETE: THE VIRTUE OF FORGETTING IN A DIGITAL AGE (2009).
[35] *Id.*
[36] PAUL BERNAL, *supra* note 17.
[37] MEG LETA JONES, CTRL + Z: THE RIGHT TO BE FORGOTTEN (2016).
[38] The California Consumer Privacy Act, 2018, Cal. Civ. Code § 1798.105 (U.S.).
[39] The California Delete Act, 2023, Cal. Civ. Code §§ 1798.99.80 – 1798.99.89 (U.S.).

same time, others, like the Quebec Law 25[40] in the province of Quebec in Canada, do not automatically prioritise free speech over privacy or vice versa. Instead, it requires that these rights must be balanced contextually.

Likewise, an "*Indian Right to Be Remembered Well*" must align with the Indian Constitution, ensuring that privacy, dignity, and autonomy rights are effectively protected without excessively encroaching on freedom of expression.

This poses a constitutional dilemma of reconciling these competing rights. Part II examines the current legal framework governing this right. Part III elucidates the double proportionality standard for balancing competing fundamental rights. Part IV discusses how this framework can be applied to reconcile freedom of speech and expression with the right to privacy in the context of the right to be remembered well. Finally, Part V concludes with recommendations on how the right to be remembered well should be tailored to ensure its compatibility with the Indian Constitution.

II. Legal Framework for The Right to be Remembered Well in India

As discussed above, the right to be remembered well is a fundamental right that empowers individuals to exercise control over their personal information, enabling them to curate their persona. By allowing individuals to restrict access to their personal information over the internet, this right protects fundamental rights such as privacy, reputation, personality, and identity. It addresses the power asymmetry between data subjects and data fiduciaries,

[40] Act Respecting the Protection of Personal information in the Private Sector (Quebec Law 25), 2021, §§ 23, 28, 35, 36, (Can.).

ensuring that individuals have greater control over their personal data and how it is used.

While this right is fairly novel, the underlying concept of controlling one's personal image is fairly well established. Therefore, this right has several legal predecessors, such as the writ of "*habeas data*"[41] and the right of informational self-determination.[42] As informational privacy is recognized as a fundamental right in India, the right to be remembered well enjoys a strong foundation. However, the DPDPA[43] has opted for a restricted version of the right to be remembered well. It enables data principals to exercise their rights of correction, completion, updating, and erasure only in limited cases.[44] Notably, it does not guarantee the right to de-index at all. The constitutional Courts in India, however, have upheld various aspects of this right. The following sections explore the legislative framework and the rulings of the constitutional Courts in India pertaining to this right.

A. Legislative Framework for the Right to be Remembered Well in India

The proliferation of digital platforms, the collection and processing of vast amounts of personal data, and the potential for misuse of this data have raised serious concerns about individual privacy and rights. As a result, most jurisdictions, including India, have embarked on a journey to modernise their

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[41] Sarah L. Lode, "*You Have the Data" The Writ of Habeas Data and Other Data Protection Rights: Is the U.S. Falling Behind?,* 94 IND. L.J. 41 (2018).
[42] Antoinette Rouvroy & Yves Poullet, *The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy* in SERGE GUTWIRTH ET AL (eds.), REINVENTING DATA PROTECTION? 45 (2009).
[43] The Digital Personal Data Protection Act, 2023, Act No. 22, 2023 [hereinafter 'DPDPA, 2023'].
[44] *Id.* § 12. These rights are only available when the personal data is processed with the consent of the data principal, or when the personal data is voluntarily shared by the data principal for a specified purpose.

data protection laws to address these challenges and safeguard individual rights. In 2012, a Committee of Experts was appointed by the Planning Commission of India and chaired by Justice (Retd.) A.P. Shah submitted its opinion on the modernisation of data protection laws in India.[45] It identified five key aspects that must be considered while updating our data protection regime, namely,

> "(i) Technological neutrality and interoperability with international standards; (ii) Multi-Dimensional privacy; (iii) Horizontal applicability to State and non-State entities; (iv) Conformity with privacy principles; and (v) A co-regulatory enforcement regime."[46]

These aspects were, however, not incorporated at that time in our legal framework. Nevertheless, they continue to be relevant for assessing and improving upon the current framework that still lacks some of these aspects, like interoperability. The journey towards comprehensive data protection legislation in India began in 2017 with the establishment of a committee chaired by Justice (Retd.) B.N. Srikrishna.[47] The committee's report, submitted in 2018, laid the groundwork for the Personal Data Protection Bill, 2018,[48] marking a significant step towards safeguarding privacy and data protection in the country. However, the legislative process for data protection in India has been marked by several iterations and revisions. This process, which was initially based on a privacy and data principal-focused approach,

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[45] Planning Commission, *Report of the Group of Experts on Privacy* (Feb. 7, 2024), https://cis-india.org/internet-governance/blog/report-of-group-of-experts-on-privacy.pdf.
[46] *Id.*
[47] Committee of Experts under the Chairmanship of Justice B.N. Srikrishna, *A Free and Fair Digital Economy: Protecting Privacy, Empowering Indians*, (Feb. 7, 2024), https://www.meity.gov.in/writereaddata/files/Data_Protection_Committee_Report.pdf.
[48] The Personal Data Protection Bill, 2018.

shifted gradually towards a State and economy-centric approach with each version. After consultation with relevant stakeholders, The Personal Data Protection Bill, 2018, was replaced by the Personal Data Protection Bill, 2019,[49] which was then reviewed by a Joint Parliamentary Committee. This Committee proposed a fresh legislation titled The Data Protection Bill, 2021,[50] which shifted the priorities of the data protection regime in India by focusing on the powers of the State. It was subsequently replaced by the Digital Personal Data Protection Bill, 2022.[51] Despite being open for public comment, the 2022 Bill eventually lapsed. Finally, the DPDPA was enacted and is yet to come into force. The current framework places economic growth and the State's interests over individual rights. It lacks several privacy-oriented concepts of the initial draft such as "*privacy by design.*"[52]

The B.N. Srikrishna Committee had recommended the introduction of a limited right to be remembered well, which included a right to de-index[53] and a right to correct inaccurate personal data.[54] They advised against the inclusion of a right to erasure, considering its possible implications for freedom of speech and the public's right to know.[55] They also outlined specific factors to consider when balancing freedom of speech with privacy in relation to this right.[56] These factors include the sensitivity of the personal data, the scale of

[49] The Personal Data Protection Bill, 2019, Bill No. 373 of 2019.
[50] Seventeenth Lok Sabha, *Report of the Joint Committee on the Personal Data Protection Bill, 2019,* EPARLIB.IN (May 11, 2024), https://eparlib.nic.in/bitstream/123456789/835465/1/17_Joint_Committee_on_the_Personal_Data_Protection_Bill_2019_1.pdf.
[51] The Digital Personal Data Protection Bill, 2022.
[52] The Personal Data Protection Bill, 2018, § 29.
[53] *Id.* § 25.
[54] *Id.* § 27.
[55] Committee of Experts under the Chairmanship of Justice B.N. Srikrishna, *supra* note 47 at 78-79.
[56] *Id.*

disclosure, the role of the data principal in public life, the relevance of the data to the public, and the nature of the disclosure and the activities of the data fiduciary.[57]

In determining the relevance of the data to the public, they opined that the standard of newsworthiness prevalent in the U.S. may be helpful.[58] This standard, as defined in the U.S. Supreme Court's decision in *Snyder v. Phelps*.[59] treats a material as newsworthy if the information relates to any matter of political, social, or other concern to the community or is of general interest and value to the public. Additionally, other factors such as the likelihood of injustice, the sensitivity of the information, the passage of time, and the class of affected persons may also be relevant in determining where the public interest lies.[60] By considering these factors, it is possible to strike a balance between an individual's right to privacy and the public's right to information. They also suggested that the law must include a review mechanism to accommodate situations where the information might subsequently become relevant to the public.[61] Certain exceptions to the right were also suggested, such as for law enforcement or national security purposes.[62] They also recommended exemptions for manual processing of personal data and for research, archival, and statistical purposes.[63] However,

[57] *Id.*
[58] *Id.*
[59] Snyder v. Phelps, 562 U.S. 443 (2011).
[60] *Id.*
[61] Committee of Experts under the Chairmanship of Justice B.N. Srikrishna, *supra* note 47 at 78-79.
[62] *Id.* at 133-134.
[63] *Id.* at 138-139.

these exemptions would only apply in specific situations and would need to be justified based on the context.[64]

