ANNUAL ISSUE 2024 | ISSUE 22

THE PROBE

BEYOND MOWING THE GRASS

Deconstructing the Destruction of Palestine

About Us

The Probe is a non-profit, student-run, independent & non-partisan monthly magazine published by Caucus, the discussion forum of Hindu College, University of Delhi. Caucus was founded in 2007, and The Probe in 2020. Our ambition lies in creating a platform that promotes writing and critical thought among students and enables them to engage in a learning experience with experts & working professionals.

Published by Caucus: The Discussion Forum, Hindu College
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THE PROBE

FROM THE EDITOR-IN-CHIEF

Dear readers,

Over the years, people from myriad backgrounds have believed in our cause and contributed to The Probe in various capacities. The cause remains as we welcome a new batch of dedicated and passionate members. With this, we also celebrate the third anniversary of the magazine. In these three years, The Probe has consistently improved and expanded. As we enter another year of publication, we express our gratitude for your support and valuable feedback. It is you, the reader, who makes this publication worthwhile. We look forward to your continued support as we continue our attempt to unwrap the world around us.

With one of the most poignant humanitarian crises unfolding in front of our eyes, we try to dissect the destruction of Palestine. A conversation with foreign expert Dr Stanly Johny provides key insights on the same. We also analyse a range of policy and legislative initiatives taken recently and how they affect the common populace. In this edition of The Probe Interviews, Advocate Apar Gupta takes us through the intersectionalities of law, policy and technology. Furthermore, an expert column by Maj. Gen. Anil Verma (Retd.), the head of the Association for Democratic Reforms, deconstructs the kerfuffle around electoral bonds.

Make sure to check out excerpts from our panel discussion on 'The Future of Marriage Equality'. Videos of all the interviews and discussions are available on our YouTube channel. Happy reading!

Write for Us.

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A historical review of some of the main tropes that form the backbone of the popular imagination about the ongoing catastrophe in the Gaza Strip. Alongside, a dissection of South Africa's case vs Israel at the International Court of Justice.

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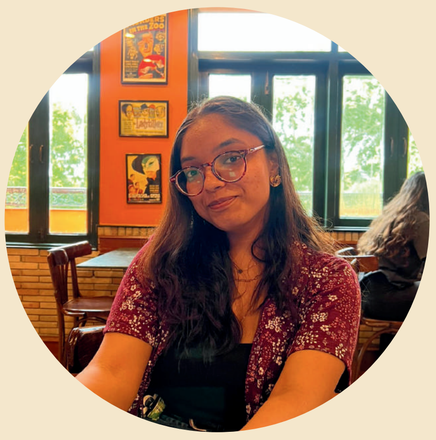

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THE PROBE

by STUDENTS

for the WORLD

The Probe Annual Issue-9

Beyond Mowing The Grass:

Deconstructing the Destruction of Palestine

by Pushkar Pandey & Shubh Mathur

The Probe Annual Issue-10

“And Gaza is not the most polished of cities or the largest. But she is equivalent to the history of a nation because she is the most repulsive among us in the eyes of the enemy- the poorest, the most desperate, and the most ferocious. Because she is a nightmare. Because she is oranges that explode, children without childhood, aged men without an old age and women without desire. Because she is all that, she is the most beautiful among us, the purest, the richest and most worthy of love.”

Mahmoud Darwish. 'Journal of an Ordinary Grief.'

The Perfidy of Decontextualised Atrocity Literature

The introduction of this piece is centred around something that at first glance, may not seem relevant to the topic at hand: The Great Indian Rebellion of 1857. While recent works on Economic History seem to overlook the conventional nationalist view of the destructive economic impact of British Rule in India, one may be less kind to the British on social grounds; both due to the very illegitimacy of colonial rule, as well as the fractured society they left behind. Nevertheless, a deep exposition of British perfidy in India and its analogues in the Middle East is not germane; the analogy that forms the crux of this introduction is more specific.

It is rather interesting that the Indian Nationalist Historian R C Majumdar, and Karl Marx, agreed on a couple of respects as far as the 1857 Rebellion goes. Interestingly, they diverge as far as the nature and scope of the Rebellion are concerned. Majumdar is unwilling to treat it as a War of Independence, contrary to Marx’s characterisation of the Revolt as the First Indian War of Independence; something which the Hindutva Icon and Intellectual Savarkar agreed to. The more crucial point of agreement pertains to the perfidy of Colonial Propaganda. As Majumdar observed in his famous work ‘The Sepoy Mutiny and The Revolt of 1857’:

“An important feature of the great outbreak of 1857 is the perpetration of horrible deeds of cruelty on both sides …..

Some English writers, who have the candour to admit that atrocities were committed on both sides, have expressed a wish that a veil should be drawn over them. But with a few honourable exceptions, the English writers and, following them, others have drawn the veil over the excesses of the British troops, but not over those of the Indian sepoys …..

Historical truth and political fair play both demand that the veil should be drawn aside, and an objective study made of the atrocities on both sides.”

Karl Marx went one step ahead. Instead of merely calling for a balanced portrayal of cruelties perpetrated by both factions, he clearly explained how one must not attempt to portray the violence and brutality that was part of the Rebellion of 1857 as a sudden development. To ignore the antecedents that led up to the Rebellion and mutilate its narrative so that one views it through an episodic lens is but a subtle way of being partisan. Marx’s astute criticism of those who sought to valorise the British for their disproportionate brutalities yet villainised the Sepoys for theirs cannot be adequately emphasised. Two pithy extracts from Marx’s piece in the New York Tribune elucidate this.

“However infamous the conduct of the Sepoys, it is only the reflex, in a concentrated form, of England’s own conduct in India, not only during the epoch of the foundation of her Eastern Empire, but even during the last ten years of a long-settled rule …..”

“And then it should not be forgotten that, while the cruelties of the English are related as acts of martial vigour, told simply, rapidly, without dwelling on disgusting details, the outrages of the natives, shocking as they are, are still deliberately exaggerated.”

The pernicious argument that the primary responsibility for what is occurring in Gaza lies with Hamas, that the only responsibility that Israel has for the disaster that has unfolded and continues to reveal ghastly pictures of death and destruction is in its minor transgression of “proportionality” during its “defensive operation”, seems to grossly undermine the disproportionality that is evident to anyone who has seen even snippets of how Israel has ravaged the Gaza Strip. It also ignores the settler-colonial aspect of the Zionist project; something that is traceable to the very origins of Zionism and is exemplified by the Israel settlements in the West Bank. Gaza, on the other hand, has been in a horrifying state for a long time now.

In 2006, Giaora Eiland, a retired Major General of the Israel Defense Forces and a former head of the Israeli National Security Council, called Gaza “a huge concentration camp”. The late Baruch Kimmerling, an Israeli sociologist of great repute, called Gaza “the largest concentration camp ever to exist.” The analogy should be clear by now; decontextualised atrocity literature does nobody a service. While populations under siege should be held accountable for disgusting crimes that they can and do commit, the siege itself should be considered a severe atrocity.

It must be pre-emptively pointed out since this is an issue where people may rightfully take umbrage, that there is no equivalence between Hamas and the Indian Mutineers. The latter weren’t religious fundamentalists and whatever atrocities they committed were reactionary and not part of a larger premeditated plan of targeting non-combatants.

October 7 was a reprehensible act of terrorism committed by Hamas. It was not an ‘armed struggle’; it was straightforward terrorism that targeted non-combatants. This will not change no matter how much one gilds such terrorism using anti-imperialist/anti-colonial rhetoric. Resistance has to be predicated on ethics and wisdom, not on our primal emotions. This is especially the case when the imperial forces you are resisting outmatch you in terms of military might.

The Birth of Hamas: A Case of ‘Divide et Impera’

That Hamas is a fundamentalist anti-Semitic organisation is not a secret. They openly propounded such despicable ideas for a long time, before amending their charter in 2017, clarifying that their fight wasn’t against Jews, but against the Zionist Project. People should, however, remember Israel’s role in the creation of Hamas, similar to how the United States of America relied on Islamists - the Mujahideen - to fight Communism. These anti-Soviet Islamists, who fought against the Soviets when they invaded Afghanistan in 1979, were the antecedents of al-Qaeda.

On a similar note, while the PLO was the main militant force that sought to destroy the Jewish State of Israel, Israel was mild on Islamists in Gaza in the 1970s and 1980s. While the Islamists fought their secular Palestinian opponents, Israel was apathetic; perhaps even relieved, at the prospects of internal tumult throwing the Palestinian struggle off-track. Israeli officials, instead, argue that it was Iran that propped up Hamas. As far as military assistance goes, that seems to be likely, notwithstanding attempts by Hamas to deny this. How far can we link Israeli complacency to the rise of Hamas? Arieh Spitzen, the former head of the Department of Palestinian Affairs, which is a branch of the Israeli Military, blames the rise of Hamas as a consequence of Political Islamism. In his words, attempts to stop Hamas would be like trying to kill all the mosquitoes, an approach that in his view, ignores how one would get even worse insects as a consequence of breaking the balance. As per Spitzen, attempts to Kill Hamas could have led to organisations like al Qaeda gaining dominance. It might be wryly pointed out that today, one does not feel as if the Zionist faction is willing to permit a distinction between the two, except perhaps on the geographical reach of the organisations.

Israel’s role extends far beyond complacency though. Sheikh Yassin, the spiritual leader of Hamas, received a fair bit of support from Israel. Yassin formed the Palestinian branch of The Muslim Brotherhood in Gaza and promulgated the writings of Sayyid Qutb, an Islamist who called for Global Jihad. Gamal Abdel Nasser, the President of Egypt during the six-day war, was strongly opposed to Islamic Fundamentalism. Israel dropped the harsh restrictions on Islamists, restrictions that hitherto curbed Islamism in the

region. In 1979, Israel recognised Mujama al-Islamiya, an Islamist group formed by Sheikh Yassin, as a charity. Despite Yassin's Islamist activities gaining prominence, Israel and the Sheikh had a common enemy - the secular nationalists in the PLO. Yitzhak Segev notes that Israel had no problems with the Cleric at that stage. Shalom Harari argues that while Israel may have neglected the threats of Islamism, it never financed or armed Hamas. Yitzhak Segev, however, has noted that the Israeli government gave him a budget, while the Israeli Military Governorate gave funding to the mosques.

It wasn't until 1989 that Hamas first targeted Israel; hitherto they only targeted secular activists such as the leadership of the Palestinian Red Crescent. Clashes between Islamists and Secular Nationalists escalated during the early 1980s, especially on college campuses. This was true to the surreptitious ways of gaining prominence that the Muslim Brotherhood and its offshoots were so familiar with. We must find ourselves in agreement with Avner Cohen's assessment when he noted that Hamas is Israel's creation. As an officer responsible for religious affairs in the region until 1994, his testimony does come from an appropriate vantage point.

The tunnels built by Hamas, especially those that cross the border, have been long cited as an existential threat to Israel. Contrary to Israeli Propaganda that has always sought to justify its disproportionate punitive expeditions against Gaza, Hamas never undertook any military expedition of great consequence before October 7, which was the deadliest single-day assault on Israel since its inception.

In the wake of Operation Protective Edge, a report of the UNHRC titled "Report of the Detailed Findings of the Independent Commission of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1" found that these tunnels were "only used to conduct attacks directed at IDF positions in Israel in the vicinity of the Green Line, which are legitimate military targets." This evaluation lay in stark contrast to the claims of Colonel Richard Kemp who compared the tunnels to Auschwitz.

A similar case of gross exaggeration exists in the case of Hamas' rocket attacks. Even before the first deployment of the Iron Dome during Operation Pillar of Defense in 2012, Hamas had fired approximately 13,000 rockets and mortar shells at Israel between 2001 and 2012, killing 23 Israeli Civilians; a ratio of one death per 500 projectiles. During Operation Protective Edge, the UNDSS estimated that Hamas fired 7000 rockets into Israel. Approximately 2800 of these landed in the border region of Israel, where the Iron Dome was not deployed. Six civilians were killed as a result of this; 1 due to a rocket and the others due to mortar shells. Even if we lend credence to Theodore Postol's argument that Israel's early warning/shelter system prevented civilian deaths, surely such a barrage of rockets should have caused infrastructure damage of great proportions even after making allowances for rockets landing on open areas? The records do not match up to this. As an aside, it may be noted that there have been questions about the effectivity of the Iron Dome, though by reviewing the data of the region that does not fall within its protection, that problem has been circumvented.

TABLE 5 Israeli Property Damage Resulting from Hamas Rocket Attacks during Operation Protective Edge

Date	Description
7 July	
8	property damage
9	building near kindergarten hit
10	
11	one house completely destroyed, two others damaged
12	
13	rocket hits Israeli electrical plant supplying power to Gaza
14	
15	significant damage to cars and property; school for special needs children hit
16	house damaged
17	building damaged
18	kindergarten and synagogue damaged
19	massive damage in residential area
20	
21	house hit, building damaged
22	house damaged
23	
24	
25	
26	
27	two houses hit
28	
29	
30	
31	
1 August	
2	
3	school grounds hit
4	
5	house hit
6	
7	
8	house hit
9	
10	
11	
12	
13	

14	
15	
16	
17	
18	
19	shopping center hit
20	
21	building hit
22	house and synagogue hit
23	
24	
25	
26	house and playground hit

SOURCE: Israel Ministry of Foreign Affairs.

Source – Gaza: An Inquest into its Martyrdom by Norman Finkelstein

The attack on the al-Shifa hospital during the recent Israeli retaliation was justified on somewhat similar grounds. The IDF's Casus Belli for invading al-Shifa was that it contained the Hamas command-and-control centre. While it did manage to find a tunnel and some connected rooms, journalists weren't allowed to investigate it due to safety concerns. The tunnel was destroyed before any such investigation took place. A subsequent analysis by the Washington Post came to the following conclusions, quoted below:

"The rooms connected to the tunnel network discovered by IDF troops showed no immediate evidence of military use by Hamas.

None of the five hospital buildings identified by Hagari appeared to be connected to the tunnel network.

There is no evidence that the tunnels could be accessed from inside hospital wards."

Palestinian Rejectionism: A product of Islamism or a refusal to genuflect?

The Palestinians are often accused of rejectionism; of being driven by the Jihadist motive to destroy Israel and refusing to come to any agreement with the Israeli side. Delving into the works of Benny Morris will be an appropriate way to explore these accusations.

Benny Morris, a 'revisionist' historian who questioned some of the formative Zionist Myths, ended up having rather strained relations with some of the other 'revisionist' historians such as Avi Shalim and Ilan Pappe. After the breakdown of the Palestinian-Israeli peace process in the early 2000s, Morris went on to approve of the Ethnic Cleansing that occurred in 1948. In an interview with Ari Shavit in 2004, he justified the expulsion of the Arabs in 1948, lamented the fact that the job was incomplete, and explored the possibility of future population transfers. From describing it as a 'clash of civilisations' to blaming Islamism and Jihadism for 'Palestinian Rejectionism', his oeuvre certainly evolved to include works that were vastly different, in tenor.

In the views of Morris, the Arabs have always been rejectionist towards any Jewish State in the territory of Palestine, right from the time of al-Husseini in the 1930s and 1940s. Morris perhaps should also have noted the reason why Arab Nationalists such as Auni Abd al-Hadi were so opposed to the Balfour Declaration. Perfidious Albino and the extreme Zionist faction had a lot of contempt towards the Arab natives. Ze'ev Jabotinsky, a renowned Zionist, for instance, observed that 'Zionist colonization, even the most restricted, must either be terminated or carried out in defiance of the will of the native population' for 'every indigenous people will resist alien settlers. To be fair, some British officials like Lord Curzon and Secretary of State Edwin Montagu were opposed to the Balfour Declaration, though even Curzon ended up accepting that it was an obligation that had to be fulfilled. The phrase in the Balfour Declaration: 'nothing shall be done which may prejudice the civil and religious rights of existing non-Jewish communities in Palestine' demonstrates the conceit that the colonial forces had towards the Arabs in Palestine. This, in fact, was the very disposition of Arthur Balfour himself. In 1922, Balfour wrote: 'Zionism, be it right or wrong, good or bad, is of far more profound import than the desires and prejudices of the 700,000 Arabs who now inhabit that ancient land.' It is perhaps not unreasonable on our part to note the difficulty in making concessions to a faction that is driven by such a worldview.

If Morris argues that Arab rejectionism has remained constant regardless of the dimensions of the proposed Jewish State, one must also note the persistence of Zionist gradualism; a phenomenon which has explicitly resorted to settler colonialism since the Six-Day War. As far as more recent rejectionism goes, why is it that the Palestinian side has to bear the brunt of all the compromises? Is it not the case that Israeli settlements in the West Bank are illegal as per international law? Is it not the case that international

law requires that the right to return be fully implemented? It may be argued that Morris' stance on the 1948 Refugee Crisis reveals his general disposition towards the attempted negotiations and settlements as well. In an interview with Stuart Miller, he went on to say: 'Both sides did awful things, which is what happens in wars. The Arabs were the losing side and my view is that if people commit major mistakes in history they pay for them and perhaps that's how it should work out. The Palestinians should have agreed to a two-state solution.' We can only say that perhaps the price should be reasonably set. The fact that it is the 1967 borders that are being asked for, 22 % of the former British Mandate in Palestine, is already a great compromise. Surely, to expect a compromise on a compromise is to expect an undue amount of genuflection from the Palestinian side? If Israel was serious about furthering the successes gained from the Oslo Accords, why did it continue to expand the settlements in the West Bank? From 1993 to 2000, the construction of 17,190 housing units was initiated in the West Bank; 2,830 of these were built during the Barak Administration.

In any case, the record is clear on how the United States of America and Israel have voted against numerous United Nations General Assembly Resolutions that call for a peaceful resolution of the Palestinian Question. The peak of this form of rejectionism; something that negates the convenient myth of Palestinian Rejectionism was scaled during the 45th Plenary Meeting of the 10th Emergency Special Session of the United Nations General Assembly. During this session, the Member States adopted a humanitarian resolution that sought to end the siege of Gaza. It passed with a large majority - though Israel and the United States of America voted against it. It seems that this time around the State of Israel does not wish to merely mow the grass; it wants to render it barren.

TABLE 1 UNGA Vote on "Peaceful Settlement of the Question of Palestine" Resolution

Year	Vote [yes-no-abstained]	Negative votes cast by. . .
1997	155-2-3	Israel, United States
1998	154-2-3	Israel, United States
1999	149-3-2	Israel, United States, Marshall Islands
2000	149-2-3	Israel, United States
2001	131-6-20	Israel, United States, Marshall Islands, Micronesia, Nauru, Tuvalu
2002	160-4-3	Israel, United States, Marshall Islands, Micronesia
2003	160-6-5	Israel, United States, Marshall Islands, Micronesia, Palau, Uganda
2004	161-7-10	Israel, United States, Australia, Grenada, Marshall Islands, Micronesia, Palau
2005	156-6-9	Israel, United States, Australia, Marshall Islands, Micronesia, Palau
2006	157-7-10	Israel, United States, Australia, Marshall Islands, Micronesia, Nauru, Palau
2007	161-7-5	Israel, United States, Australia, Marshall Islands, Micronesia, Nauru, Palau
2008	164-7-3	Israel, United States, Australia, Marshall Islands, Micronesia, Nauru, Palau

Source – Gaza: An Inquest into its Martyrdom by Norman Finkelstein

Benny Morris is certainly among the most eminent historians to have written on the Israel-Palestine conflict. On academic grounds, I do not consider myself qualified enough to lambast him, like he has been by scholars from some quarters, though he has certainly not spared some of his targets such as Ilan Pappe. I can only regret the idealist essentialisation that characterises his analyses of the conflict.

Beyond Binaries: The Right to Self-Determination

While reflecting on the evolution of the Zionist discourse over the last century, Chomsky insisted in a recent debate that his commitment to Jewish self-determination - the defining feature of Zionism - has been consistent. He went on to argue, as he always has, that the right to Jewish self-determination need not and must not be framed in opposition to Palestinian self-determination. Edward Said echoed this during a lecture conference at the University of Washington in 2003. While he argued that the Arabs have a much greater claim due to their longer history of inhabitance, he accepted that the Jewish or the Zionist claim is legitimate. One must keep in mind Said's caveat though; that no claim has the right to override others by means of expulsion.

Stereotyping the People of Israel on racial lines, ignores their demographics and must be cautioned against. More than half of Israel's Jewish citizens are of North African, African, Central Asian, or West-Asian descent. It was a travesty that these Jews had to leave their homelands to settle in distant places like the town of Sderot; a place that is approximately a kilometer from Gaza and was devastated by Hamas during the first wave of its attack.

Even Finkelstein, the most provocative of the three intellectuals mentioned, accepts Israel's legitimacy within its pre-1967 borders. His opposition to the settler colonial project beyond the Green Line is in conformance with International Law. Finkelstein's academic career was destroyed as a result of charges of anti-Semitism by the highly influential lawyer Alan Dershowitz, who lobbied hard to deny a tenured professorship to the former at DePaul University. Finkelstein accused Dershowitz of plagiarising from a work authored by Joan Peters; a scholar whom Finkelstein had exposed for spurious scholarship earlier in his career. Dershowitz turned implacably vindictive against Finkelstein, though the Iron Curtain separating the two seems to have been lifted recently, since they shared the virtual stage for a debate moderated by Piers Morgan. While this is illustrative of how charges of anti-Semitism are weaponised against those who criticise Israel, its details cannot be covered in this piece. Nevertheless, the absurdity of some of Dershowitz's utterances may be illustrated by how he asked 'radical feminists' to condemn Hamas, when the recently unsealed Epstein Document implicated him by name.

The Israeli Call for Collective Retribution and its Myopia

To discuss other aspects of this conflict would be infeasible given spatial constraints. However, a certain point must be established before a discussion of the ICJ Proceedings begins. Notwithstanding the sophisticated calls for genocide; occasionally via arcane biblical references, the facade of euphemisms is occasionally dropped. At a press conference on October 13, Issac Herzog, the Israeli President, said that nobody in Gaza is innocent: "It is an entire nation out there that is responsible." His absurd justification for this was the fact that the civilians in Gaza did not fight to overthrow Hamas. This hideous propaganda reached its zenith when Herzog claimed that Israeli forces found an Arabic copy of Mein Kampf in a child's bedroom.

There are others too, who believe this implicitly. Bernie Sanders, disappointingly, has believed that no permanent ceasefire with Hamas is credible because they ultimately want to destroy Israel. Let us rid ourselves of this myopic view by reviewing the failure of June 2008 ceasefire between Israel and Hamas. It lasted for months until Israel unilaterally violated it by launching Operation Cast Lead; an operation that killed over 1000 Palestinians and rendered over 100,000 Palestinians homeless. The death toll in this case is comparable to the Hamas attack of October 7. I need not spell out the implications of this analogy.

Freedom of Speech may entitle people to grandstand on matters of such great importance even as human suffering reaches unbearable proportions. As far as they are honest about adhering to certain identitarian loyalties; no matter how contrived these are, their truthfulness must be commended. However, to resort

to logical acrobatics, predicated on specious ethical reasoning, to justify one's vicarious pleasure at seeing wanton violence of the kind that has recrudesced in a most dangerous avatar since October 7th, must stem either from ethical vacuity or from delusion. As Naomi Klein said: "In Gaza and Israel, side with the child over the gun".

The nature and history of the catastrophe ongoing in the Gaza Strip (hereafter Gaza) has already been covered extensively in this piece. But, the gravitas of its horrors cannot be elucidated in a novel. Nevertheless, while the cries of victims get muffled by the rockets overhead the world mustn't stay mute because even if the nature of war is open for interpretation, condemnation of it is not.

It is also emphatically established that at no point do the authors support/justify the gruesome practices of either side and actively condemn the same.

The Case at The International Court of Justice

Basis Of The Case

On 29th December 2023, the Republic of South Africa (hereafter South Africa) invoked Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide (hereafter Genocide Convention) against the State of Israel. Pursuant to Article 36 (1) of the statute of the International Court of Justice (hereafter ICJ) the matter was referred to a suitable bench. South Africa citing the words of 30 other state heads and other representatives echoed their obligation of erga omnes (which (roughly) translates to obligations owed by states towards the community of states as a whole) and petitioned the ICJ to issue directives to Israel to halt their actions in Gaza. South Africa's case was also backed by the ICJ's recent adjudication of the 2022 Russian invasion of Ukraine (March 2022 13–2 ruling that Russia must "immediately suspend the military operations) and of the Rohingya crisis.

South Africa substantiated its plea by relying on Article 2 of the Genocide Convention which demarcates the notion of genocide to acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group. These acts include killing members of the group, causing them serious bodily or mental harm, imposing living conditions intended to destroy the group, preventing births, and forcibly transferring children out of the group. Further, Article 3 defines the crimes that come under the purview of genocide: genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide. The convention adds that victims are targeted because of their real or perceived membership of a group, not randomly. There are also provisions against incitement of the same. Moreover, any perpetrators/ parties privy to it can be tried in a (suitable) court of law.

With Israel controlling all entry and exit by air and sea since the 1990s, the blockade of Gaza has resulted in a humanitarian disaster. Although it is indisputable that Hamas' actions have caused immense and unjustified loss of life for Israelis, the ramifications of Israeli actions are unprecedented. South Africa's written submissions asserted that Israel has been committed to a "heaviest conventional bombing campaign" with over 6000 bombs dropped per week on the 365sqkm Gaza strip since 7th October 2023 (para 18).

The importance of damage to civilian life was highlighted. Even though there have been disputes around the true number, there were reportedly 21,110+ deaths in Gaza with over 55,243 wounded including 7,729 children dead and 4700 women and children still missing presumed dead. The scale of destruction meant that 355,000+ houses had been destroyed so far with 1.9 million people, roughly 85% of Gaza's population displaced (para 19).

The crux of the case is highlighted in paragraph 41. Following Hamas' actions, the Israeli right-wing Prime Minister Benjamin Netanyahu vowed to "crush and eliminate" Hamas, and "clear out the hostile forces that infiltrated our territory and restore the security". Israel was also quick to invoke its right to self-defence. While it is irrefutable that every nation possesses the said right, it is also established that the right is not a blanket coverage against every action. Additionally, Israel has propagated that the genocide accusations against them are "outrageous, false, wholly unfounded, morally repugnant and anti-Semitic" (para 14).

The Charges

South Africa categorised Israel's actions into a few sections which provided them with the framework for the claims of genocide -

Israel is engaged in killing Palestinians in Gaza — including Palestinian children — in large numbers. Israel is causing serious bodily and mental harm to Palestinians in Gaza, including Palestinian children; and is inflicting on them conditions of life intended to bring about their destruction as a group.

Those conditions include expulsions from homes and mass displacement, the large-scale destruction of homes and residential areas, deprivation of access to adequate food and water, deprivation of access to adequate medical care, deprivation of access to adequate shelter, clothes, hygiene and sanitation, the destruction of the life of the Palestinian people in Gaza, and imposing measures intended to prevent Palestinian births.

Global observations on the same were also cited including the words of the president of The International Committee of the Red Cross who called the situation in Gaza "a moral failure" causing "intolerable suffering" along with the Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator at the United Nations discerning an apocalyptic situation now "where the remnants of a nation being driven into a pocket in the south" (para 41). These are just not mere observations, as of 8 December 2023, only one rescue vehicle was reportedly operational in the whole of Gaza, with survivors forced to try to dig for others with their bare hands.

Multiple reports also stated that multiple Israeli soldiers performed summary executions, including of multiple members of the same family (para 46). Many families were wiped from the face of the Earth in one go. Israel's arbitrary actions extended even to those who had no part to play in the conflict—at the time of filing Israel had killed: over 311 doctors, nurses and other health workers, 103 journalists, 40 civil defence workers (responsible for helping to dig victims out of the rubble) over 209 teachers and educational staff, and 144 United Nations employees (para 49).

Israel has also been accused of using White Phosphorus in densely populated areas while their dead bombing campaign has meant the strip only has one functioning hospital left to treat the thousands which are being added every day (para 51). Civilians have also had to pay the costs of a war they did not wage. There have been reports which stated that large numbers of Palestinians including children, have reportedly been arrested, blindfolded, forced to undress and remain outside in the cold weather, before being forced onto trucks and taken to unknown locations. Medics and first responders have also been repeatedly detained by Israeli forces (para 54).

Citizens evacuating northern Gaza have also been shelled along "safe corridors". Israel is also slated to have reneged on other ceasefire promises. Gaza has also started suffering from a famine-type situation with a UN Secretary-General stating that four out of five hungriest people in the world are in Gaza (para 64). At the time of filing and writing the situation is continuing to exasperate.

Perhaps the most horrifying section of South Africa's application came with their records of the medical situation in Gaza. The IDF has shown no mercy for any medical facility constantly besieging them to deprive

them of electricity and fuel crucial to maintain effective functioning and equipment, to obstruct them from receiving medical supplies, food and water, to force their evacuations and closure and effectively to destroy them (para 78). Four healthcare workers are also losing their lives on average in Gaza every day. The scale of death is so magnificent that medical workers' harrowing acronym of WCNSF (wounded child, no surviving family) has been echoed in every household around the world since its inception. Pregnant women have also felt the brunt of the force with hospitals having to do cesareans without anaesthetics due to the widescale decimation of medical resources.

religion, they have done irreversible damage to Islamic & Christian sites in Gaza destroying an estimated 318 sites where thousands if not millions had worshipped for generations (para 92).