Considering that the implementation of the right to be remembered well requires reconciliation between freedom of speech and the right to privacy, they proposed that the Adjudicatory Wing of the Data Protection Authority of India should be tasked with implementing this right.[65] This would ensure a fair and impartial adjudication of requests related to the right to be remembered well, preventing the potential for bias or conflicts of interest that may arise if private entities were responsible for balancing these competing rights. They also provided for an appellate mechanism wherein appeals would be directed from the Adjudicatory Wing to the Appellate Tribunal[66] and thereafter to the Supreme Court of India.[67] Accordingly, the Personal Data Protection Bill, 2018 empowered data principals to request restrictions on access to their personal data and corrections for erroneous information.[68] It was replaced by the Personal Data Protection Bill, 2019, which introduced the right to erasure.[69] This allowed data principals to request for deletion of personal data that was no longer necessary for the purpose it was processed. The Data Protection Bill, 2021, further extended the right to be remembered well by enabling data principals to request restrictions on the continued processing of their personal data in those cases where the interest of the data principal superseded the right to freedom of speech, expression and information, of any other citizen.[70] The Digital Personal Data Protection Bill, 2022, however,

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[64] *Id.*
[65] *Id.* at 79-80.
[66] *Id.* at 158.
[67] *Id.* at 159.
[68] The Personal Data Protection Bill, 2018, *supra* note 52, § 27.
[69] The Personal Data Protection Bill, 2019, *supra* note 49, § 18.
[70] The Data Protection Bill, 2021, §§ 18, 20(2).

significantly limited the right to be remembered well. It did not recognize the right to restrict accessibility and the right to restrict processing of personal data. It only enabled the data principals to request for correction of inaccurate or misleading personal data, updating of outdated information, and erasure of data no longer necessary for its original purpose of collection.[71] Notably, data principals could not invoke it in cases where Courts or tribunals processed personal data for judicial or quasi-judicial functions or for the prevention, investigation, or prosecution of legal contraventions.[72] Additionally, the legislation empowered the Central Government to exempt certain data fiduciaries from compliance with this right on grounds such as national security or research purposes.[73]

Finally, the DPDPA was enacted on August 11, 2023, and is yet to come into force. It does not guarantee the right to de-index, de-list, or de-reference personal data.[74] It, however, requires that when personal data is processed to make decisions about the data principal or shared with another data fiduciary, the fiduciary responsible for processing must ensure the data's completeness, accuracy and consistency.[75] It also mandates that personal data must be erased if the data principal withdraws their consent or if it is reasonable to assume that the specified purpose for the data collection is no longer being served, whichever occurs first.[76] This requirement is subject to exceptions where data retention is necessary to comply with existing legal obligations.[77] Data

[71] The Digital Personal Data Protection Bill, 2022, *supra* note 51, § 13.
[72] *Id.* § 18.
[73] *Id.*
[74] DPDPA, 2023, *supra* note 43, § 12.
[75] *Id.* § 8(3).
[76] *Id.*
[77] *Id.* § 8(7).

fiduciaries are also obligated to ensure that their data processors erase such personal data when applicable.

The DPDPA explicitly recognises the "*right to correction, completion, and updating of personal data.*"[78] However, this right is limited to instances where the data principal has previously given consent for the processing of their personal data.[79] It also applies in cases where the data principal voluntarily shares personal data for a specific purpose and does not explicitly withhold consent.[80] Under this provision, data principals may request that the data fiduciary correct inaccurate or misleading data, complete any incomplete personal data, update outdated personal data, and erase personal data. When exercising this right, data principals are required to provide verifiably authentic information to support their requests.[81]

Upon receiving such a request, the data fiduciary is required to comply. However, a request for erasure can be denied if the retention of personal data is deemed necessary for the specified purpose or for compliance with any applicable law currently in force.[82] If the data fiduciary does not comply with the data principal's request, the data principal must first exhaust the grievance redressal mechanism provided by the data fiduciary.[83] The data fiduciary is required to respond to grievances within a prescribed timeframe. If the data principal's grievance remains unresolved, they have the option to escalate the issue to the Data Protection Board of India ("DPBI").[84]

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[78] *Id.* § 12.
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.* § 15(e).
[83] *Id.* § 13.
[84] *Id.*

These rights may not be availed in certain circumstances. Section 17 of the DPDPA outlines exemptions to the rights of data principals. These exemptions include the processing of personal data for the enforcement of a legal right or claim by any Court or tribunal performing judicial or quasi-judicial functions, for approved corporate reconstruction schemes, and for the prevention, detection, investigation, or prosecution of any offence or contravention of the law.[85] The Central Government can exempt State instrumentalities from the provisions of the DPDPA through notification. These exemptions can be based on grounds such as the sovereignty and integrity of India, national security, friendly relations with foreign States, maintenance of public order, or the prevention of incitement to any cognizable offence related to these grounds.[86] Exemptions are also applicable when the processing of personal data is necessary for research, archiving, or statistical purposes, provided that the personal data is not used to make decisions specific to the data principal and the processing is conducted in accordance with prescribed standards.[87]

When a data principal approaches the DPBI with a complaint of non-compliance with their request by the data fiduciary, it is empowered to give both parties an opportunity to be heard and issue directions, with reasons documented in writing.[88] These directions can be reviewed upon a representation made by either the Central Government or the aggrieved party. Appeals from the DPBI's orders are to be directed to the Telecom Disputes Settlement and Appellate Tribunal.[89] Subsequent appeals can be made to the concerned High Court and ultimately to the Supreme Court.[90] The DPDPA

[85] *Id.* § 17.
[86] *Id.*
[87] *Id.*
[88] *Id.* §§ 27, 28.
[89] *Id.* §§ 29, 2(8).
[90] *Id.* § 29(9).

also provides mechanisms for Alternative Dispute Resolution through mediation and allows matters to be resolved through the acceptance of a "*voluntary undertaking*" by any party at any stage of the proceedings.[91] This is appreciable, considering the privacy risks associated with the processing of personal data.

Nevertheless, as discussed above, the DPDPA does not create a data principal-oriented framework. The rights guaranteed to the data principal have been truncated by limiting their applicability and by granting wide exemptions to these rights. Notably, it also does not offer any guidance with respect to the implementation of these rights, particularly the right to be remembered well, which requires balancing competing rights of privacy and free speech.

B. Judicial Pronouncements on the Right to be Remembered Well in India

The Supreme Court of India recognises that the right to be remembered well is rooted in the fundamental right to privacy.[92] Following this precedent, various High Courts in India have upheld this right primarily to protect the reputation and dignity of individuals, particularly that of victims of non-consensual pornography, rape and sexual abuse. For instance, the Karnataka High Court upheld this right in the case of *Name Redacted (Sri Vasunathan) v. The Registrar General.*[93] In this case, a woman's father sought the removal of her name from online Court proceedings to protect her reputation and current marital relationship. The High Court granted the request, acknowledging her right to be remembered well and noting that similar rights have been upheld in foreign jurisdictions. However, the Court failed to provide

[91] *Id.* § 31.
[92] Justice K.S. Puttaswamy (Retd.) v. Union of India (Privacy), (2017) 10 SCC 1.
[93] Name Redacted v. The Registrar General, 2017 SCC OnLine Kar. 424.

specific guidelines for balancing competing privacy and speech interests while implementing this right.

Subsequently, the right to be remembered well was further established in *Zulfiqar Ahman Khan v. Quintillion Business Media Private Limited*.[94] In this case, a news website published defamatory articles about Mr. Khan based on anonymous sexual harassment complaints. These articles were indexed by search engines and republished by another website. Mr. Khan sought the removal of these articles, their links in search engine results, and a permanent injunction against their republication. He argued that the articles presented a defamatory and one-sided narrative, causing him significant personal and professional loss.

To protect Mr. Khan's right to reputation and privacy, the Delhi High Court granted his request for the duration of the legal proceedings. It ordered the removal of the original article and prevented its republication in any form. The Court also directed search engines to de-index the articles within 36 hours. However, once again, clear and comprehensive guidance was not provided for reconciling freedom of speech and privacy in the context of the right to be remembered well.

Thereafter, the Odisha High Court recognized the need for a right to be remembered well in cases of non-consensual pornography or revenge pornography in cyberspace.[95] It observed that existing penal laws were insufficient to grant relief to victims in such circumstances, as they could neither prevent the initial dissemination of such content nor halt its further

[94] Zulfiqar Ahman Khan v. Quintillion Business Media Private Limited, 2019 SCC OnLine Del. 8494.
[95] Subhranshu Rout v. State of Odisha, 2020 SCC OnLine Ori. 878.

spread. To address this gap, it cited the decisions in *Google Spain*[96] and *NT1 and NT2*.[97] The Court explained the nature of this right and its origins in the right to privacy, autonomy, dignity, and personality rights. It also observed that in cases of conflict between privacy and any other fundamental right, the right that would advance public interest in that context should take precedence.