While those mentioned earlier have illustrated Israel's morbid practices, South Africa's appeal brought into light the heinousness and 'dolus specialis' (special intent) of Israeli leaders to cause damage and indulge in crimes. The statements of intent combined with the level of killing, maiming, displacement and destruction on the ground, together with the siege evidence an unfolding and continuing genocide (para 101).

The annihilation of cultural heritage in Gaza is irreparable as well. Israel has decimated Gaza's public libraries, the Islamic University of Gaza, killed academics while also destroying various markers of Palestinian history including (but not limited to) the Al Zafar Dmari Mosque and Center for Manuscripts and Ancient Documents, the Orthodox Cultural Centre and the Rafah Museum — Gaza's newly opened museum of Palestinian heritage, housing hundreds of cultural and archaeological artefacts (para 91). The attacks have also destroyed eight of Gaza's integral ancient history sites which include UNESCO world heritage sites like a 2,000-year-old Roman cemetery. Moreover, with all of Israel's emphasis on their own

South Africa cited Israel's Prime Minister, President, Minister of Defence, Minister for National Security, Minister of Energy and Infrastructure, Minister of Finance, Minister of Heritage along with many Israeli Defence Forces high ranking and ground troops advocating statements to slaughter Gaza residents without any intention to distinguish between Hama sand civilians (paras 101-103). The genocidal rhetoric extended to non-cabinet ministers of Knesset and even to Israeli masses who called for Gaza to be turned into a "slaughterhouse, razed and erased" (paras 105-106).

These statements constituted direct and indirect sentiments of genocide (para 107). Furthermore, many

UN and other parties also reported how the situation in Gaza could be connoted to genocide (paras 108-109).

Based on all of the above-mentioned and much more South Africa claimed that the conduct of Israel through its State organs, State agents, and other persons and entities acting on its instructions or under its direction, control or influence concerning Palestinians in Gaza violates its obligations under the Genocide Convention, including Articles I, III, IV, V and VI, read in conjunction with Article II (para 110).

The charges were further categorised as -

failing to prevent genocide in violation of Article I;
committing genocide in violation of Article III (a);
(c) conspiring to commit genocide in violation of Article III (b);
(d) direct and public incitement to commit genocide in violation of Article III (c);
(e) attempting to commit genocide in violation of Article III (d);
(f) complicity in genocide in violation of Article III (e);
(g) failing to punish genocide, conspiracy to commit genocide, direct and public incitement to genocide, attempted genocide and complicity in genocide, in violation of Articles I, III, IV and VI
(h) failing to enact the necessary legislation to give effect to the provisions of the Genocide Convention and to provide effective penalties for persons guilty of genocide, conspiracy to commit genocide, incitement to genocide, attempted genocide, and complicity in genocide, in violation of Article V
(i) failing to allow and/or directly or indirectly impeding the investigation by competent international bodies or fact-finding missions of genocidal acts committed against Palestinians in Gaza, including those Palestinians removed by Israeli State agents or forces to Israel, as a necessary and corollary obligation pursuant to Articles I, III, IV, V and VI.

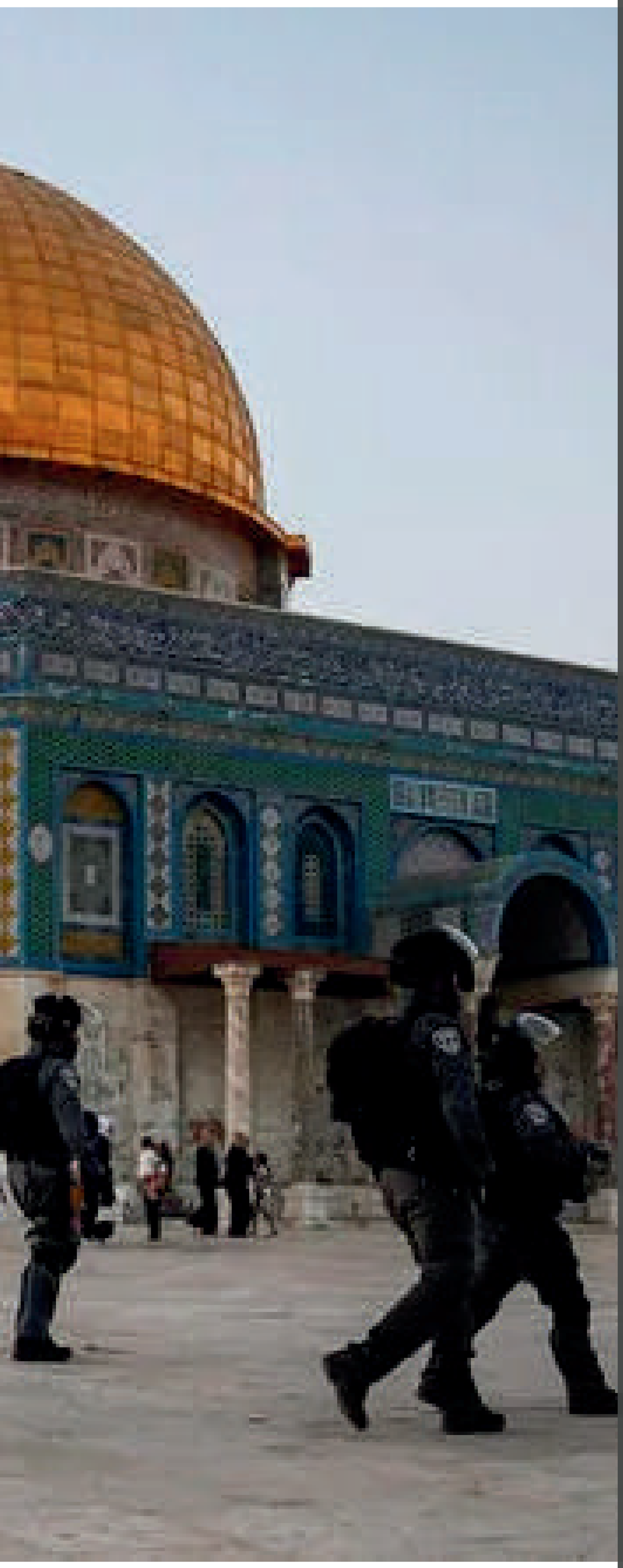
Additionally, South Africa sought reliefs from the ICJ including (but not limited to); Israel must cease forthwith any acts and measures in breach of those obligations, including such acts or measures which would be capable of killing or continuing to kill Palestinians or causing or continuing to cause serious bodily or mental harm to Palestinians or deliberately inflicting on their group, or continuing to inflict on their group, conditions of life calculated to bring about its physical destruction in whole or in part, and fully respect its obligations under the Genocide Convention.

They also asserted that the persons committing genocide, conspiring to commit genocide, directly and publicly inciting genocide, attempting to commit genocide and complicit in genocide are punished by a competent national or international tribunal. South Africa also wanted reparations for the Palestinians and assurances Israel would never indulge in such practices again (para 111).

South Africa has also moved the ICJ requesting provisional measures to protect the rights of the Palestinian people who are continuously being harmed with impunity (para 115). This was substantiated by various reasons including how nowhere is safe in Gaza, infectious diseases are spreading rapidly, and international experts are warning of imminent mass starvation (para 117). South Africa echoed that the Court is empowered to indicate provisional measures if the provisions relied on by the applicant appear prima facie (first impression) to afford a basis on which its jurisdiction could be founded (para 120).

Further citing precedent, Soth Africa stated that the Court does not have to determine that all of the acts complained of are capable of falling within the provisions of the Convention as long as at least some of the acts alleged are capable of falling within the provisions of the Convention. Which they do and have (paras 124,125,128). A key annotation to be cognisant of comes from the fact that the Court does not need to establish definitively that Palestinians are at risk of genocide, that they are being subjected to genocidal acts, or that Israel is otherwise breaching its obligations under the Genocide Convention (para 134).

With the above grounds established, South Africa requested the measures from the ICJ which included Israel - immediately suspending its military operations in and against Gaza, no entity associated with it must do military actions in Gaza, take all reasonable measures within their power to prevent genocide, must not indulge in any of the above-mentioned acts which may constitute genocidal actions, must ensure every action to prevent further destruction in Gaza, refrain from any action and shall ensure that no action is taken which might aggravate or extend the dispute before the Court.



The written submission provided a harrowing account of the ongoing situation in Gaza. Nevertheless, during the oral hearings, Israel did have a chance to provide reasonings for its actions. While their assertion that South Africa is a succour of Hamas is, to say the least ludicrous. The Israelis did shed light on the horrifying actions of Hamas, by showing pictures of 130+ under-hostage Israelis who cannot be tracked, the crimes Hamas have done recently. October 7th has been argued online as one of the most deadly days for Jews since the Holocaust. Further, the Israeli defence team at ICJ claimed that if there were acts of genocide, they have been perpetrated against Israel.

Conclusion

At the time of writing, the ICJ is still deliberating over the judgement. Nevertheless, the people of Gaza and Israel are continuously suffering from the hell that is being rained upon them. While there are always hopes for a ceasefire preposterous acts like shelling of hospitals have opened wounds which may never heal. And even if the ICJ convicts Israel and/or issues operational orders we still do not have any assurances they will be acted on as the ICJ does not have any active mediums to make sure their judgement is adhered to.

It cannot be emphasised enough that the conflict has had a convoluted history but what everyone does agree on is that the murder of innocents to every level is unjustified. The ICJ and the international community must ascertain their priorities and act accordingly to curb the loss of life because the ICJ's judgement and justice are worthless without action. The international community must actively work for welfare because even if a judgment decreeing a cessation of operation comes in, it must be followed.

> *"Judgement and justice must be supported by an iron hammer because justice on paper is worthless if the hands of the writer are tied."*

THE OCCUPATION OF PALESTINE

with

Dr Stanly Johny

Interviewed by Siddhant Sinha, Vagmi Singh & Anirudh Mehta

Gaza has lost over 1 per cent (24 thousand) of its population in a span of a hundred days since October 7. This interview was recorded on November 27, 2023. Some facts and figures mentioned, therefore, might not be accurate at the time of publication as the war and the humanitarian crisis continue to unfold.

Dr Stanly Johny is the foreign editor at The Hindu and an expert on West Asia. He has authored and co-authored books like The ISIS Caliphate and The Comrades & the Mullahs.

The Probe Annual Issue-22

Siddhant

There is a four-day-long pause in the war in Gaza at the moment with calls for a ceasefire. The Israeli government, though, has repeatedly made clear its ambitions to crush Hamas, even deliberately targeting civilians under the Dahiya doctrine. A minister in the Israeli cabinet has said that Gaza should be nuked in such a context. How long do you see the war continuing and what end is Israel seeking in this?

Dr Johny

If you look at the fine print of the truce reached between the Israelis and Hamas, they have kept a door open for extending the truce because it's a four-day truce and Hamas would be releasing some 50 hostages, women and children. Israelis would release some 150 Palestinian prisoners. And for four days, there would be a total halt of fighting aerial bombardment. There would be a limited pause to aerial surveillance of Gaza. But at the same time, the Israelis have said, Netanyahu's cabinet itself has said, that if Hamas releases more hostages, the truce will be extended. I think they have kept a door open for further negotiations and my understanding is that further negotiations are on. As you pointed out, the Israelis started attacking Gaza after the October 7 attack by Hamas, in which some 1200 Israelis were killed, mostly civilians. Israel's retaliation has killed more than 14,000 people in six or seven weeks and more than 5000 of them are children. But the challenge before Israel is that before launching the attack, Israel had set a target of crushing Hamas. If you look at Israel's military operation, what did Israel want to achieve by attacking Gaza? Maybe it wanted to topple the Hamas government in Gaza, it wanted to free hostages because some 247 hostages were taken by Hamas. And as Netanyahu himself said, it wanted to crush Hamas or dismantle Hamas. Israel carried out continuous bombing shelling and ground operation in Gaza over the last six to seven weeks. So did they meet any of their objectives? Yeah, they indeed killed a lot of Palestinians. They displaced some 1.7 million Palestinians, which is, you know, more than half of the total population of Gaza, and thousands were injured. 14,000 More people were killed. The vast majority of them are women and children, but this would also include Hamas fighters.

And Israel has also taken over parts of northern Gaza. But you look at Israel's declared objectives, did they crush Hamas? Did they take out any of Hamas's top leadership?

Mohammed Deif, who is the commander of Hamas's military wing, who apparently masterminded the October 7 attack and who is reportedly living in Gaza is still in Gaza. The Israeli said when they launched the attack, that he was a dead man walking, and he's still walking. Did they free hostages? No, they couldn't free hostages after the bombardment. They had to cut a deal with Hamas to get at least 50 hostages out. And will they be able to crush Hamas? Hamas has indeed used terror as a means. Many countries call Hamas, which is an Islamist militant organisation, a terrorist organisation. And even on October 7th, Hamas unleashed unspeakable horrors in Israel. Israel's anger is, I think, understandable. But at the same time, Hamas is rooted in Palestinian society. There is a reason why Hamas is powerful inside Gaza. It is because of the continuing occupation of the Palestinian territories.

The Israelis do not want to talk about occupation, they only want to talk about Hamas's attack. But I think the problem is that as long as the occupation continues, Hamas will project itself as the main resistance force, and it will have its roots in the Palestinian society. This is what makes Hamas different from other cult organisations. Is it possible for Israel to crush Hamas? This is a strategic question that the Israelis are also facing. I think after six or seven weeks of bombing Gaza, Israel is also facing a reality check. It is not meeting its declared military objectives. So that at least to to get the hostages out, it had to cut a deal with Hamas through the Qataris, Egyptians and under the tacit approval of the Americans, that's what we are witnessing now

Israel is also run by a far-right government. Netanyahu's ministers, to be frank, are worse than him. There are settler-zionists, there are ultra-orthodox zionists, far-right politicians, and those are the guys who wanted to nuke Gaza. They said that they would rather welcome epidemics from Southern Gaza because that would bring victory closer. They wanted to displace Palestinians from Gaza. You look at Netanyahu's minister's statements, they have issued all kinds of statements. But at the same time, I think

Israel is also facing operational challenges in Gaza, which is what pushed both sides. Of course, Hamas has also taken a huge hit. There is no doubt about it. That's what pushed both sides to reach this agreement now. I think they have also kept a door open. So we have to wait and see whether there will be an extension of the ceasefire.

Anirudh

Israel has claimed that its violent response has been a form of self-defence. It has also been their reason for denying any kind of peace talk. Do you think there is any merit in this argument? Furthermore, Mr. Krishna Kumar, in his article in The Hindu, talked about the impact of violence on the minds of children. So what do you think would be the impact of this attack on the radicalization of youth in Palestine?