In *X v. Union of India and Ors*,[98] the Delhi High Court again recognised the right to be remembered well. The case involved photographs of a woman extracted from her private Facebook and Instagram accounts, which were subsequently posted repeatedly on pornographic websites. While the images themselves were not inherently offensive, they became problematic through their association with the pornographic context. The unauthorized use of these images, despite the implementation of appropriate privacy settings on her social media accounts, demonstrated a clear violation of her intent to limit the sharing of such content. Moreover, it was reasonable for her to expect that these images would not be repurposed on offensive websites by third parties.

Considering the technological challenges, the Court contemplated how the right to be remembered well may be implemented effectively in this context. It referred to the Information Technology Act, 2000 and various related rules addressing procedures for blocking access to information, intermediary guidelines, and security practices. These provisions establish mechanisms for addressing grievances related to objectionable content and impose specific obligations on significant social media intermediaries.

The Court also considered international jurisprudence to elucidate the

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[96] Google Spain, *supra* note 15.
[97] NT1 and NT2 v. Google LLC, [2019] EWHC 799 (QB) (U.K.).
[98] X v. Union of India & Ors., 2021 SCC OnLine Del. 1788.

obligations of intermediaries in such cases. It referenced cases such as *X v. Twitter Inc*,[99] from the Supreme Court of New South Wales, Australia, which ordered the global suspension of accounts publishing offending material. The Court also cited the *Google Spain*[100] case to explain intermediary obligations and the right to de-index, as well as the Canadian Supreme Court's *Equustek*[101] decision recognizing the right to de-referencing. Additionally, it drew upon the CJEU's judgment in *Eva Glawischnig-Piesczek v. Facebook Ireland Ltd,*[102] which addressed the repeated publication of defamatory content.

Applying these legal principles, the Court concluded that to ensure an effective remedy in such cases, the removal of content and disablement of access must be comprehensive. Such cases do not engage the public interest in having access to the information. The harm to the dignity and reputation of the victim, on the other hand, is manifold. At the same time, the global nature of the internet and varying jurisdictional laws pose a hurdle to the remedy of erasure for such offending content. Hence, the Court emphasized the possibility of making the content difficult to locate by de-indexing it from widely used search engine results.

Consequently, the Court directed the State and cyber cell to remove the offending content to the maximum extent possible within 24 hours of receiving the Court order and remove similar content in future as well. It further instructed popular search engines to globally de-index and de-reference the offending content from all relevant web pages within 24 hours of receiving the judgment and information from the investigating officer.

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[99] X v. Twitter Inc., [2017] NSWSC 1300 (NZ).
[100] Google Spain, *supra* note 15.
[101] Google v. Equustek Solutions Inc. [2017] S.C.R. 34 (Can.).
[102] Eva Glawischnig-Piesczek v. Facebook Ireland Ltd, Case C – 18/18, ECLI:EU:C:2019:821 (EU).

Additionally, these search engines were directed to proactively identify and disable access to identical offending content.

The Delhi High Court further expanded the scope of the right to be remembered well in *X v. YouTube*.[103] The case involved audition videos of a prominent Bengali actress that had been uploaded to YouTube. These videos contained explicit content, prompting the actress to request their removal from the original uploader. While the uploader complied with this initial request, the videos were subsequently reposted on YouTube and other websites, accompanied by objectionable comments. This unauthorised dissemination resulted in significant personal harassment and professional repercussions for the actress.

The petitioner's argument drew upon a series of landmark judgments, including *Puttaswamy (Privacy)*,[104] *Zulfiqar Ahman Khan*,[105] *Jorawer Singh Mundy*,[106] and *Subhranshu Rout*,[107] to assert her right to be remembered well. Additionally, she contended that under the provisions of the Information Technology Act, 2000, and the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, particularly Rule 3(2)(b), the websites were obligated to remove the contentious videos.

The Court's analysis focused on the issue of consent, noting that although the petitioner had voluntarily participated in the filming of the videos, she had not consented to their dissemination via the defendant's website and search engines. It emphasized that the petitioner had promptly objected to the initial

[103] X v. Youtube, AIR ONLINE 2021 Del. 527.
[104] Puttaswamy, *supra* note 92.
[105] Zulfiqar Ahman Khan, *supra* note 94.
[106] Jorawer, *infra* note 109.
[107] Subhranshu, *supra* note 95.

uploading on YouTube by the producer. In its deliberation, the Court drew parallels with the *Zulfiqar Ahman Khan*[108] case, where the right to be remembered well was recognised as a means to protect the petitioner's privacy and reputation rights. It determined that the present case similarly involved an invasion of privacy and potential damage to reputation, warranting comparable relief. Consequently, as an interim measure, it ordered the removal of the offending videos within 36 hours of the receipt of its order and prohibited their further publication. Furthermore, it directed search engines to de-list links to these videos within the same timeframe.

Apart from these cases, the right to be remembered well has also been recognised to offer a fresh start to those who have been completely acquitted of criminal charges in order to ensure their societal reintegration. For example, in *Jorawer Singh Mundy v. Union of India*,[109] the Delhi High Court granted interim relief to an American citizen seeking the removal of an outdated judgment from online platforms. The Court acknowledged Mr. Mundy's right to privacy and the right to be remembered well, balancing these rights with the public's right to information and the maintenance of transparency in judicial records. It considered the nature of the information, assessing whether it was outdated, irrelevant, or excessive in relation to its original purpose. It also evaluated the potential harm that the information could cause to Mr. Mundy's reputation, personal life, and career prospects. Finally, it weighed the public's interest in accessing the information against Mr. Mundy's right to privacy and reputation.

Similarly, the Kerala High Court's decision in *Vysakh K.G. v. Union of India*

[108] Zulfiqar Ahman Khan, *supra* note 94.
[109] Jorawer Singh Mundy v. Union of India, 2021 SCC OnLine Del. 2306.

and Connected Cases[110] represents a significant advancement in the jurisprudential recognition of the right to be remembered well as an integral component of the right to live with dignity. Herein, the Court explained that individuals possess the right to control information about themselves and to "*live their life in the moment, erasing their past*." It noted that the right to be remembered well is contextually related to an individual's past life and cannot be claimed with respect to recent or ongoing proceedings. This distinction acknowledges the tension between the right to be remembered well and the principle of open justice, particularly in ongoing or recent judicial proceedings. Notably, the Court addressed the role of intermediaries, particularly search engines like Google, in enforcing the right to be remembered well. It challenged the notion of content blindness of search engines, citing examples of content filtering and personalization already employed by platforms like Google. It posited that in the era of AI, identifying and filtering offending content to uphold this right should be technologically feasible.

Likewise, recently, the Madras High Court recognized the right to be remembered well in *Karthick Theodore v. The Registrar General & Ors.*[111] In this case, a man who was acquitted of criminal charges pertaining to sexual assault sought to have his name redacted from Court records and their digital copies. Initially, the Court had rejected the petitioner's request, citing underdeveloped criminal law jurisprudence and the principle of open justice. However, a Division Bench of the Court reconsidered the matter. The Court's

[110] Vysakh K.G. v. Union of India and Connected Cases, (2023) 1 KLT 83.
[111] Karthick Theodore, *supra* note 30.

revised stance drew upon international precedents such as *Google Spain*[112] and *Puttaswamy*,[113] as well as the DPDPA.

It elucidated that while High Courts, as Courts of Record, are obligated to retain data in perpetuity, they possess discretion regarding the public availability of personal data. This discretion, it noted, has been exercised previously to protect crime victims, as exemplified in cases like *X v. State of Maharashtra*[114] and *Nipun Saxena*,[115] where identities of victims of rape and sexual abuse were concealed.

Significantly, the Court characterized the petitioner's request as enforcement of his "*fundamental right to erasure*," asserting that "*the right to be forgotten or the right to be remembered well, cannot be denied to a person if the facts and circumstances so commend it*."[116] This formulation underscores the Court's recognition of the challenges posed by "*uncontrolled and unbridled information dissemination in the internet era*."[117]

At the same time, it illustrates the need for a proper framework for reconciling competing rights of freedom of speech and privacy in this context. On an appeal by Indian Kanoon, the Supreme Court has granted interim relief in the form of a stay while it reconsiders the matter.[118] The subsequent parts of this

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[112] Google Spain, *supra* note 15.
[113] Puttaswamy, *supra* note 92.
[114] X v. State of Maharashtra, 2023 SCC OnLine SC 279.
[115] Nipun Saxena & Anr. v. Union of india & Ors., (2019) 2 SCC 703.
[116] Karthick Theodore, *supra* note 30.
[117] Karthick Theodore, *supra* note 30.
[118] Anmol Kaur Bawa, *Supreme Court To Settle Law On 'Right To Be Forgotten'; Stays HC Direction To 'IndianKanoon' To Pull Down Judgment*, LIVE LAW (Jul. 24, 2024), https://www.livelaw.in/top-stories/supreme-Court-to-settle-law-on-right-to-be-forgotten-stays-hc-direction-to-indiankanoon-to-pull-down-judgment-264401?fromIpLogin=64355.273243304524.

paper address the issue of an appropriate framework for reconciling competing rights in this context.