Dr Johny

Israel has the right to self-defence. I think everybody has the right to self-defence. So, Israel also has the right to defend itself. I'm not contesting that. But the question is, the kind of attack that Israel is carrying out on Gaza, is this self-defence? Because if you put this in perspective, Israel has killed 14,000 people in six weeks, which I think is not how a responsible country behaves. This is not how a country that respects international humanitarian laws behaves. Israel can do this and still get away with it because it has the unconditional support of the United States. Nobody would impose sanctions on Israel. There won't be any UN Security Council Resolution, asking Israel to stop fighting because the United States would veto that. Even a resolution that called for a humanitarian pause, which was put together by Brazil, was vetoed by the United States.

I think the larger question is, is this self-defence? I think that can be contested because of the huge civilian toll, roughly 70% of the total people killed in Gaza were women and children, and 5000 to 6000 children were killed in six weeks. I think that is unacceptable for a civilized international order. I think this is a major issue. I don't think any other country, any other responsible country, that is in the global mainstream can do this and get away with it. Israel manages to do this and gets away with it because of the support it enjoys from the United States, the world's most powerful country. We have to accept this reality. For example, you can just compare and draw parallels between Russia's invasion of Ukraine and Israel's continuing occupation of the Palestinian territories. Russia started the war. I don't buy into the Russian argument that the West started the war. The West must have provoked him. But at the end of the day, Putin started the war. And the Russians face sanctions. The United States and the Western countries are supplying billions of dollars worth of weapons to Ukraine to resist the Russians. The total number of civilians killed over the last 20 months of Russia's invasion of Ukraine is 9500 people according to the United Nations. And here, the total number of people killed in six weeks is 14,000. You look at the difference and still, Israel doesn't face any international pushback. No sanctions, not even a call for a ceasefire. This is the global order we are talking about. When we talk about self-defence, I think we have to take this also into consideration.

Secondly, the effect on the Palestinian children. Israel is the most powerful country in the region, in terms of military might. It's a nuclear power. Nobody would talk about it. The United States doesn't want Israel's nuclear capabilities to be referred to IAEA or any other international monitoring mechanism. But it is a nuclear power. It's the most powerful country in West Asia. In terms of conventional military might, Israel is very powerful. If Israel wanted to take over Gaza, it could, because Gaza is anyway an isolated, cut-off strip without any air defence. Israel can do that. That's also why Israel continues to bomb Gaza like this. In conventional conflicts, Israel has been very powerful. For example, in 1967, it defeated all the Arab countries in six days. In 1973, the Egyptians pushed it back but Israel eventually regained the lost territories. But when it comes to fighting non-state actors in asymmetric warfare, Israel is not as effective as you might think. For example, in 1982, Israel invaded Lebanon, and the Israeli prime minister said that the war would bring 40 years of peace. But eventually, the war itself lasted 18 years. And it also led to the rise of Hezbollah. Israel's battle record with Hezbollah has hardly been rosy either. The same with Hamas. See how many times Israel attacked Hamas since 2005. Israel withdrew from Gaza in 2005. I think there have been at least five major operations in Gaza. And did Israel manage to defeat or dismantle Hamas? No, it didn't. In asymmetric warfare, I think the problem is

that when Israel declares dismantling Hamas as its main military objective, Hamas can claim victory just by surviving and Hamas has survived in the past.

We're talking about a territory of 2.3 million people. And of these 2.3 million 1.7 million are now refugees. 14,000 plus people were killed, 6000 children were killed. **If you look at the proportionate impact of the casualties, or the suffering, it's huge. This is going to impact the psyche of the Palestinians living in Gaza. I think this is what Hamas's source of support is.** Hamas is, at the end of the day, an Islamist group, no doubt about that. You have the Fatah which is a secular nationalist movement. With Fatah, Israel had, in the past, reached the Oslo agreements. But Oslo crumbled. Israel says, in principle, it is committed to a two-state solution, but there is no progress towards a two-state solution. That's where Hamas is growing support from the Palestinians. For an average Palestinian, it is Hamas that is resisting the Israelis. It is the sad reality here. With this kind of attack, you are not weakening Hamas. You might be weakening Hamas's infrastructure. But you are strengthening Hamas's ideological appeal among the Palestinians.

Vagmi

Israel has witnessed a strong rightward shift in recent years. Leaders like Benjamin Netanyahu and Naftali Bennett have ensured that there is no scope for dialogue or negotiation. Yet, Netanyahu has not been able to put to rest the issues he inherited. The October 7 attacks came as a huge intelligence failure on the part of Mossad. What role then would the attack play in Mr Netanyahu's legacy and his dealing with the Palestinian issue?

Dr Johny

That's a very important question. We have to see how the October 7 attack will impact Prime Minister Netanyahu. One thing is now clear. He built a career promising security to the Israelis who said that only he can offer security to the Israelis. He has a strong man image and has always ruled out peace. His point was that peace is a weakness and further compromises security. In 2015 or 2016, during the election campaign, he said that no Palestinian state would be created on his watch. However, under his watch, the biggest security crisis unfolded in Israel's history. October 7 was the biggest attack on Israeli land. That is an indisputable fact. Once the dust settles, there will be questions Mr. Netanyahu has to answer. It is a huge failure. Mr Netanyahu had tweeted, blaming the intelligence agencies and within a few hours, he deleted the tweet. That itself shows that things are not fine. Things are not justified with an even his security cabinet.

Now there is a ceasefire. We have to see whether the ceasefire would be extended to long, long-ish pauses in fighting. That is one option. The second option is for Israel to continue bombing. These are the two options you have. Let's analyse both possibilities. If there's a lasting ceasefire, Hamas would still be there. Netanyahu's declared goal was that he would crush Hamas. That's not happening if there is a ceasefire. To get hostages out, they got 50 hostages out, but there are still 200 hostages with Hamas. And Hamas has said that for every Israeli hostage they are releasing they need to get at least three Palestinians from Israeli prisoners. That is the ratio- one is to three. To get 200 hostages out Israel will have to release 600 Palestinians more, and also the pause will have to be extended.

Netanyahu will face further questions, one, why did October 7 happen? There will be investigations into the intelligence failure. There will be investigations on the government's response. And then secondly, what did your military campaign achieve? Your military campaign killed a lot of Palestinians. It grew in international condemnation. Israel was completely isolated. You look at the UN General Assembly voting. Except for the United States, Canada and Hungary, no other country supported Israel, even India voted against Israel at the UN General Assembly voting on the settlers. So what did your military campaign achieve? These questions would be there and Prime Minister Netanyahu will have to answer these questions.

The second possibility is to continue the war, but for how long? That's the question. Let's suppose that they take over the whole of Gaza. What will Netanyahu do? Is Israel going to reoccupy Gaza, which means Gaza would be turned back to the 2005 status quo, which also means there will be continuing insurgency in Gaza. In 2005, Israel withdrew from Gaza because it was extremely costly and difficult to deal with the insurgency in Gaza. If they go back to reoccupy Gaza,

that would be going back to 2005. There will be insurgency and continuing violence, which will also have political repercussions. So Israel also doesn't have easy options in its hands right now. They have a lot of firepower. They can kill a lot more people. But that alone doesn't bring you results. The question is whether you are meeting your strategic objectives. I think that is a very important question here.

Siddhant

China has gradually emerged as a force in the region. This goes beyond being the largest trading partner for the Gulf countries as it has mediated in the Iran-Saudi reconciliation as well. Do you think with America's policy shift towards China and the Far East, can China, in turn, fill the vacuum and play a decisive role in West Asian politics?

Dr Johny

Yeah, China would like to play a major role, but not a security role. China may not like to play a security role in Western Asia but would like to play a peace broker, it would like to play a major economic presence in the region. And I think the United States would continue to play the security role if you will look at the United States military presence in the region. So the US is clearly, what I usually say, deprioritizing the region. Its focus is on Eastern Europe and the Indo-Pacific, where the United States is facing more powerful conventional challenges in Russia and China. But at the same time, the United States would not like to exit West Asia, because West Asia is too critical for both the United States and China. The United States would try to maintain some kind of a presence in the region. Also militarily speaking, the USA has Israel and Egypt. Both are the biggest recipients of American aid, and the USA 10,000 troops in Qatar, 1000s of troops in Saudi Arabia, and the UAE and the USS Seventh Fleet is based in Bahrain in the Persian Gulf.

The US has a huge military presence in the region, which I don't think is changing. But at the same time, the US has de-prioritized West Asia, which has left some space open for China to play a bigger role. You can see the reflections of this shift because China brokered the Iran-Saudi Arabia deal earlier this year. This was a major development that announced the arrival of China as a peacemaker in the region. And also with the current conflict in Gaza, Israel's war on Gaza, Arab countries are visibly upset with the way Israel is continuing the operation. Arab countries were also very upset with the Biden administration's approach towards this crisis because Biden immediately visited Israel and declared unconditional support for Israel. We are talking about a democratic president who said his foreign policy would be centred around human rights. 14,000 Palestinians were killed in six weeks, and the United States has still not called for a ceasefire.

The Arab countries are also very much upset with the United States' unconditional support for Israel, despite Israel's disproportionate attack on Gaza. But they are effectively helpless. They can't do much. What did they do? They did two things. I think both are important. One, they convened a conference in Saudi Arabia, which is the Gaza conference which the Iranian president also attended. So you have for the first time, the Iranian President travelling to Saudi Arabia, at a time when the Palestine issue is at the centre of West Asia's geopolitical couldron. This hadn't happened in the past. And also you look at the larger geopolitical changes that are happening in the region. Before the war, before October 7, Saudi Arabia and Israel were in a very advanced stage of normalizing their relationship. The Biden administration was effectively pushing for this. The Biden administration wanted to clinch the deal before the 2024 elections so that Biden can claim that he has a major diplomatic breakthrough in West Asia. He hasn't got any diplomatic breakthroughs so far in his first administration, right?

My sense is that the Biden administration was so confident that the deal was achievable, that at the G-20 summit in New Delhi, they unveiled the **India-Middle East-Europe Economic Corridor** because the economic corridor hinges on the Israel-Arab peace. President Biden was very confident that Saudi Arabia and Israel are coming together. During the G-20, we saw a lot of commentaries on the Corridor. I, myself, had written. But I wrote a cautionary piece saying that we have to wait and see about the Arab-Israel peace. But what now? What happened to the Saudi-Israel peace plan? It's off the track. This is what Hamas achieved, basically by the October 7 attack. This Saudi-Israel peace plan is not going to happen, at least, as of now. It's off because the Saudis cannot afford to make peace with Israel now, after the war. What you saw in the Saudi summit on Gaza, was that

the peace deal, which the Americans were trying to stitch together, has gone off the rails, whereas the peace reconciliation which the Chinese put together between Saudi Arabia and Iran, is getting stronger.

Secondly, the Arabs themselves formed a committee. I am sceptical about this initiative because they always form a committee, they do nothing more than that. But still, interestingly, the first visit this committee undertook was to China. China may not be in a position to immediately affect any change. But I think we have to understand that by carrying out a visit, going to China and meeting Wang Yi, the Chinese foreign minister, the Arabs are sending a very clear message to the Americans that you are not the only superpower in the region, there are others as well. We have to see whether this will have any long-term impact on West Asian geopolitics. So clearly, I think the Biden administration has put the United States in a very difficult space in West Asia by offering unconditional support to Israel during this war.

Anirudh

All of us here are avid readers of the Hindu. I look for look forward to Fridays particularly because on Friday, there's a section called the notebook. When I started reading the newspaper on 19th May this year, there was a new notebook that you wrote. In it, you wrote about your experience in Ramallah, and it fascinated me. I want to know your experience when you were in Israel and now that the war has started, how it hasenhanced your knowledge as an observer of the war.

Dr Johny

Yeah, being on the ground is always helpful. That is one advantage of being a journalist. You can travel, you can talk to people and you can experience what is actually happening on the ground. So I've been to West Bank a couple of times, and to Israel, more than that. The last time I went to Israel was in November last year (2022). So we went to the Gaza border. So I remember the Israeli IDF spokesperson showing us the surveillance posts on the Gaza border, saying that they are monitoring everything. “We have a very advanced surveillance system, unmanned surveillance system, we have drones, we have huge barriers, overland barriers, as well as underground barriers”. So I asked him about the depth of the underground barriers. He said, “No, it's classified because we don't want Hamas to know this”. So they were pretty much confident about the situation in Gaza. Just a week before the war, I think the IDF said that the situation in Gaza was stable instability. “It is unstable, but we can manage the situation”. This is what they said. But still, Hamas carried out the attack.

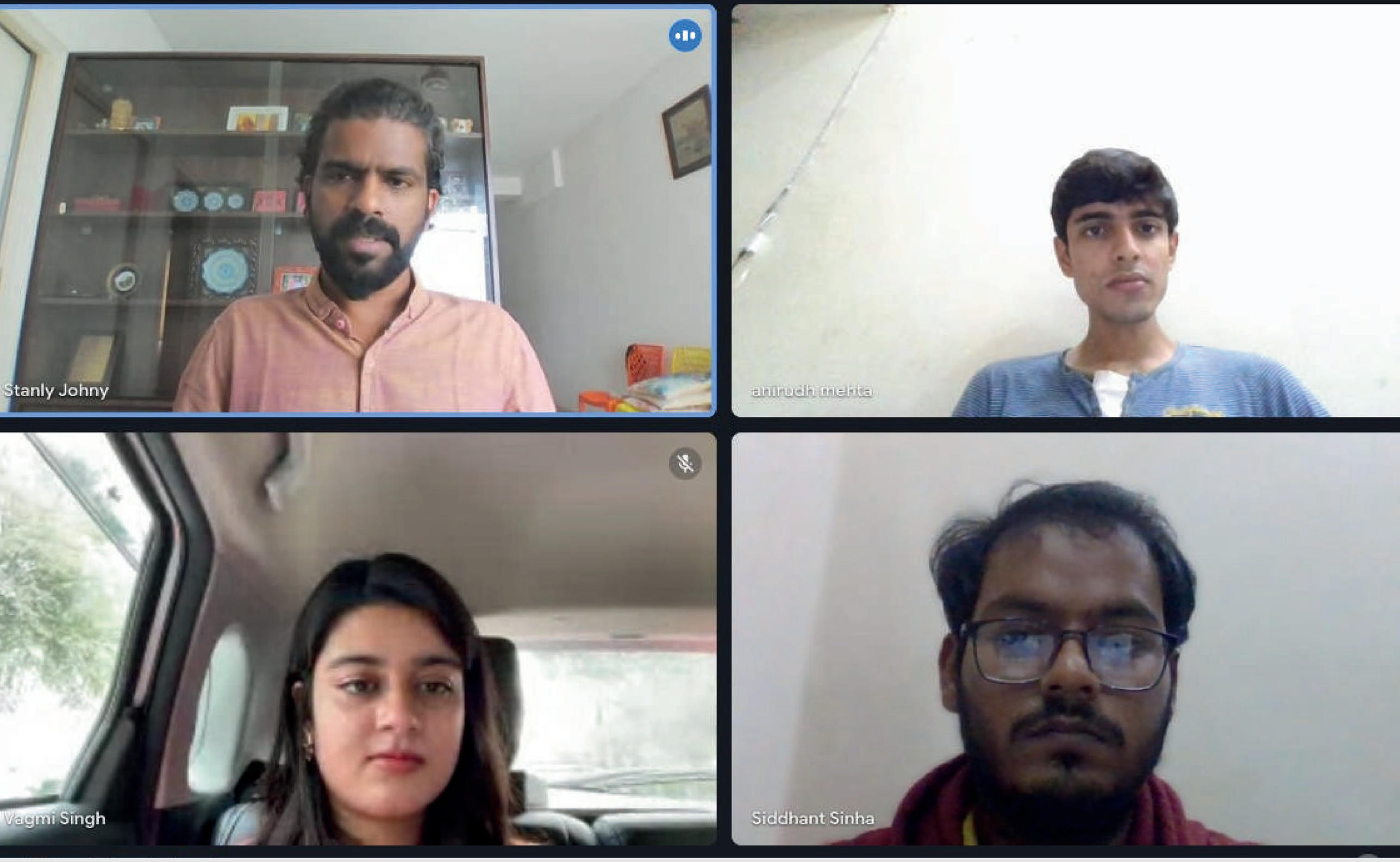
West Bank and Gaza are not geographically linked. West Bank is on the western side of the Jordan River and Gaza is on the Mediterranean coast. In West Bank, you have the Palestinian Authority, and Gaza is run by Hamas. I usually call the Palestinian Authority, which is Abu Mazen's government, the **Palestinian Non-Authority**, because they practically lack any meaningful authority. So West Bank is divided into three areas- areas A, B, and C. The Palestinian Authority has limited powers in Area A- civil powers, policing powers, etc, etc. But practically the whole West Bank is under Israeli occupation. There are some six 600 plus Israel checkpoints there. What Israel has done is that it has put the West Bank townships in capsules. So if you are a Palestinian and have to travel from one place to another, you have to go through Israeli checkpoints, even within the West Bank. I have gone through that. From Ramallah, which is the headquarters of the Palestinian Authority, if you have to go to other places like Abu Dis, you will have to go through multiple Israeli checkpoints. Very young Israeli soldiers holding automated rifles would be there and imagine if you're a Palestinian going through Israeli checkpoints almost daily, it's not going to be pleasant.

West Bank also has some **7 lakh Jewish settlers**, 4 lakh in West Bank proper and 3 lakh in East Jerusalem. It is the Israeli government's policy to promote settlements inside Palestinian territories. And these Jewish enclaves are surrounded by huge walls. Palestinians are not allowed to go inside unless they have passes, work permits etc. Otherwise, they are not allowed. Even separating Israel proper and the West Bank, Israel has built a huge 12-foot wall along the West Bank border. So forget about crossing the border unless you have the work permit. This is the situation in the West Bank.

In my case, what I wrote about it was that I was in Ramallah, and my flight was from Tel Aviv. So I had to go to Tel Aviv from Ramallah. In Ramallah, the Palestinian taxi drivers are there but they cannot

drive you out to Tel Aviv. Israeli taxis would not come to Ramallah. So the only option was to get a taxi from Jerusalem- an Arab taxi. The Jerusalem Arabs have special permits because Jerusalem has been annexed by the Israelis. So a taxi driver has to come from Jerusalem, pick me up from Ramallah, and then take the main highway, which the Palestinian activists call the apartheid highway because the Palestinians are not allowed to take the highway. Only Israelis or Arabs from Jerusalem can take this highway and this highway goes to Tel Aviv. While crossing this, we passed through a check post, which is a huge intimidating one. They took away my passport, asked questions, etc. So when you land at Tel Aviv airport, the Israelis will issue you a special permit card if you are travelling to the West Bank. You're supposed to keep that. So I showed him everything. He asked some questions and let me go.

Then before reaching Tel Aviv airport in Israel proper, there was another checkpoint where I was stopped There the soldiers asked me what I was doing in Ramallah. I told them I came here to cover the Indian Prime Minister's visit, but they didn't care. It is written on my visa, 'Travelling to the West Bank to cover Prime Minister Narendra Modi's visit'. It's there on my passport. But they still took away my passport. They asked me to go inside the screening room and made me open my bag. Everything was taken out and screened and then they asked me to wait in a room next to the screening room which is a very tiny room with only one screen closed space. So I had to wait there for roughly 20 minutes. After that, the soldier came back and gave me the passport saying that I could go. I went back to the screening room, my bags were open. The clothes, including the gift I bought for my mom, everything was out, so I had to repack, close the bag and get inside the cab. The cab driver said, "I'm sorry, but they did this because of me because I am an Arab". I don't know why they did this. But this is the experience I had and this is what I wrote about in the notebook.



Vagmi

Although there is no straightforward answer to this question, still, what do you think should be the considerations for a sustainable and just resolution to the Israel-Palestine conflict? Moreover, how might these considerations shape the future of the region?

Dr Johny

See, **none of us are going to see a resolution to this conflict**. To be honest, I'm a cynic. I'm a realist when it comes to this issue. But whatever solution you're talking about, whether it is a one-state solution or a two-state solution, what ideally we should have is a solution that treats both people, the Palestinians and the Israelis equally. Israel is a reality. I don't agree with the far-right version. **Israel is a nation-state, Israel has the right to exist and it has the right to defend itself. But the tragedy is that Palestine has not become a reality yet.**

Palestine has been living under occupation, at least since 1967. I'm saying at least because you can go back in history, but at least since 1967, all the Palestinian territories have been occupied by the Israelis. What used to be historical Palestine during the Ottoman period is now controlled by the Israelis. Effectively, the whole of Palestine is being controlled by the Israelis. So inside these territories, you have Israel proper. And you have the Palestinian territories, by which I refer to the Gaza Strip, East Jerusalem and West Bank, these are internationally recognized Palestinian territories, according to the United Nations. All these territories are controlled by the Israelis at this point.

The Palestinian people are living under the occupation, they don't have equal rights. They are not treated as equal citizens. This is the reality now, which not many people would like to talk about. So the solution is to find a solution to this. You can't go on like this, right? But Israel is not ready to talk about the occupation. Israel is talking about the security crisis. It is true that there is a security crisis. **But the security crisis is deeply rooted in the larger issue of occupation.** So that has to be addressed. But that is not being done. The two-state solution is that you create a Palestinian state, you have a Jewish state, and both states should live side by side with equal sovereignty and respect. But Israel is not ready to do that now, because there are contentious issues, such as the status of capital. The Palestinians want East Jerusalem, and it is recognized as a Palestinian territory by the UN Security Council resolutions, but Israelis are not ready to give it up.

Then the issue of the border. The Palestinians want the 1967 border, this is what the UN Security Council resolution says. But Israel has already built, as I said, a wall that cuts into the Palestinian territories. Inside the Palestinian territories, there are now 700,000 Jews living. So if you are finalizing the border, you will have to pull back all these people. Which Israeli leader is going to do that? Nobody is going to do that. And then third, you have the question of refugees. When the State of Israel was formed, some 700,000 Palestinians were made refugees in 1948. They are still living elsewhere. So according to international laws, the Geneva Convention or whatever, these people have the right to return to their homes. Israel is not ready to respect that because if these people are allowed to come back, Israel proper's demographic would be changed. Israel is a country that takes pride in being a Jewish nation. Israel doesn't want seven hundred thousand Palestinian Arabs and their offspring to come back to their homes and their homes are in Israel proper today.

So these are contentious issues if you're talking about a two-state solution. And the one-state solution is that you build a single state under a secular constitution under a federal structure maybe, in which the Israelis and the Palestinians can live with equal rights, equal voting rights, like what happened in South Africa after the apartheid. Even for that, there would be resistance. The far right in Israel would resist that. The Islamist militants on the Palestinian side might resist that. So whatever solution you're talking about, at the end of the day, **what you need is for both people to live with equal rights under some kind of a mechanism, which I don't think is feasible in the near future,** because this is a very complex conflict. But unless this issue is addressed, I don't think there will be peace either. **Israel would like to think that they can treat this as a security issue and go on, but it will have blowbacks like what happened on October 7.**


LAW &

POLICY

PROGRESS ON TRIAL :

Litigating the Conscience of the Law in the Marriage Equality Case

by Shubh Mathur

This essay takes a deep dive into the Honourable Supreme Court's recent judgement concerning the plea for marriage equality through a multidisciplinary lens. Alongside examining the contentions that have arisen since the judgement was delivered, it also emphasises the influence of socio-political dynamics on the judiciary's decision- making.

German sociologist Max Weber once stated, *"The modern state is a compulsory association which organises domination"* (Weber, 1919). While the context of power .in the world has evolved magnificently since Weber published his works, the significance of some of his deductions has persisted through the sands of time.

A flawless demonstration of this ideologue in contemporary times presented itself on October 17, this year, at 10:30 a.m. when a constitution bench of the Honourable Supreme Court of India led by Chief Justice of India Dr D.Y. Chandrachud alongside his learned puisne judges Justices S.K. Kaul, S. Ravindra Bhat, Hima Kohli and P.S. Narasimha assembled in court one to pronounce one of the most anticipated judgements pertaining to the progression of rights in the country. Following the same, the petitions concerning the plea for extension of marriage equality to non-heterosexual couples witnessed two minority judgements by Chief Justice and Justice Kaul alongside two majority judgements, one authored by Justice Bhat (with concurrence from Justice Kohli) and another opinion from Justice Narasimha.

Although much has already been stated about their opinions, it would be preferable to reiterate the key points.

- A unanimous decision that there is no fundamental right to marry under articles 19 & 21.
- A unanimous holding that transgender people can marry under personal law and the Special Marriage Act (with the caveat of a heterosexual relationship).
- A unanimous holding that the Special Marriage Act, of 1954 and Foreign Marriage Act, of 1969 are valid and constitutional. Additionally decreeing, they cannot be struck down under the aegis of discriminative language (as they do not include queer couples).
- A unanimous deduction that the omission of queer couples from the adoption domain is indirectly discriminatory.
- A unanimous holding that queerness is not an "urban-elitist" concept.
- A 3:2 split that non-heterosexual couples do not have the fundamental right to form associations. However, this may only be bracketed with the right to marry and, queer couples still have the right to be in a relationship.
- A 3:2 split on the argument that while there is evident discrimination against queer people, they cannot be overcome by directions through the judicial mechanisms.
- The doctrine of separation of power limits the honourable Supreme Court's ability to read non-heterosexual marriages into any laws.

The holdings of the judgements have been disputed from multiple legal lenses with many critiquing, concurring, and reiterating the notion of an "executive's court", alongside disputing judicial independence and commemorating the (apparent) death of a liberal democracy. With the same in mind, this piece will be analysing the conceptions of power regarding social dynamics and its relationship with the Indian legal framework, which provides the scaffoldings for the critiques of the judgement and emphasises the gravitas of the same.

Power & Law

"How does one use power to do good, if wielding power requires one to do evil?"

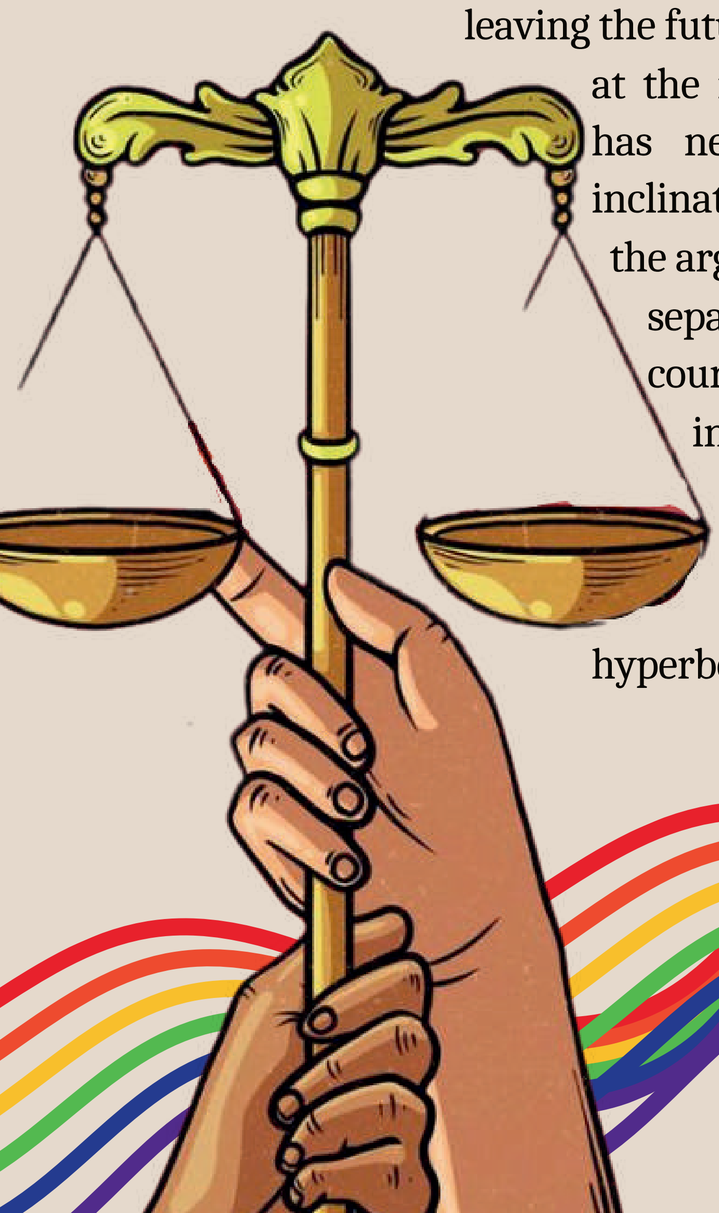
Niccolo Machiavelli

To comprehend the diverse reactions to the judgement and the emotions surrounding the same, one can revolve back to Max Weber. In his work, he outlines that domination is the probability that certain specific commands (or all commands) will be obeyed by a given group of persons, and features of the same inculcate interest, obedience, regularity and belief. Furthermore, he adds that when any form of dominance exists for an elongated period, it morphs into the bedrock of social relationships and social actions, thereby, gaining the status of custom and attaining legitimacy.

It is fitting to include this train of thought to identify the reasoning behind the Union of India's stance in the affidavit filed in response to the petitions and its ill-founded purview that queer relationships are an "urban-elitist" concept "unknown to rural and working-class populations". The dominance of social conservatism has authorised those in power to sanction such stances without merit and penalise those it deems "unnatural" through the apparatus that should be protecting them. This traditionalism has been legitimised by the claim of an absolute/natural law.