III. The Double Proportionality Standard for Reconciling Competing Rights

The double proportionality standard for reconciling rights modifies the traditional four-stage proportionality standard[119] to ensure that both competing fundamental rights are treated with equal respect.[120] It is a three-step process that is used when the text of the Constitution does not indicate any priority between the competing rights.[121] It ensures that a measure is both suitable and necessary for advancing both rights while avoiding undue infringement on either.[122] First, the measure must be genuinely aimed at furthering both rights and have a rational nexus to that purpose.[123] Second, it should be the least restrictive means to achieve this goal, ensuring there are no less restrictive and equally effective alternatives available.[124] Finally, the measure must strike a fair balance between the competing rights, avoiding disproportionate restrictions on either.[125]

The double proportionality test has provided significant clarity in reconciling competing fundamental rights. Prior to its introduction, Indian Courts often prioritised one right over another based on public interest[126] or engaged in contextual balancing using the proportionality test.[127] In comparison, it offers

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[119] Modern Dental College v. Union of India, (2016) 7 SCC 353.
[120] Association for Democratic Reforms v. Union of India, 2024 INSC 209.
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] Mr. X. v. Hospital Z, AIR 1999 SC 495.
[127] Central Public Information Officer, Supreme Court of India v. Subhash Chandra Aggarwal, (2019) SCC OnLine SC 1459.

a more structured approach to resolving conflicts between fundamental rights. However, though the double proportionality test offers a solution for the dilemma of competing fundamental rights, it is not a universal panacea. In cases where both rights pursue fundamentally different objectives, the test may prove inadequate. For instance, in *Mr. X v. Hospital Z,*[128] the right to life and health conflicted with the right to privacy. While both rights are rooted in dignity, they serve distinct purposes in the given context. The right to life and health necessitated the disclosure of the HIV-positive status of the petitioner, while the right to privacy required the non-disclosure of this sensitive personal information. The doctor-patient confidentiality rules could not simultaneously fulfil both objectives.

Hence, it is essential to ascertain if the relationship between the competing rights is complementary within the given context in order to apply the double proportionality standard effectively. In the context of the right to be remembered well, freedom of speech and expression and the right to privacy are mutually reinforcing. Both further human dignity and enhance the internet as an information resource. Consequently, they may be reconciled through the double proportionality standard. The next section examines the factors that must be considered when balancing these rights in the context of the right to be remembered well.

IV. The Double Proportionality Framework For Reconciling Free Speech & Privacy

As discussed above, the double proportionality standard ensures that both rights in conflict are equally respected and realized, providing a more nuanced and balanced resolution. In this approach, rights are seen as complementary.

[128] Mr. X, *supra* note 126.

Hence, it ensures that the fundamental rights guaranteed in the Indian Constitution can exist in contemporaneous accord.[129] While reconciling freedom of speech and expression with privacy, it must be recognized that both rights are important for a healthy democracy. A lack of privacy, especially informational privacy, in the contemporary era, would impede intellectual freedom and could ultimately create a chilling effect on the freedom of speech and expression.[130] Similarly, the right to be remembered well safeguards individuals' freedom of thought and expression, protecting them from the adverse effects of constant surveillance by others.[131] It also ensures that individuals have access to accurate and up-to-date information.

The reconciliation process should start by assigning equal weight to both sets of rights. At this stage, it is crucial to assess whether the measures adopted are narrowly tailored and have a rational connection to the legitimate aims of advancing the values inherent in both rights.[132] For example, if a request for de-indexing has been made, the focus should be on whether this action supports the constitutional objectives underlying both rights. It is not necessary at this stage to evaluate the effectiveness of the requested remedy in achieving these objectives.[133]

In evaluating a data principal's request concerning their personal data available online, a primary assessment should be conducted to ascertain the potential harm resulting from continued accessibility of the information. This

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[129] Association for Democratic Reforms, *supra* note 120.
[130] Daniel J. Solove, *I've Got Nothing to Hide and Other Misunderstandings of Privacy,* 44 SAN DIEGO L. REV. 745 (2007).
[131] Stefan Kulk, and Frederik Zuiderveen Borgesius, *Privacy, Freedom of Expression, and the Right to Be Forgotten in Europe* in EVAN SELINGER ET. AL (eds.) THE CAMBRIDGE HANDBOOK OF CONSUMER PRIVACY, 301 (2018).
[132] Association for Democratic Reforms, *supra* note 120.
[133] *Id.*

assessment should consider several key factors: the identity of the data fiduciary and/or the entity that made the information available online, for example, indexing by search engines significantly increases accessibility;[134] whether the data principal's consent was obtained for processing the personal data; the purpose of data processing; the nature of the personal information, particularly if it is sensitive data such as financial or medical records; the presentation of the information, for instance, photographs may be deemed more intrusive than text;[135] whether the information is manifestly inaccurate;[136] and which specific rights of the data principal have been impacted and to what extent.

To assess the rights affected and the extent of the impact of information disclosure, several factors must be considered from the perspective of a reasonable person. First, it is essential to identify the data principal and determine whether they are a minor[137] or a public figure,[138] as this can significantly influence their reasonable expectation of privacy. The potential harm of disclosure, particularly to minors associated with the data principal, must be evaluated to ensure their safety and well-being. Prior disclosure of the information or related matters to the public is also a relevant factor.

It is crucial to assess whether access to the information is necessary to protect the public from potential harm arising from the public or professional misconduct of the data principal, thus serving the interests of the public.[139]

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[134] Google Spain, *supra* note 15.
[135] Von Hannover v. Germany (No. 2), (2012) 55 E.H.R.R. 15 (European Court of Human Rights).
[136] TU & RE v. Google LLC, Case C – 460/20, ECLI:EU:C:2022:962 (EU).
[137] Murray v. Big Pictures, [2008] UKHRR 736 (U.K.)
[138] Kanimozhi Karunanidhi v. Thiru P. Varadarajan, 2018 SCC OnLine Mad.1637.
[139] *Id.*

Particularly, the information's relevance to the data principal's accountability towards the public should be considered, especially if there has been deliberate misconduct or deception.[140] Ethical and moral concerns, such as involvement in bribery or expressions of racism or misogyny, should also be taken into account, as these can significantly influence the public's perception and the need for disclosure. The connection of the information to ongoing societal discussions and movements can also play a significant role, as can the temporal aspect, assessing the age and current relevance of the information.[141] The geographical relevance of the information is another important factor, as it may impact its significance in different contexts.

Further, the contribution of the information to re-evaluating broader historical, cultural, or societal narratives must also be evaluated to understand its broader implications. Moreover, the circumstances under which the information was obtained can impact the ethical and legal justification for its disclosure.[142] Lastly, the extent to which the information is typically regarded as private and of no substantial relevance to the general public should be considered, as unnecessary disclosure of private matters may unjustly infringe on individual rights.[143] In contrast, if the information involves questions of national security, pertains to public health, may impact diplomatic relations with foreign states or pertains to crime or legal disputes, it may be considered as relevant to a debate of general public interest and must be evaluated in reference to the possibility of such contribution.

Subsequently, it must be determined whether the proposed limitation on one

[140] NT1 and NT2, *supra* note 97.
[141] Vysakh K.G., *supra* note 110.
[142] Naomi Campbell v. MGN, [2004] UKHL 22 (U.K.).
[143] R. Rajagopal v. State of Tamil Nadu, (1994) 6 SCC 632.

right is necessary to protect the other and vice versa. This requires that the chosen measures be the least intrusive in relation to both rights.[144] It must also be established that no equally effective alternatives are available that could achieve the constitutional objectives underlying both rights more effectively than the chosen measure.[145] In this process, the reasonable expectation of privacy in a given circumstance and the value of speech and expression, based on the justifications for protecting freedom of speech, will be compared. It will be assessed whether the issue can be resolved without compromising the other right. If it is necessary to limit one right, the adopted measures must be unavoidable. For example, in a case involving revenge porn, if erasure is proposed as a remedy, it will be evaluated whether this limitation on freedom of speech, expression, and information is necessary to protect the privacy, dignity, and autonomy of the data principal. This involves considering the extent of the invasion of the data principal's privacy, dignity, and autonomy and whether erasure is the only effective remedy to safeguard these interests. This will be contrasted with the necessity of protecting the free speech and expression rights of the individual who published and shared the material, as well as the public interest in accessing such information. If the privacy, dignity, and autonomy of the data principal can be sufficiently protected by a less intrusive measure, such as de-indexing, then erasure should not be employed, preserving both freedom of expression and the public's right to know.