Thankfully, the dominant ones can also be overruled with enough pressure. And, one does not need to look further than part D section ii b) of judgement by Chandrachud, CJ, where he unequivocally establishes that India has played host to a rich history of the queer community and it was the colonial government which infested Indian society with such deplorable notions by prosecuting the queer (para 95-98), which now need to be revamped. Nevertheless, Weber's prognostication about a future dominated by mechanisms of legal authority has also triumphed.

The Supreme Court even through all of its "progressive" holdings has once again let down the minority by leaving the futures of countless queer people at the mercy of a legislature which has never stopped reiterating its inclinations to disown them. While the argument that the doctrine of separation of powers limited the court comes with merit, its inaction to uphold its status as the protector of constitutional rights does not. This may seem like hyperbole on first impression but the court's refusal to recognise non-heterosexual marriages and the fundamental right to marry on grounds that it does not have well, grounds to do so is exceptionally self-contradictory. As the court has delineated the impact of the discriminatory practices with a dedicated section in the minority judgements, as well as, the majority judgement of Bhat, J (para 108-118). And it is the job of the court to rectify the same.



Further, the argument that the right to privacy and education can be elevated because of their "centrality to the values that the Constitution espouses" (para 184, Chandrachud, CJ) but marriage cannot be is more than contradictory. The constitution espouses a core value and fundamental right of dignity in Article 21, and the dignity that stems from a marriage (alongside its legal consequences) should be available to everyone regardless of their background & orientation. Moreover, the very same court has held time and time again that the state must facilitate the indulgence of fundamental rights (the debate surrounding marriage's non-elevation as a fundamental right will have to be addressed in a separate post). And if a citizen commands the dignity and the choice to choose their partner, every legal mechanism must protect them from those who are trying to prevent them. This notion of dignity was also addressed in Bhat, J's, majority opinion (para 31-37).

With regard to the above paragraphs, it is alarming that even after finding discrimination the court did not take action, leaving their fate to a "high-powered committee headed by the Union Cabinet Secretary" (Bhat, J, para 118) with no timelines nor safeguards for accountability or findings. Such a situation provides stark reminders of the works of scholars who documented how the dominant classes affect the decision-making of the state apparatuses leading to the court's amalgamation as an "executive's court".

Judicial Conscience and Its Relationship With the Union

> *"As the wind of political expediency now chills parliaments' willingness to impose checks on the executive, and the executive now has a large measure of control over Legislation, the courts alone retain their original function of standing between the government and those who are governed"*
>
> *Sir Gerard Brennan.*

The Supriyo case has added fuel to the fire concerning the debate surrounding the Supreme Court's powers. The limitations of the court and in particular Article 142 have been convoluted multiple times. But, the complexities of the court's morality, power, the philosophies of judicial restraint and judicial activism must also be addressed to navigate the future of non-heterosexual marriages in India. There will be an attempt to tackle the same in this section.

French scholar Michel Foucault once stated that "wherever there is power, there is resistance" and it is fitting to contextualise this segment with the same, owing to his extensive work on sexuality (which is a topic for a separate essay). Foucault has also argued that modern power flows in a capillary fashion across the body of social dynamics and everyday practices maintain social relations (Foucault, 1976). This train of thought co-relates prominently with the study of politics of personal relations and gender power.

Returning to the judgement by Chandrachud, CJ, there is abundant evidence that queerness is not a concept foreign to Indian history and has been an omnipresent feature since society's inception. Nevertheless, the ramifications of the Indian Penal Code and section 377 (struck down in Navtej Johar) have been horrifying by cementing heteronormativity and expounding homophobia.

Moreover, the resistance to the challenge of heteronormativity stems from the aforementioned Foucoldian idea of how everyday practices maintain social relations and how it certified power to those of heterosexual orientation leading to diffusion of repression in every aspect against those they certify as "different".

Moving onto my contentions, the power of constitutional morality has been an ever-governing feature of our legal framework and its separation from public morality is what has resuscitated the rights of many whom society has termed "different". This can be accentuated by paragraph 144 of Malhotra, J's judgement in Navtej (supra) where she stated-

"*This Court, being the highest constitutional court, has the responsibility to monitor the preservation of constitutional morality as an incident of fostering conditions for human dignity and liberty to flourish".*

Nonetheless, Supriyo is very much an antithesis of the above-mentioned. The rejection of the extension of marriage rights deprives non-heterosexual couples of dignity and liberty, also reinforcing common discourse. This rejection also provides a rather disappointing reminder of Singhvi, J's (as he then was) judgement in Koushal where he stated the parliament's decision not to amend section 377 provided the north star for them (not verbatim), portraying how common consensus still reigns supreme even in the supreme court.

The notion of the court's power in this case has been one of extensive debate. While the doctrine of

separation of powers has been established across all opinions, the inaction of the court needs further commentary.

In his opinion, Chandrachud, CJ notes that the court would enter the legislative domain if it were to frame a policy on this issue (paras 66-69). But the bench's insistence that there has been a violation of queer rights because no provisions to satisfy their rights exist (as noted in Bhat, J's majority opinion (para 156)) clinically undermines the stature of the court, and future interpretations of Article 14.

On the issue of judicial restraint, it implies that the learned judges must be limited to the actions and inactions of the elected legislature. Nevertheless, I would contend this by reiterating the paragraph above as in matters where there is no legislative action even after six years of establishment of rights (Navtej (supra)), the courts must step in. And even if striking down the SMA is a bad idea, the rejection of reinterpretation from a heteronormative to an inclusive one is a worse idea.

While this may pave the pathway for criticisms of judicial activism and overreach. The restraint of the court can easily be attributed to judicial underreach

One of the primary purposes of the said court is to facilitate the enjoyment of rights and if it fails to do so because of grey areas, it must demarcate a colour to the same, which it failed to do so in Supriyo.

Conclusion

While my contentions with the judgements have been made clear, I would like to conclude with two anecdotes.

The honourable Supreme Court had the option to not repeat the misjudgements some have associated with Koushal, but its omission to act has very much provided a bleak reminder of the Naz to Navtej struggle.

Nevertheless, I would like to assert what Antonio Gramsci would've labelled the "optimism of the will'' over the "pessimism of the intellect". Even in times without optimism of Koushal and Supriyo, one must not forget the joy of Navtej. The recognition of non-heterosexual marriages is a natural progression, even if the LGBTQIA+ community must wait to enjoy the facilitation of the same.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HC HINDU COLLEGE, DELHI

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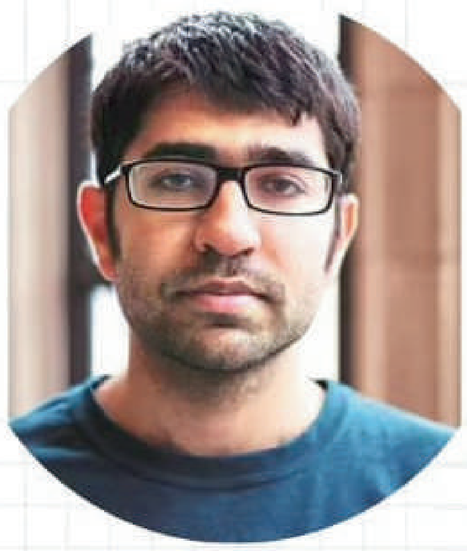
THE DISCUSSION FORUM

presents

PANEL DISCUSSION

TOPIC: THE FUTURE OF MARRIAGE EQUALITY JUDGEMENT AND THE RELATIONSHIP OF JUDICIARY WITH SOCIO-LEGAL RIGHTS

with



GAUTAM BHATIA

***Lawyer** and **author** of Disturb: Freedom of Speech under the Indian Constitution, The Transformative Constitution, The Horizon among others*

ZAINAB PATEL

***Petitioner** in the National Legal Services Authority v. Union of India case on transgender rights and Supriyo v. Union of India*

JUSTICE S. MURALIDHAR

*Former **Chief Justice of Odisha High Court** and Judge of Punjab and Haryana High Court and Delhi High Court*

ROHIN BHATT

Non-binary queer rights activist, lawyer and bioethicist

On 18th November 2023, **Caucus: The Discussion Forum of Hindu College & The Probe** hosted **Justice Dr S Muralidhar, Advocate Gautam Bhatia, Advocate Rohin Bhatt and Ms Zainab Patel** for a panel discussion on **'The Future of Marriage Equality and the Relationship of Judiciary with Socio-Legal Rights'**. The session was later also covered by Bar & Bench.

This is an excerpt from the Q&A part of the session which was moderated by **Siddhant Sinha**, and anchored by **Shubh Mathur and Pushkar Pandey.** The full session can be watched on Caucus' official YouTube Channel.

Q) A 3:2 split of the judgement decreed that while the LGBTQIA+ community has the right to a relationship, the state does not have a positive obligation to recognise the said union. In your opinion(s), how would you interpret this move by the court about the advancement of LGBTQIA+ rights in the country, especially when contextualised with Justice Indu Malhotra's opinion in Navtej where she noted that history owed an apology to the queer community and their families for what it has done to them. Is the court now making the same mistakes, it was apologising for in Navtej?

Justice Dr S Muralidhar

Most struggles for rights have been incremental. If you look at the history, world history, the struggle for rights has been incremental. Brown versus Board of Education. I think you should read the book '*All Deliberate Speed*'. You know, the US Supreme Court itself, in an order that followed ***Brown versus Board of Education***, said. This should be implemented with all deliberate speed. And that was interpreted very differently by the states in the US, which delayed the complete desegregation for many, many, many years.

Many of these struggles are incremental. I am repeating, don't view this as a negative verdict in terms of that arc of struggle, which is why I'm saying it has to happen over a period of time. It has to carry many people along.

Look at the Naaz arc, the NALSA arc. I know there is a degree of impatience with this kind of issue, but I would urge you not to lose your patience. These struggles do take some time. We are in a democracy with multiple voices. They also have to acknowledge the scenario today generally. There's a huge backlash against inter-caste marriages. We still have a society where there are honour killings. We still have child marriages. We still have dowry deaths. I'm saying give it the time for the critical mass of public opinion to develop. It will develop. Look, today you have very vocal criticisms of the judgment of the Supreme Court, which is welcome. I would welcome it. It's good we are having this debate. It's good we are having this critique. These will be the building blocks for that mass of public opinion which you want to generate in your favour. Ultimately, with the mass public opinion not being with you, you may not be able to fully enjoy the fruits of, the victories that one has in court. So be patient. I know this verdict could have gone in favour of petitioners as most of them were expecting, but don't lose hope. Every case in the court is not meant to be "won" in that sense. It is a stepping stone for a longer journey of the struggle for these rights, and I would see this as the first step in that direction.

Q) In section B, part D of his judgement the Chief Justice held that the court would be entering the legislative domain if it were to design a policy on this case. Yet there has been ample commentary they could've taken the route of issuing a suspended declaration of invalidity. Do you think it would've been plausible to use the *Fourie* remedy in India?

Adv Gautam Bhatia

Before I answer that, with your permission, just a very brief thing on what ***Justice Muralidhar*** said, which I agree with completely. I completely agree with respect to strategy and incrementalism. What I would say is that there are cases where the petitioners force an issue, and there are cases where the court drives or forces the issue. And this is, in my view, a case of the latter kind, because where else have you recently seen, from filing to issuing of notice, to referral to Constitution bench in an oral hearing, not even a referral order, to scheduling the Constitution bench, to hearing, to judgment, in ten months? A case of this kind, right?

So, I personally. completely agree on incrementalism, on, you know, on delaying when you need to delay. But there are some occasions where the court doesn't leave you with that option. And I think this was a case where, for most of us, we didn't have an option.

The case was going to be heard and decided. So either you would try to give it a shot, or you would sit it out. And I think once you know that the case is going to be

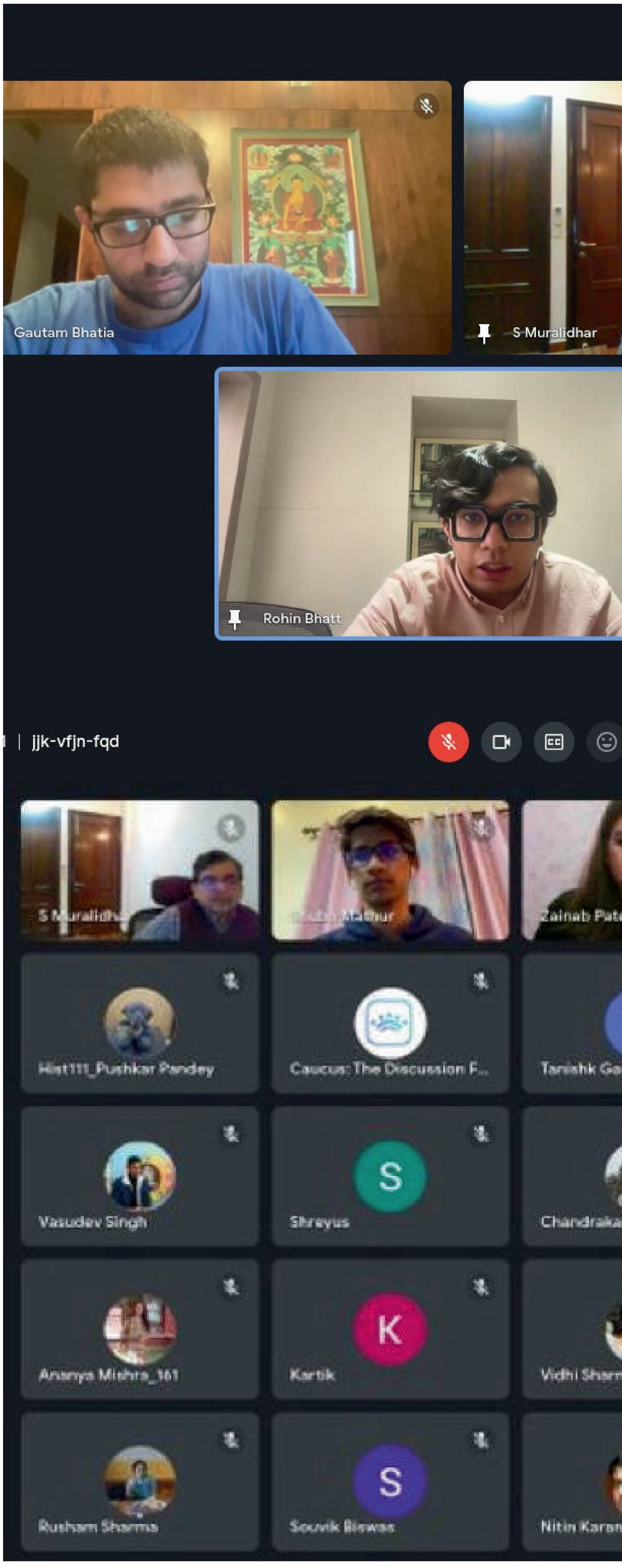
decided at this time, you normally try and give it a shot. Though I can see the merits in sitting it out sometimes.

So, agreeing with you completely, I think this is a case that was court-driven. It wasn't petitioners-driven in that sense. And I would personally have much preferred it to be in the High Court. Delhi and Kerala were hearing it. Have a judgment, you know, come up in the normal course of things. I think that option wasn't left to us after a point. So I think that also addresses a certain point about going forward. I think that now the way forward is incrementalism.

If you look at the way it happened in the UK, it began with the most innocuous of things. It began with the rent discrimination case, you know, that Ghaidan v. Godin, which we relied on, was a rent case. And you were not allowed to have rental agreements with the same-sex couples. So the starting point was holding that to be in violation of the Human Rights Act. And then you sort of build up bit by bit. So I think, for me, that should now be where we really talk and focus and try and go forward. Keeping up with the theme of hope and, you know, this just being one fun step in the road. As far as the question goes, Fourie, as I said in my initial remarks, I think that the suspended declaration

of invalidity is an option open to the court. Where you navigate the twin issues of constitutional rights violation and let parliament address the complexities of the issues through a legislative remedy. As I have said there are various ways through which you can go. So either, the court can provide a solution, and this will hold until the parliament acts which happened in Anoop Baranwal v Union of India, the Election Commissioner case. The court can say our solution, we are keeping it in reserve, we are declaring that this is unconstitutional, we are giving parliament six months, a year, two years to bring about a remedy. Should parliament not do so, we will provide you with a remedy.

So we have many degrees of this remedy which are perfectly possible under the Indian Constitution, given the creativity with which our courts have correctly approached these remedies. So I think it was definitely possible. I think, again, sticking with the point, I feel like this was a case where this wasn't necessary, honestly. Even accounting for the complexity of



reinterpretation, I think that, again, given our court's history, the toolbox to reinterpret the SMA was already with the court. And in fact, one point that we made, was that actually, if you look at Ghaidan's case, the UK, then the House of Lords case. In Ghaidan, they effectively did exactly, or more or less exactly, what was being advocated for in this case, which was that you basically reinterpret.

So in there, the phrase was husband and wife, in terms of rental agreements. The court, added in the words, husband or wife, or as if they were husband and wife, thus, making it inclusive of queer couples.

Now, the UK House of Lords is famous for being a conservative court. It's famous for not being creative with its remedies. It's famous for being really conscious of its limits. And the point was, if that is what they can do, then we are not asking for you to go so far as creating new remedies, suspended declarations, none of that, you know. So this is an interpretive case. So I think that it was possible to do it without even going there.

Of course, completely on board with Justice Muraldihar's point that there is, of course, what the court can do. And of course, what it sees itself as being able to do, given the space it has at any given time. And that's, of course, ultimately what decides the case at the end of the day.

Q) Speaking of representation at the highest court, and instances like the constant refusal of the centre to elevate Senior Advocate Saurabh Kirpal even after the Collegium's written explanation. There is still an absence of female advocates and judges being elevated to the SC and HCs. Would appreciate the panel's insight into the aspect of a representative court.

Adv Rohin Bhatt

I think when it's a matter of judicial appointments, I think the Supreme Court, again, has said something and done something else. So, for example, when the first set of six or seven judges were appointed by this Collegium, headed by the current Chief Justice, the Chief Justice said, look at the diversity on the bench. If

you looked at the diversity of the judges who were elevated, all of them were males, right?

Since the Chief Justice and the current Collegium have taken over, we've seen around 14 appointments. Fifteen, if you count Justice Dipankar Datta, who was sworn in by Justice Chandrachud, but nominated by the Collegium, headed by Justice Lalit, then there are 15. Out of the 14 appointments, all of them have been men, number one. Number two, one Muslim and one Christian have been appointed.

Again, these figures are, of course, subject to the correction. There's been no Sikh judge since 2017 since I guess when Justice Khehar retired. So, what the Supreme Court has time and again said, Collegium resolutions have time and again said that we want to ensure diversity on the bench. You had senior women judges, you had Justice Ritu Bhari, who was recently elevated, and you had Justice Neeta Agarwal in the Gujarat High Court, who was elevated a few months ago. So, it's not as if there are not enough senior women judges who can be elevated, right? But they're not being elevated for the reasons best known to the Collegium.

Now, coming specifically to Senior Advocate Saurabh Kirpal's appointment. Now, it's an open secret why the recommendation has not been approved. And I think with all the movement and the clamour that we are seeing in court around judicial appointments, I think this is one thing that the court itself seems not to be bothered about. You know, every time the matter comes up for hearing on appointments, we see a lot of tamasha going on about seniority, this, that. But one of the most striking things that is left out is this is a man who was recommended four or five years ago, and his name has still not been approved. So, I think it's time as the lawyers said the court lays down the law and that candidates who should be elevated are actually elevated, one of them is amongst us here today. The inaction of government is no reason for the collegium to capitulate. If the government refuses, then the court, I think, in my mind, I have no doubt, should issue a mandamus to the government to approve the name. The executive cannot pocket veto names. And based on that pocket veto, we have seen the collegium say, okay, since no action has taken place, we are now withdrawing our recommendation. I think that is a case where there has been a shameless capitulation by the collegium.

Q) Justice Bhat in his opinion held that the petitioners did not argue if the state's omission to enact a law or regulatory framework for non-heterosexual couples could amount to discrimination under Article 15. Advocates Bhatia and Bhatt, you were part of the petitioners' legal teams, in your opinion and experience how would you like to respond to this and do you believe that if the aforementioned was argued it would've made a difference?

Adv Gautam Bhatia

That's a very sharp question. I'm glad that you've closely read that judgment because I found that paragraph very bewildering. The case, as was presented by, the people I was representing, was that there exists an institution of marriage. This institution is intrinsically valuable in the sense that the ability to participate in the institution is a marker of equal moral membership of the polity, dignity, and so on. That's how society perceives, the ability to participate in that institution.

It's also instrumentally valuable in that it is a gateway to multiple other rights, which you all know of. This being the case, the state in framing the law that creates the access conditions to this institution, cannot discriminate on grounds of sexual orientation. So, therefore, in other words, you have the institution, you are bound to then, allow participation in the institution on equal terms. That was the argument.

So, the question of the absence of an institution doesn't even arise. So, what the majority does, and again, this is sort of fundamental to, this is the pillar of the majority judgment, is that they separate the rights, they separate these, these two issues They make it about, A, a freestanding right to marry, and then they say, because marriage is an institution outside the state, you asking for a freestanding right to marry amounts to asking for the creation of an institution, and we can't do that. And they say that's answer number one to question number one.

Question number two is, is the SMA, discriminatory?

And they both (majority judgements) say it's not. I want to avoid getting into that because that'll take a long time. But the thing is, the moment you separate those two questions, effectively, then you are addressing the wrong issue because it's not that you separate the SMA and the right to marry. It is that under the SMA, you cannot discriminate by not extending that right on the basis of, sexual orientation. That's the key thing. So, therefore that paragraph, I think, betrays really what is fundamentally the issue with the majority, in terms of a purely legal and conceptual plane. Because it's not about the absence of an institution. And again, just to understand why this doesn't work, just think back to my contract analogy. So, you have the law of contract. And the law of contract literally bars women from entering into contracts. You had that law of contract in the past, you challenged in the court, and the court says, oh, actually, you want a separate institution of contract for women, and we can't do that.

That doesn't make any sense, right? So, it's basically, it's the same institution. It's just who can access it. I think that is, is my answer. And, and, I mean, of course, there's a whole separate issue of whether the absence of an institution violates the positive obligation of the state. That, but that's a different issue. That's a complex issue. It's different. It's not the issue in this case.

Advocate Rohin Bhatt

I think Gautam, spoke about everything that had to be spoken. But I think one thing I do want to point out, is that they say that we did not argue that there was a legislative vacuum. I think that is something I think is wrong. We had presented evidence to the court, based on research done by ***Pink List India*** that took the matter of same-sex marriages or queer marriages had come up before the parliament these many times to private members' bills. The parliament, in its wisdom, has chosen not to do anything. So, to say that the petitioners did not even argue that there was a legislative vacuum, I think is incorrect.

Petitioners did say that the legislator has not chosen to act. And I think that is enough of a legislative vacuum, as I see it, for the court to then step in and say that, look, if there is inaction on the side of the legislator, then we must step in. So, I don't agree with the whole premise of it that the petitioners did not argue the whole issue.

Chief Justice Dr D.Y. Chandrachud

Justice Sanjay Kishan Kaul

Justice S. Ravindra Bhat

Justice Hima Kohli

Justice P.S. Narasimha

LAW POLICY and TECHNOLOGY

with

Advocate Apar Gupta

Interviewed by Gaurvi Saluja & Shubh Mathur

The Probe Annual Issue-44

Adv. Apar Gupta is an advocate and public policy professional who worked at the Internet Freedom Foundation for roughly six years, leading and supporting various initiatives to promote digital freedom and safeguard fundamental rights, such as strategic litigation, policy and legislative engagements, civic literacy, and online campaigns. Some of his notable achievements include appearing in constitutional challenges to website blocking, facial recognition technologies, surveillance reforms, and malware, drafting the Indian Privacy Code Bill, and running SaveTheInternet.in the movement for net neutrality.

Shubh

You have been at the forefront of the legal domain for quite some time now, being a part of multiple landmark cases. In your practice, how would you describe the evolution of judicial intervention on topics which concern the privacy of the citizen and political contention like the Aadhar judgement where, (as he then was), Justice Chandrachud “called it a fraud on the constitution”? Further, in your experience on matters of public policy, we would like to know your analysis of the influence of said contention in shaping policy.

Adv Gupta

So, I think Shubh the first question which you're putting to me is that what is the role of the courts in shaping policy and it's a practice in the domain of technology. I think the courts have played a very important role and my first interaction with how policy was being formulated around technology in India happened through the court. So the initial litigations concerning how technology is impacting people quite often happened to be in the around areas of free expression in which people were discovering social media and then using it to make certain kinds of posts online and what it was doing was that it was putting into conflict what was a social understanding and practice of speech in which we say things to each other but people putting it online also then brings this higher amount of scrutiny of laws such as hate speech defamation etc a lot of them are archaic they are not well-formed and they are formulated or their imposition itself is in some ways threatening our constitutional understanding of fundamental rights to freedom of speech and expression. \

I was lucky enough to work as a junior lawyer in the case of Shreya Singhal versus Union of India which challenged the constitutionality of Section 66A of the Information Technology Act, that led to the court declaring that because the law itself was very vague and was then ripe for abuse in which of course the person could be jailed or prosecuted under this law for any kind of comment online and they ruled it to be unconstitutional.

So the courts have had a very significant role in shaping technology policy which also speaks a little poorly to how laws are drafted or sometimes vacuum in the legal regulation of technology itself is presented, or how technology itself. Maybe another takeaway is to think about how technology sometimes aligns with a framework of power that can threaten rights.

So I think a lot of these things have come through the

courts the Aadhar litigation has been one litigation on the IT rules much more recently has been another area in which people have talked about it very openly and much more recently the seizure of devices right of journalists as well as other people whether it is a proportionate exercise in the interest of fulfilling an investigatory purpose of law enforcement or is it by itself a roving or fishing expectation or requires safeguards so I think the courts have a very very vital role to play in the enforcement of fundamental rights as technology quite often has the tendency to align with frameworks of power.

Shubh

In Anuradha Bhasin vs Union of India, the Supreme Court held that the suspension/restriction of internet services should not be done in a disproportionate way and state-imposed internet restriction must be proportionate to the situation it was trying to control. I would like to ask you two things; how did you perceive the situation in J&K and your thoughts on the internet shutdown in Manipur?

Adv Gupta

So the internet in fact all telecommunications were suspended in the state of Jammu and Kashmir after Article 370 was revoked which I think was 5th August and the internet remained suspended there, mobile internet in the districts where it was last restored for close to about 551 or 552 days. So we should look at it from the perspective of how long there was a period of deprivation of internet access, and mobile-based internet access is the primary method of how people all over India access the internet. Wired-based internet access is usually there for privileged socio-economic groups people who use laptops or you know desktop computers or people who are in offices or government departments. So most people use the internet through mobile and that remains shut for such a long period of time. And what's important to remember is it was not only shut in Kashmir which is Srinagar and adjoining areas it was also closed in Jammu. So as soon as the internet shuts down what happens is that quite often there's a very severe impact which occurs socially economically culturally in terms of a person's daily life and we have to remember that the internet was shut down during the period of the COVID pandemic where there was of course an understandable need for a certain degree of restriction on physical movement to ensure that crowding does not take place and COVID does not spread. So it required people to take remote classes, remote health consultations or conduct their business over Zoom calls and a lot of this was not possible in Jammu & Kashmir at that time. So there was a very high degree of deprivation which was there. Also, internet shutdowns don't distinguish between what are good websites, and what are bad websites and don't reason for it specifically. So per se in many ways it's disproportionate.