If the requested measure does not pass muster, it may be denied, and a less intrusive and equally effective alternative may be granted if required. If the

[144] Association for Democratic Reforms, *supra* note 103.
[145] *Id.*

request is denied and no alternative is recommended, the analysis will end at this stage.[146]

The final stage involves assessing the proportionality of the chosen measure. This requires evaluating the advantages and disadvantages of the proposed measure in relation to the context, societal interests, and the constitutional values supported by both sets of rights.[147] The goal is to achieve a fair balance that advances both rights to the greatest extent possible.[148] For example, in a case involving revenge porn, if erasure is proposed as a remedy, the benefits of retaining the material online must be weighed against the harm it causes to the individual and society. This evaluation should consider the justifications for freedom of speech, such as the free marketplace of ideas, democratic self-expression, and the discovery of truth, against the individual's dignity, privacy, autonomy, reputation, life, and health, as well as the potential societal value of the information. Erasure would be deemed fair only if the information contributes minimally to the justifications for free speech relative to the harm it inflicts on individual rights and societal interests. If a less intrusive measure, such as de-indexing, can achieve the balance without causing disproportionate harm, then erasure would be considered excessive in these circumstances.

V. Suggestions and Recommendations

As previously discussed, the DPDPA marks a significant departure from earlier drafts by offering only a narrowly defined right to be remembered well. It limits the application of this right to the personal data that is being processed with the consent of the data principal or is shared voluntarily by them for a specified purpose. This prevents the data principal from having effective

[146] *Id.*
[147] *Id.*
[148] *Id.*

recourse in cases where their data is processed for other purposes. It also grants broad exemptions, particularly in favour of State instrumentalities. Further, in the absence of explicit legislative guidance, Courts have been handling cases involving requests for de-indexing and the removal of personal information from websites on a case-by-case basis.

Given the inherent power imbalances in the digital age, it is imperative that Section 12 of the DPDPA be amended to encompass various dimensions of the right to be remembered well. This provision should empower the data principal or their legal guardian to request multiple measures to exercise this right effectively. Such measures may include the erasure of both original and subsequent postings of personal information; de-indexing/de-listing/de-referencing of search engine results; de-ranking of search engine results; the flagging of information as inaccurate, outdated, out of context, or incomplete; updating of outdated information; correction of inaccurate or misleading personal information; completion of incomplete personal information; and providing contextualisation for information that lacks appropriate context.

This right should be enforceable irrespective of whether the processing of personal data was conducted with the consent of the data principal and must be guaranteed against both State and non-State actors. The provision should also articulate the application of the double proportionality standard to reconcile the right to freedom of speech, expression, and information with the right to privacy, dignity, autonomy, and reputation, depending on the circumstances. It must explicitly State that neither right holds automatic precedence over the other, and it should provide for the abovementioned guidelines and factors for balancing these competing rights. A data principal's request for a specific measure should be granted only if it demonstrates a rational connection to both sets of rights and advances the underlying

objectives of both in the relevant context. The requested measure must be the least intrusive option available, and there must not be an equally effective alternative that can further both rights simultaneously. It must strike a fair balance between the competing rights, ensuring that both are protected to the greatest extent possible.

India and Quasi-Secularism: Through the Lens of the Sree Padmanabhaswamy Temple

Aparna Babu George*

Abstract

In 2020, the Supreme Court ruled that the Padmanabhaswamy temple in Trivandrum (the capital city in the southern province of India) be allowed to be administered and managed by the Royal Family of Travancore. With this, the Court maintained the status quo in an issue that had seen a deep enmeshing of religion and State. In 1976, after India officially became secular, a dilemma was created around how the participation of the State in numerous temple matters could be justified. Sometimes, these roles exceeded the ones envisaged in Article 25(2), which allows for limited participation. This then gave rise to the question of how Indian secularism has been shaped and moulded over the years, both by the judiciary and the legislature. The Constitutional obligation to be secular stands in contrast to an otherwise flexible society where religion and the State overlapped and are interlinked. This paper first contextualises the temple conundrum by detailing the Padmanabhaswamy case. It then fans out to Indian secularism and how the State has managed to reconcile its growing interference with temples, even as it preaches indifference. Does that make India quasi-secular, then? The last part of the paper analyses the repercussions of this outlook, both the positive and the negative.

I. Introduction

On July 13, 2020, the Supreme Court ("SC") gave an important decision regarding the historic Sree Padmanabhaswamy Temple.[1] The Court ruled in favour of the status quo by recognising the covenant that was signed by the

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[1] Sri Marthanda Varma (D) Thr. LRs & Anr. v. State of Kerala & Ors., (2020) 16 SCC 250.

Kingdom of Travancore-Cochin with the Government of India that allowed the present members of the Royal Family to participate in the management of the temple, whose deity presides over the city of Thiruvananthapuram.[2]

It is not the first time that Indian Courts have presided over matters concerning religion or religious institutions. In a similar matter in 1997, the SC decided on the issue of management of the Puri Jagannath Temple.[3] However, in that judgement, the Court ruled in favour of reducing the role and participation of the Raja of Puri in these matters.[4] The Padmanabhaswamy judgement does not reduce or take away any power or responsibility that the royal family already had; in fact, it further regularised it.

This brings to mind questions about the State and religion within the Indian context. India's secularism is guided and moulded by Article 25 of the Constitution of India, which makes the right to profess, practice, and propagate religion a fundamental right.[5] As with all such rights, Article 25 also comes with its inherent limitations. In addition to public morality and health, it is also subject to the State's right to "*regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; or; providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.*"[6]

The judgement in the Padmanabhaswamy case recognised the covenant that

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[2] *Id.*
[3] Sundar Gopal Panda v. State of Orissa, (2022) 7 SCC 751.
[4] *Id.*
[5] INDIA CONST., art. 25.
[6] INDIA CONST., art. 25(2).

was signed by the Maharaja of Travancore-Cochin, who signed it as the representative of the real ruler of Travancore *viz* the deity of the temple. The judgment then proceeds to maintain the conditions of such a covenant. This raises important questions on how accommodating Article 25 really is and how this affects India's secular identity.

This paper tries to answer this question by sketching the journey of Indian secularism. First, the paper delves deep into the Padmanabhaswamy conundrum. It examines how one deity became the ruler of a whole kingdom and the consequences that have arisen from such a setup. In that context, the paper then analyses Indian secularism through the ages. The flexibility and malleability of Indian secularism could best be described as a feature of a quasi-secular State with more of a tendency of interference than indifference. Finally, it analyses this status quo of secularism with the Padmanabhaswamy judgement.

II. Head of the Temple and Ruler of the State

Sri Marthanda Varma v. State of Kerala needs to be studied and read in the historical context of the temple. The deep enmeshing of religion, in this particular case, religious institutions with the State, is evident in the small history of this grand august temple. The Sree Padmanabhaswamy temple, an important landmark in Thiruvananthapuram, the capital city of Kerala, holds significant historical and cultural value. There are multiple stories regarding the temple's establishment and consecration, the most popular involving Sree Vilvamangalam being led to the spot by a small boy who was, in reality, the Lord.[7]

[7] K. SANKUNNI, AITHIHYAMALA (2014).

The earliest known dynasties to rule the region now known as South Kerala (formerly Travancore) were the Ays, followed by the Cheras.[8] Both dynasties considered the temple with utmost reverence and were major patrons. Kulashekhara Perumal of the Chera dynasty was one of the first rulers to call himself "*dasa*", or a servant of the Lord.[9] From this time, the gradual but definite interweaving of royal affairs with the temple's daily activities becomes evident and is further cemented through multiple incidents.

For instance, in 825 A.D., Udaya Marthanda Varma, ruler of Travancore, along with a small group of his counsellors, discussed and established the daily rituals and pujas to be followed at the temple.[10] These practices continue to this day with very few amendments. The most significant administrative action occurred in 1050 A.D. when Bhaskara Ravi Varma III formalised a council to manage and control the temple.[11] Over time, the king also became a member of this group, known as the Ettara Yogam or the Group of Eight and a Half, with the king having only half a vote. The rest comprised members of the warrior class and one representative from the priestly class. In 1737 A.D., King Marthanda Varma stripped the group of their powers, curtailing their influence over temple matters and finances.[12]

A common practice in temples across the country is the donation of money or valuable items such as gold, precious pearls, copper plates, and coins as a

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[8] Sarath Pillai, *Fragmenting the Nation: Divisible Sovereignty and Travancore's Quest for Federal Independence,* 34 LAW AND HISTORY REVIEW 743 (2016).
[9] G.L. BAI, SREE PADMANABHASWAMY TEMPLE (1998).
[10] *Id.*
[11] *Id.*
[12] Deepa Das Acevedo, *Divine Sovereignty, Indian Property Law, and the Dispute over the Padmanabha Swamy Temple,* 50 MODERN ASIAN STUDIES 841 (2016).

means to appease the deity or as gratitude for the answered prayers.[13] Over the years, the Padmanabhaswamy temple has accumulated a vast array of such items, making it the richest temple in the world.[14] A significant royal practice involved dedicating baby boys in the royal family to the Lord as his "*dasa*." In 1750, Anizhom Thirunal Marthanda Varma performed the Thrippadi Danom.[15] He placed his entire kingdom at the feet of the deity of Sree Padmanabhaswamy as a gift to the Lord, thereby declaring that his kingdom belonged to the Lord.[16] He further announced that any additional land his successors might seize should also be deemed to belong to the Lord.[17] This event has had a lingering influence on the Travancore rulers, who began to add the prefix Padmanabha Dasa to their official names. By the 18th century, the Lord was considered the supreme sovereign of the State.[18]

As India approached independence, the negotiations facilitating the entry of the 546 Princely States to form the Union of India were underway. At that time, Travancore was ruled by Uthradom Thirunal Marthanda Varma. V.P. Menon - a close aide of the then Home Minister and Deputy Prime Minister Sardar Vallabhbhai Patel, initiated negotiations with the Raja.[19] The Maharaja declined to take an oath as Rajpramukh, preferring the term "*Perumal*." He also made it clear that, since he ruled on behalf of and as a servant to the Swamy, a satisfactory solution had to be reached, or he would abdicate.[20] He

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[13] Cynthia Talbot, *Temples, donors, and gifts: patterns of patronage in thirteenth-century South India,* 50 THE JOURNAL OF ASIAN STUDIES 308 (1991).
[14] Guinness World Records, *Richest Hindu temple Guinness World Records* (2011), https://www.guinnessworldrecords.com/world-records/richest-hindu-temple.
[15] S. UMA MAHESHWARI, THRIPPADIDAANAM, 41–53 (2012).
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] V. P. MENON, THE STORY OF INTEGRATION OF THE INDIAN STATES (1956).
[20] *Id.*

later agreed to the position of Rajpramukh for uniformity but did not take an official oath; instead handed over a letter promising allegiance to India.[21]

Regarding temple properties, Travancore-Cochin had temples with their own departments, called Devaswoms, managing temple affairs and properties.[22] The Sree Padmanabhaswamy temple, with extensive property, stood apart. During the reign of Marthanda Varma, State and temple affairs, along with properties, became intertwined. Consequently, the Maharaja was made the temple's administrator, fulfilling this role through a chief operating officer appointed by him.

Clause A of Article 8 of the Covenant of Accession, signed by the Maharaja, obligated the State to pay the temple through the chief executor and specified sums to be given in lieu of lands taken from it. For other temples in the region, a Travancore Devaswom Board was established. Article 290A of the Constitution mandates payments to the Devaswom by the State.[23] In 2007, a suit challenged the royal family's management of the temple, alleging financial mismanagement and seeking a government takeover. The lower Court and the High Court ruled in favour of the petitioners, directing the government to form a trust to manage the temple. The High Court, in its 2011 verdict, stated that no king after Uthradom Thirunal Marthanda Varma could claim the right to manage the temple, and therefore, no member had the default right to control it.[24] When the matter reached the SC on appeal, the Court acknowledged the special relationship between the deity and the Royal Family, as admitted by

[21] *Id.*
[22] *Id.*
[23] INDIA CONST., art. 290A.
[24] Uthradam Thirunal Marthanda Varma and others v. Union of India, WP(C). No. 4256 of 2010(O).

the Government in Article VIII of the Covenant. This privilege was unaffected by the abolition of privy purses by the Government of India in the 1970s. Thus, the Supreme Court ordered the status quo to be maintained.[25]

III. The Road to Indian Secularism

Originally, the Indian Constitution did not mention "*secularism*" as an ideal it upheld. It was added in 1976 through the 42nd Amendment.[26] Since then, secularism in India has been the subject of much investigation and scrutiny. Ashis Nandy, in his work, posits that "*secularism*" is a Western concept that was introduced in India without considering the unique social fabric that existed in the country: a society in which religion, culture and history had significant roles to play. As a result of this, the strict separation of religion from the State, which secularism advocates, does not function effectively in India.[27] T.N. Madan also adopts a similar perspective, suggesting that the imposition of secularism in a manner that did not accommodate the desires and needs of Indians has paradoxically led to increased violence and fundamentalism.[28] For instance, the State is actively involved in the management of temples across the country, but its role in the management of institutions of other religions is very, very limited, if not absent. This becomes a source of discontent. If the approach had been different, many of these threats could have been mitigated.

I concur with both authors that secularism is an imported concept in India and, much like other foreign practices, was not sufficiently adapted for a smooth

[25] Sri Marthanda Varma (D) Thr. LRs & Anr. v. State of Kerala & Ors., (2020) 16 SCC 250.
[26] INDIA CONST., Preamble, amended by the Constitution (Fourty Second Amendment) Act, 1976.
[27] Ashis Nandy, *An Anti-Secular Manifesto* in GANDHI'S SIGNIFICANCE FOR TODAY (John Hick & Lamont C. Hempel eds., 1995).
[28] T.N. Madan, *Secularism in its Place*, 46 JOURNAL OF ASIAN STUDIES 749 (1987).

transition into the Indian context. This lack of adjustment continues to create friction within the country even today. For instance, the Constitution culls out an area of activity for the State in Article 25 through its second sub-clause viz:

> "[R]egulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
>
> (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."[29]

However, it stops short of describing what amounts to "*secular activity associated with religious practice*" or what it means when it says "*social welfare and reform.*" Does secular practice only involve the appointment, the determination of employment conditions and the payment of salaries to temple officers? If it is so, then how can the State argue in Court that it wants to take over the possessions of the temple, which had been donated to it by devotees of the Lord over centuries? Is that not an excess committed by the State? Does "*social welfare and reform*" also involve taking an entire temple on such grounds? The lack of clarity on how secularism is to be formulated in India has led to these issues.

Conversely, Rajeev Dhavan employs another set of case laws to substantiate his point about Indian secularism.[30] For instance, the Ayodhya Ramjanmabhoomi issue,[31] which required the SC to delve into various aspects

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[29] INDIA CONST., art. 25(2).
[30] Rajeev Dhavan, *The Ayodhya Judgement: Encoding Secularism in the Law*, 29 ECONOMIC AND POLITICAL WEEKLY 3034 (1994).
[31] M Siddiq v. Mahant Suresh Das, AIR 2018 SC 5134.

of religion and history to reach its landmark decision, is used by Dhavan to show how Courts exercise their authority to balance religious considerations with the rule of law. Time and time again, one sees the tempered and seasoned hand of the judiciary allaying ruffled feathers each time the State oversteps in matters of religion. This is evident in the Padmanabha issue also.

This begs the question: what kind of secularism does India yearn to achieve? Rajeev Bhargava coins "*principled distance*" as the holistic term that encapsulates everything that describes religion and the State in India. He positions Indian secularism around the themes of freedom of religion, equal respect for all religions and principled distance.[32] Principled distance suggests that in India, there is interference in religion; it is not separate. The State is not and will not be indifferent. But this interference is balanced and strict, and it is not the separation that is balanced and strict. This equilibrium is maintained almost always by the Courts. As is shown by Deepa Das Acevedo in her book, where she touches upon the Sabarimala judgement: the Courts intervened to rectify deeply set gender inequalities on the entry to the temple.[33]

Indian context and Indian secularism are far from being simple or straightforward. As Partha Chatterjee argues, it has close links with identity and politics in India that maybe this is the only way to handle it within the constitutional framework and democratic set up that we have for ourselves.[34]

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[32] Rajeev Bhargava, *The Secular Imperative*, 22 INDIA INTERNATIONAL CENTRE QUARTERLY 3 (1995).
[33] DEEPA DAS ACEVEDO, THE BATTLE FOR SABARIMALA: RELIGION, LAW AND GENDER IN CONTEMPORARY INDIA (2024).
[34] PARTHA CHATTERJEE, THE NATION AND ITS FRAGMENTS: COLONIAL AND POSTCOLONIAL HISTORIES 237-239 (1993).

IV. Is India Quasi-Secular?

But what is the legal and democratic set-up that India has? Does it support a truly secular setup?

The original text of the Indian Constitution did not include the word "*secular*" as a prefix to "*republic*" in its Preamble.[35] This term was incorporated in 1976 through the 42nd Constitutional Amendment.[36] The addition of this term was not without debate in the Parliament. An examination of the Constituent Assembly debates from 1948 reveals that a prominent member, Professor K.T. Shah, eloquently advocated for the explicit inclusion of the term "*secularism*" in the Preamble.[37] He questioned why India was hesitant to add the term "*secular*" to the Constitution when the nation consistently proclaimed its secular identity at various forums, especially in the context of the Partition, which was marked by religious strife.[38] He argued that it was insufficient to justify the omission by noting that most constitutions worldwide do not explicitly state secularism.[39]

> "But every constitution is framed in the background of the people concerned. The mere fact, therefore, that such description is not formally or specifically adopted to distinguish one State from another or to emphasise the character of our State is no reason, in my opinion, why we should not insert now at this hour when

[35] GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 308 (1966).
[36] INDIA CONST., Preamble, amended by the Constitution (Fourty Second Amendment) Act, 1976.
[37] CONSTITUENT ASSEMBLY DEBATES, Book No. 7, Dec. 06, 1948, *speech by* K.T. SHAH (1948).
[38] *Id.*
[39] *Id.*

> we are making our constitution, this very clear and emphatic description of that State."

Dr. B.R. Ambedkar, the Chairman of the Drafting Committee and often credited as the architect of the Indian Constitution, had unique reasons for his stance on this matter. He viewed the Constitution as a document with a specific purpose: to regulate the functioning of the organs of the State.[40] According to Dr. Ambedkar, the Constitution should not dictate State policy or societal organisation, as doing so would be undemocratic.[41] He illustrated his point with an example, emphasising that the Constitution should not constrain the actions of future governments by explicitly stating policies and principles. Instead, it should provide guidelines that could be considered "*non-negotiable.*"[42] The Constitution should not instruct the functioning of the State in a prescriptive manner. For instance, explicitly mentioning "*socialist*" would preclude the possibility of the State adopting more market-oriented policies, even if necessitated by external circumstances. Similarly, including "*secularism*" in the text would mean that the State could never deviate from a strict interpretation of secularism, regardless of potential future needs. In other words, this implies that the State must retain the flexibility to not be strictly secular if circumstances demand it.

It is the essence of this flexibility that the original Constitution retains throughout its text. This is why it didn't create a dilemma when the Union consisted of certain states that had cities whose rulers had entered the Union on behalf of revered deities. Possibly because the Constitution had enough

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[40] B.R. AMBEDKAR, THE CONSTITUTION OF INDIA: A POLITICAL-LEGAL ANALYSIS 42-43 (1956).
[41] CONSTITUENT ASSEMBLY DEBATES, Book No. 7, Nov. 19, 1948, *speech by* DR. B. R. AMBEDKAR (1948).
[42] *Id.*

room for such deliberations to take place. However, the matter obtained a more static nature when "*secular*" was added. It then afforded no space or ground for the State to take a stand when it came to matters of religion or religious institutions. It had to be kept away. Ambedkar iterated:

> "It is perfectly possible today for the majority of people to hold that the socialist organisation of society is better than the capitalist organisation of society. But it would be perfectly possible for thinking people to devise some other form of social organisation which might be better than the socialist organisation of today or of tomorrow. I do not see, therefore, why the Constitution should tie down the people to live in a particular form and not leave it to the people themselves to decide for themselves."[43]

V. What It Means For Indian Secularism?

This can be further investigated by a deep reading of Article 25(2)[44] of the Constitution, which specifically allows the State to interfere in matters of religion to regulate or restrict any economic, financial, political, or other secular activity.[45] Accordingly, this provision effectively creates a subcategory within religious matters, termed "*secular matters within religious practice*," and grants the State the authority to regulate such activities. The second provision, i.e., Article 25(2)(b),[46] enables the State to implement welfare and reform measures within religion by allowing access to Hindu

[43] CONSTITUENT ASSEMBLY DEBATES, Book No. 7, Nov. 14, 1948, *speech by* DR. B. R. AMBEDKAR (1948).
[44] INDIA CONST., art. 25(2).
[45] *Id.*
[46] INDIA CONST., art. 25(2)(b).

religious institutions of a public character to "*all classes*."[47]

> "Article 25: Freedom of Conscience and free profession, practice propagation of Religion
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> (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—
>
> (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
>
> (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus."[48]

With this, the State has created a niche for itself, thus implying that the secularism promised by the Constitution is not unlimited or blanket - that the very provision that promises the indifference of the State also facilitates the interference of the State. In other words, what it promises is something that is best described as "*quasi-secular*."[49]

A secular country typically exhibits certain key characteristics.[50] It aims to maintain a clear distinction between the State and religious institutions, avoiding direct endorsement or opposition to any particular religion.[51] The

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[47] *Id.*
[48] INDIA CONST., art. 25(2).
[49] Tahir Mahmood, *Professedly secular vs. conspicuously communal*, THE HINDU (May 01, 2024) https://www.thehindu.com/opinion/op-ed/professedly-secular-vs-conspicuously-communal/article5963508.ece.
[50] Singh, Ranbir, Singh, Karamvir, *Secularism in India: Challenges and its Future*, 69(3) THE INDIAN JOURNAL OF POLITICAL SCIENCE, 597–607 (2008).
[51] *Id.*

State endeavours to remain neutral in religious matters, striving not to grant any special privileges or elevated status to specific religious communities.[52] In this context, laws are ideally grounded in principles of human rights and the rule of law,[53] and the State generally promotes secular symbols and practices.[54] Thus, it can be concluded that a country that attempts to generally adhere to these characteristics is considered secular. For instance, France exemplifies this approach through its policy of *laicite,* which enforces the separation of religion from public life.[55] This policy is reflected in laws that prohibit the display of overt religious symbols in public institutions, such as schools and government buildings, to ensure that the State remains neutral in religious matters. Similarly, in the United States of America, the same approach is displayed in the First Amendment of the Constitution.[56] This prevents the government from establishing an official religion or unduly interfering in religious matters, ensuring laws and policies are based on secular considerations.

A quasi-secular State, such as India, will also emulate at least some of these features. But for India those features will always co-exist along with the space that the State has carved out for itself for its operation and involvement. Thus, such a State treats all religions equally without endorsing or renouncing any. But it is not entirely indifferent to religious considerations. It respects and acknowledges the presence of religion in society and its impact on the

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[52] *Id.*
[53] *Randall Peerenboom, Human Rights and Rule of Law: What's the Relationship?, 36* GEORGETOWN JOURNAL OF INTERNATIONAL LAW, 20 (2005).
[54] *Id.*
[55] Jean Baubérot, *Histoire de la laïcité en France*, PRESSES UNIVERSITAIRES DE FRANCE 115-118 (2000).
[56] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 1247-1251 (2019).

citizenry. This means that its Parliament building may feature religious symbols or cultural signs,[57] it may grant religious holidays, and its members may take oaths on religious texts upon appointment.

At the same time, such a State maintains secular education in its educational institutions. It grants religious institutions autonomy to manage their affairs and properties according to their traditions. On the other hand, some of its policies and laws may be influenced by religion and culture. It gives significant weight to customs and, when these customs become questionable, scrutinises them to resolve any issues. In 1951, the Supreme Court, while upholding the Bombay Prevention of Hindu Bigamous Marriage Act, 1946,[58] ruled that Article 25(2)(a)[59] empowers the State to legislate for the social welfare of specific communities, overriding any religious beliefs held by those communities.[60] The Court declared that although religious belief is considered a matter between the individual and God, the State can intervene when social welfare is at stake.

A quasi-secular State such as India also has unique elements of its own.

A. Principled Distance

Such a State does not propose or propagate strict separation. It espouses a principled distance, akin to a protective parent who allows their child to play independently while remaining close enough to supervise. The State does not

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[57] *Symbols and substance: on the inauguration of the new Parliament building and beyond*, THE HINDU (May 30, 2023), https://www.thehindu.com/opinion/editorial/symbols-and-substance-on-the-inauguration-of-the-new-parliament-building-and-beyond/article66908554.ece.
[58] The Bombay Prevention of Hindu Bigamous Marriages Act, 1946, Bombay Act No. 25, 1946.
[59] INDIA CONST., art. 25(2)(a).
[60] The State of Bombay v. Narasu Appa Mali, AIR 1952 BOMBAY 84.

aim for strict separation but maintains a respectful distance. For instance, the State permits the practice of polygamy for communities[61] where it is essential but will intervene whenever the rights of any involved parties are violated.

B. Public Role of Religion

Such a State does not eliminate religion from public discourse or policy-making.[62] Instead, it addresses the role of religion.[63] For instance, the erstwhile Section 494[64] of the Indian Penal Code ("IPC") and its corresponding Section 82(1)[65] of the Bharatiya Nyaya Sanhita ("BNS") 2023, which deal with bigamy apply to all persons in India except Muslims for whom polygamy is allowed as per their religious beliefs. This shows how the acceptance of tradition or custom is pertinent to the application of law and justice in the country.

C. Judiciary and the Balancing Act

The judiciary plays a crucial role in maintaining this balance, whether it is in terms of the opening of the doors of the Sabarimala temple in accordance with the case of *Indian Young Lawyers Association v. The State of Kerala*,[66] the striking down of triple talaq as per *Shayara Bano v. Union of India*,[67] or allowing Parsis who marry outside their community to inherit ancestral property, the Courts have been instrumental in upholding this equilibrium. Therefore, it becomes clear that India's quasi-secular nature embodies a

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[61] Abhijit Vasmatkar, Purba Das, *The Debate on Polygamy & the Laws in India: An Analysis*, 22(2) INTERNATIONAL DEVELOPMENT PLANNING REVIEW 1121 (2023).
[62] Aernout J. Nieuwenhuis, *State and religion, a multidimensional relationship: Some comparative law remarks*, 10(1) INTERNATIONAL JOURNAL OF CONSTITUTIONAL LAW 153 (2012).
[63] *Id.*
[64] The Indian Penal Code, 1860, Act No. 45, 1860, §494.
[65] Bharatiya Nyaya Sanhita 2023, Act No. 45, 2023 §82(1).
[66] Indian Young Lawyers Association v. The State of Kerala, AIRONLINE 2018 SC 243.
[67] Shayara Bano v. Union of India, Writ Petition (C) No. 118 of 2016.

complex and nuanced approach to secularism, where the State acknowledges and respects religious diversity while maintaining a degree of involvement in religious affairs. This approach is neither a complete separation of religion and State nor a full embrace of religious authority. Instead, it represents a delicate balance, where the State intervenes to ensure social justice and equality, as seen in its judicial decisions and legislative decisions. India's model of quasi-secularism allows for the co-existence of religious traditions within a legal framework that upholds the broader principles of human rights and secular governance. This unique approach reflects India's diverse cultural fabric and its commitment to navigating the challenges posed by religious plurality in a way that seeks to harmonise tradition with modernity.

VI. India and Its Temples

The status of India as a quasi-secular country complicates matters such as the Padmanabhaswamy issue. A similar incident occurred with the Shree Jagannath temple as well. When Orissa entered the Union of India in 1947, Raja Birakishore, who was the then Raja of Puri, signed the Instrument of Accession to facilitate his kingdom's entry.[68] He specifically stated that he was signing on behalf of Lord Jagannath, who, he reiterated, was the real ruler of the region. In subsequent years, litigation questioned the rights of the ruler in the affairs of the temple. Currently, although the Raja has retained much of his former powers and influence within the domain of the temple, most secular duties of the temple are managed by a government-appointed committee. But the main difference here is that while in Puri, the role of the royal family and

[68] *1947: Maharaja Hari Singh signs Instrument of Accession*, FRONTLINE (Aug. 10, 2022), https://frontline.thehindu.com/the-nation/india-at-75-epochal-moments-1947-maharaja-hari-singh-signs-instrument-of-accession-jammu-kashmir/article65727536.ece.

their traditions have been given a back seat, giving a greater role to the State, in Trivandrum, it has been upheld by the Supreme Court.[69]

This decision displays the intricate balance that needs to be maintained between respecting religious autonomy and exercising State control.[70] By acknowledging the cultural and religious significance of the royal family in the Padmanabha case, the Court has invariably ventured into a territory that it rarely enters without a constitutional objective to pursue. Here, it did so while actively telling the State that its interference cannot be justified on the grounds set out in Article 15(2).[71]

The Court's action here exemplifies an instance of two arms of the State discussing religious matters while considering whether State involvement in religious matters is to be right or wrong but whether it is right or wrong in this particular instance, highlighting a characteristic of a quasi-secular State. In a truly secular State, the government maintains a strict separation from religious affairs. However, in a quasi-secular State like India,[72] the lines between State and religion often blur. This intervention, driven by the need to respect and uphold cultural traditions, underscores the complex relationship between the State and religious institutions in India.[73]

VII. Conclusion

The idea of India's secular identity is a matter of great deliberation, even today, regardless of whether it is owing to the blood history that India has had with

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[69] Raja Birakishore v. The State of Orissa, 1964 AIR 1501.
[70] *Id.*
[71] INDIA CONST., art. 15(2).
[72] RAJEEV BHARGAVA, *The Distinctiveness of Indian Secularism* in RELIGION IN THE PUBLIC SPACE (2013)
[73] JAGDISH BHAGWATI, *Secularism in India: Why is it Imperilled?* in THE FUTURE OF SECULARISM (2008).

religion in the modern era or is an attempt to stay true to its democratic ideals, India keeps the secularism ideal alive. In this way, the country has moulded its own version of secularism. This much is granted, but it is still a work in progress. The Sree Padmanabhaswamy temple case study is a testimony to this.

Every country desires religious amity within its borders, as religious conflicts have the potential to incite people to extreme actions, including taking up arms. Thus, it can be argued that every country moulds its own form of secularism. The catch, however, lies in how far these models deviate from the true meaning and essence of secularism. This is the critical point highlighted in this paper: by entering the domain of religion and related aspects such as custom, tradition, and history, Indian secularism diverges significantly from the true meaning of secularism. This divergence is why I describe the Indian form of secularism as quasi-secularism, suggesting it retains only some aspects of secularism while shedding others.

As has been reiterated, the Indian form of secularism cannot and will not be a direct implant of Western secularism. It has to be reflective of the trials and tribulations of its own past and experiences. It has to be a nuanced and careful balance of State intervention and religious freedom and reform. Post-independence, India was determined not to repeat the mistakes of the past, mostly led by the colonialists. Thus, the Indian Constitution made provisions for maintaining diversity and freedom. Which, in other words, amounted to a quasi-secular approach.

The Sree Padmanabhaswamy case illustrates this quasi-secular approach. Here, the SC argued in favour of maintaining the tradition that the royal family wanted to uphold. This underscores how the Indian judiciary engages with

religious customs and traditions, balancing them out with constitutional principles. The Court's engagement with such aspects highlights the blurry lines between State and religion here.

Another theme that comes to the fore is how these aspects are so close to the very fabric of the Indian psyche and thus cannot be neglected. There have been cases that have navigated the two and have upheld the principles and ideals of equality and freedom. The Sree Padmanabhaswamy temple case is also an example of the Court walking this tightrope to attain that higher ideal.

The quasi-secular nature of the Indian State also manifests in the State's engagement with religious institutions through legislation and administrative controls. For instance, several states in India manage temples and religious institutions, a practice that would be considered an anathema in a strictly secular State. However, this involvement is justified on the grounds of ensuring transparency, preventing mismanagement, and protecting public interest. It also indicates the State's willingness to engage with religion in ways that challenge the traditional and conventional understanding of secularism.

At the same time, the State's intervention in religion is not uniform throughout, raising allegations of discrimination and preferential treatment. So, for instance, where Hindu temples are subject to State control, churches and mosques have run more autonomously, free from the State. This further complicates the notion of Indian secularism and adds to the perception of it being quasi-secular.

Conclusively, the concept of secularism in India is a unique and evolving construct that differs significantly from the Western model. The Indian State's and judiciary's involvement in religious affairs, as exemplified by the Sree

Padmanabhaswamy temple case, underscores the complexities and contradictions inherent in Indian secularism. By engaging with religious customs and traditions, India has developed a quasi-secular model that seeks to balance religious diversity with democratic principles. While this approach aims to maintain social harmony, it also raises critical questions about the true essence of secularism and the extent to which it can be adapted without losing its core values.