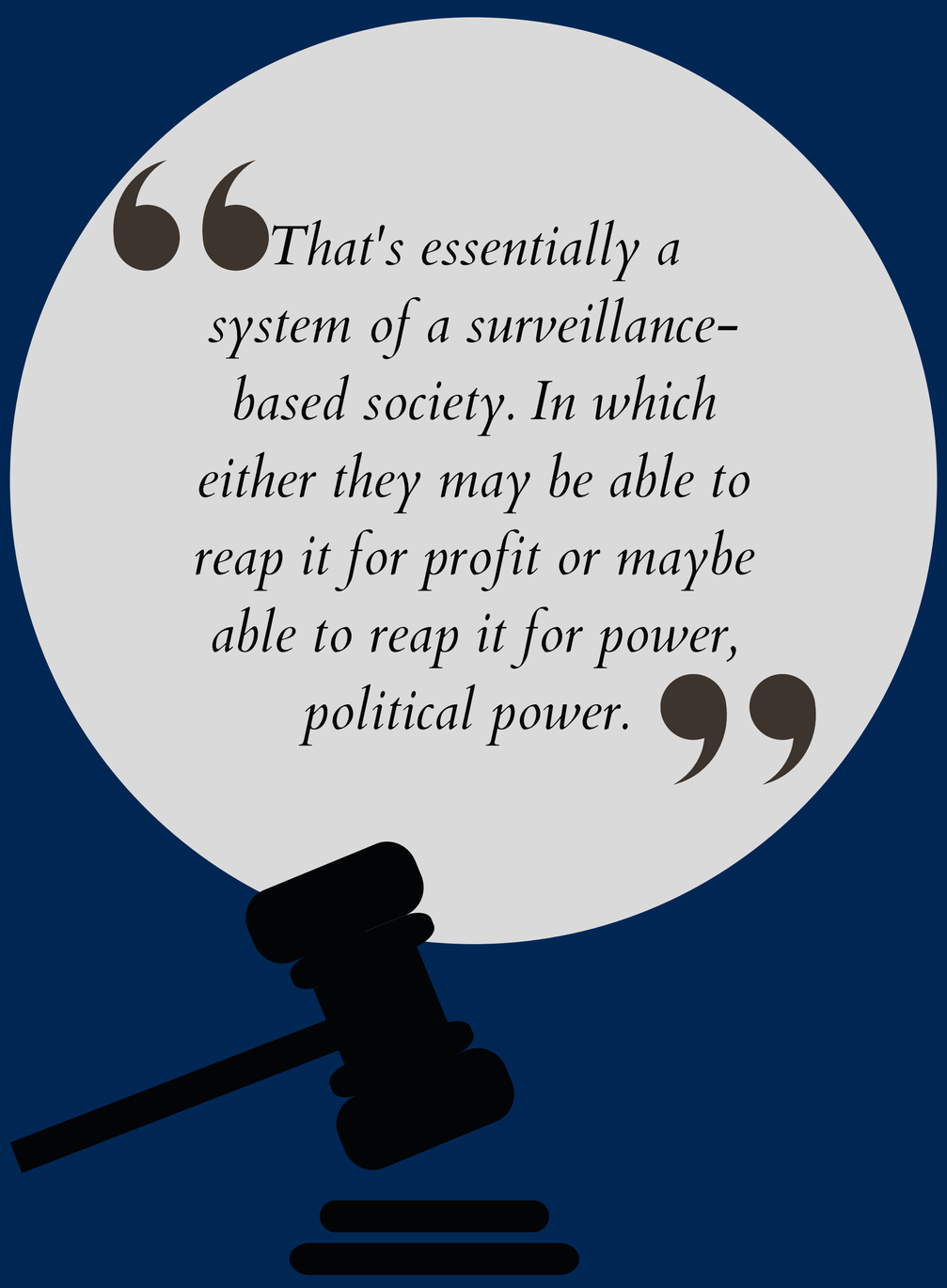
Although that matter as to the constitutionality itself of internet shutdowns was not before the court in the said case. Anuradha Bhasin is the editor of Kashmir Times and she's faced a high degree of state repression. She approached the Supreme Court questioning the constitutionality of the enforcement of the internet shutdown. So there's a difference in basically challenging the per se unconstitutional character of internet shutdowns which is that you can't do it at all. The second is you have enforced an internet shutdown where we are questioning the action, not the principle. So you're not questioning your power to put an internet shutdown, we are saying that you can't do it the way you have done it.

Here the first argument by the government was we can't even disclose to you the orders of internet shutdowns they are secretive and here, the court essentially pushed back. It said that transparency is necessary because whenever you interfere with anybody's speech and expression you need to set out reasons and you need to make that person aware of why their fundamental rights are being restricted. It also gave other safeguards such as internet shutdowns cannot be perpetual, there needs to be an administrative review of internet shutdown orders. But it's also important to remember what the court did not do. The court did not in fact get into the orders which were passed by the central government for shutting down the internet. It did not actually see the orders and say that the law which we are laying down, whether it's been followed in those orders or not. It sent it back to the central government and it said that you reassess your orders.

So the outcome of the Anuradha Bhasin case was not an immediate restoration of internet shutdowns. In fact, there are about three more cases which applied subsequently which I was associated with through the Internet Freedom Foundation in which we were asking for restoration of internet access not only in

Kashmir but also in districts of Jammu, all through that period of time internet shutdowns were mechanically extended all through that place without adequate factual basis to support them as much as the orders were made public. Sometimes the safeguards were not followed, and sometimes the orders were not uploaded prior to the internet shutdown. Five orders were uploaded all of a sudden at the end of the month. So you notice a lot of things, people from Kashmir, and Jammu used to tag IFF on its social media handles quite often, they used to tag the government they used to plead with them and eventually the internet came to be restored. But I think it took a lot of international shaming which resulted in it, so it wasn't only the courts. In fact I remember there was a tweet by Rihanna of a CNN article about the internet shutdown in Kashmir which led to some kind of diplomatic incident. But my friends who are constitution lawyers who practice in courts sometimes like to question whether it was a Supreme Court or a tweet by Rihanna which led to a restoration of the internet in Jammu and Kashmir.

If people want to know more about the the chronology of this litigation and the subsequent cases, there is a journal article which has been co-authored with Devdutta Mukhopadhyay who was working at the Internet Freedom Foundation at that point in time, and people can look at what were the different cases what was the court looking at over this period of time. But it's important to remember that the court's decision in Anuradha Bhasin did not lead to immediate restoration of internet access.



Gaurvi

In times when the government is pushing for "Digital India" and the internet has become a necessity to avail various welfare schemes of social protection, right to work guarantee, PDS and given shutdowns are usually on mobile internet services and not on fixed line; rural populations, the majority of who use their mobile devices to access the internet are disproportionately impacted. So, how do you view the relationship between access to the internet and basic rights and its differential impact on various communities?

Adv Gupta

I think there's a disproportionate socio-economic impact because most internet shutdowns in India are on mobile internet and quite often you have to think about it from the administrative perspective of it playing into some kind of remote public interest that there may be a tendency for people to use instant messaging or make a video which goes viral and then excites a mob. But it basically brings me to the question is the state failing to enforce law and order? Is shutting down the internet, a good excuse for it because you know irrespective of a communal flare-up most of the people in that area are not going to be able to access the internet. That area will also suffer a degree of incredible deprivation from their regular day-to-day function.

So it's possibly like a curfew I've talked about it much more recently in the context of the internal shutdown in Manipur, I've written three op-eds in which I've questioned the basis of limited internet shutdowns in which wide-line internet access is permitted, wireless is banned and somehow that's seen as proportionate by arguing but it's not proportionate per se. The alternative which I offer in terms is if there is an urgent need, an exceptional urgent need, it needs to be first with procedural safeguards and processes which means that orders need to be public they need to have clear reasoning and factual inputs why not the internet is being shut down why specific websites are being blocked and it needs to be disclosed publicly because the public also has a right fundamental right to know.

It also needs to be limited to time, so it can't be a perpetual ban in that sense I think what we are facing

today is that there's a great amount of power which is right now being exercised in terms of the direction technology you should take where the state is saying, that yes you should use it but, you should only use it in the way we want you to use it in that way. Of course, it also then plays to the political interest of the government in which when people ask them for transparency and accountability they don't want it so it's manifesting in different kinds of issues from surveillance to freedom of speech and expression. So the concept of digital India is not a form of universal internet access which is without a political conditionality, it comes with a prescription that you need to use it in this way, right we are going to direct you that you need to utilize access to the internet for the instrumental goals which are set out by the government, and you can't use it for other things.

So that itself I think undermines the promise of the internet which is essentially a medium for curiosity exploration for people to do new things. Innovation is at the root in terms of a decentralized network in a sense but it's not truly decentralized in a way. But still, you know the political value behind the internet is that you to a large extent do have a degree of state control on illegal action. But there's a wider sense of liberty of freedom people feel when they use a digital device and I think that conflicts with that friction which is presenting itself and how the internet is being shut down in India more than any other country in the world.

Gaurvi

In light of Twitter vs the Union of India, how do you view the influence of the government in arbitrarily curtailing certain voices that go against them without any written justification or prior notice, limiting their freedom of speech and expression on social media platforms?

Adv Gupta

So just a little background about the case. Twitter goes to Karnataka High Court because it's getting orders over a period of time in which the government's saying block not only these tweets which we are seeing are illegal, but also entire accounts. The orders quite often don't have reasons, and these orders also match the factual timeline of the farmer protests and have actually resulted in blocks on journalistic platforms like **The Caravan.**

So Twitter says on behalf of our users we are approaching the Karnataka High Court representing their fundamental right to freedom of speech and expression, because these orders are made in secret, so our users can't approach the court directly. They're sent to us, we can't disclose it per se to our users because the government is also saying you should not do it. The orders don't contain reasons in writing hence they by themselves are arbitrary and therefore blocking of entire accounts which is disproportionate, because an account can't be illegal per se right you need to have some justification to say there's repeated misconduct or criminality. Otherwise, it'll just be one tweet which will be withheld through a blocking direction.

Now the Karnataka high court basically rejects all of this and says the government has adequate power to take these actions I have written on the judgment actually in the Indian Express in an op-ed and people can possibly read my reasons for disagreeing with the court. In fact I find it very surprising that the court avoids deeper constitutional examination of the powers of the central government because the fundamental right to know and its impact is directly on the individual users of Twitter, that's the first thing. So if the fundamental right of freedom of speech and expression is being restricted. The state should ideally inform them and needs to certainly establish that it is informing them, it is providing them with reasons and a legal process.

In addition to that, it's not only the users who are impacted it's also the users who are affected it's also the readers. Social media platforms like Twitter are public forums and there's a constitutional right, for the right to receive information, because it's reasoned that when we read something, when we watch something, we formulate an opinion. So our opinions, our knowledge come from the information which we

receive and based on what we receive, we speak, we express, and we formulate our opinions. So it's really important for us to have a fundamental right to freedom of speech and expression, that we receive speech as well, so there's a general public right there. So the orders also need to be made public. Here the court itself does not enter into a sound constitutional examination also on proportionality. It does not actually look at the orders properly, and in fact there's a lot of detail which is missing from the court case. And it passes strictures against Twitter.

I am no fan of Twitter, I've been on Twitter for close to a decade and I get to see a lot of abuse on Twitter. Every tweet is seemed to be followed by nonsensical arguments. I also fundamentally disagree with the surveillance capitalism model in which our data, our behaviour on digital platforms is harvested and then we're shown different kinds of ads which play based on the same, thus contributing to a sense of mental insecurity and loss of privacy.

So, in my opinion, a battle between Twitter and the government is basically a one between us, the ordinary citizens, and the government. Our freedom of speech has been curbed by the Karnataka High Court judgement. One final comment on the Karnataka High Court's decision - I find it so immature that they would cite statements from the G20 in Sanskrit and some kind of theological reasoning when it's a matter of constitutional adjudication. It's a very dangerous sign when constitutional cases are being influenced by political messaging. So according to me, it kind of impairs the impartiality of the judiciary.

Shubh

In 2017, the Hon'ble Supreme Court asserted a fundamental right to privacy which has paved the way for many memorable judgements like Navtej. Nevertheless, the definition of privacy in the digital sense is still a grey area. We would like to know how you think the law should demarcate what qualifies as 'protected' under digital privacy and what should not be. Further, how do you think this relates to IT Act 2021?

Adv Gupta

The IT Act was made in the year 2000, some rules were made recently and I'll refer to them. In 2017, in the case of Puttaswamy judgment, the Supreme Court reaffirmed that privacy is a fundamental right and is linked to every fundamental right. What it stated was, you need privacy to exercise so many choices in your life- wear the kind of clothes you want, eat the kind of food you want, marry someone, your identity, your sexuality, what you want to read. So privacy needs to be considered through the lens of a doctrine which preserves your liberty, autonomy and dignity. That's the way the court verbalizes it. So it's much broader than what is called "informational privacy" which becomes relevant in the digital context. Privacy is really important for people in terms of their diet, their clothing attire, their choices. Nevertheless, the state can restrict it but the restriction needs to be as per the conditions which are set out in the Puttaswamy case. So that's what is important to remember. Now let's just deal with informational privacy. Informational privacy has been considered by the court (if you read different opinions) as a representative of power. So we are quite often told that the more somebody knows about you, the more power they have. Metaphorically, it has been explained through the architecture of what is called a panopticon, which is a central guard tower in which one can't see the guard but the guard can see everyone all the time. If you remember, when Jeremy Bentham drew out the panopticon and wrote about it, it was meant for the welfare of society, because he said that the panopticon essentially keeps people who are criminals or those who can't take care of themselves. People who may be suffering from mental challenges, physical challenges may need somebody to see them all the time, so that they are taken care of, by surveillance. But what it does is that it builds a system of power, and we often know from our parental relationships or from friendships, someone who's always imposing their choices on our actions. You feel that they know you and that's why they say you will like that. They presume that, so it takes away your ability to exercise choice and autonomy. Now in the digital domain, we are connected

by devices which have a bundle of sensors, which are always gathering information on minute movements or the absence of movement or other metrics of data. They get a very deep insight into our behaviour as individuals and on the basis of that, they get an immense hold of power. That's essentially a system of a surveillance-based society, in which they may either be able to reap it for profit or for power, especially political power. Here the court says that it is limited by what is called a “lawful purpose”. It needs to be tied to what the Constitution says the state should do. Of course, the state should keep us safe, but the state should not keep us safe by keeping us in a perpetual lockdown, the state should not regard us as different communities who would attack each other. That does not serve a lawful purpose. Second, it needs to be implemented in a way which is necessary. So the information collection needs to be tied to a purpose. If you can do the thing without getting to know or survey me or ask me for a whole bundle of data, you should go ahead and do it, because why create that massive apparatus? It doesn't make sense. There's a likelihood it will be abused. That's called data minimization.

So the data which you collect also needs to be tied to the purpose, so you won't ask for extra details. Say for example, if you're just wanting to know when I'm entering a building, my name and my phone number, why would you also ask for my biometrics, why should you also ask 20 different other things ? So that's extra personal information which won't be gathered. So it needs to be proportional. Then it needs to have adequate safeguards. All of this needs to have a legal basis which means the government should make a law for it, which then makes sure that these things are actually set in stone.

Now what's been happening unfortunately since 2017 is that, we have not seen adequate enforcement of the principles in practice, either in terms of the union executive itself implementing them or state governments implementing them. I come from Delhi, and right now, you have CCTV cameras which are being installed everywhere, on roads and classrooms and there's no law. Necessity or having deeper arguments, there's no legal basis to them being installed so it's ripe for abuse. Similarly, facial recognition projects are being launched, electronic databases are being built etc etc etc. Quite often there's a social attitude which is emerging, that, everyone has personal data, what difference does it make? The difference is that when it is caused over a period of time, we are becoming a much more surveyed society. We are becoming a much more scared, a fearful society where we're censoring our own actions. And it's not happening immediately, it's happening as a gradual shift over a period of time. So you're always watchful about what you say, where you say it and that's a problem according to me. That's not an open society, right?

Shubh

In contemporary times, facial recognition and fingerprint recognition technologies are glorified due to media portrayal, but many still do not know how they are actually utilised by the actors. As an expert in the field, can you divulge how the said technologies are being used and misused in India? Additionally, can you also elaborate on the institutional safeguards (if any) that are present regarding the same?

Adv Gupta

I'd just like to caveat by saying I'm not an expert on technology. I'm an expert on the legal and policy examination aspects of technology in terms of social impact. From what I've been seeing around facial recognition technologies is that it's not being used for one thing, it's being used for different things such as state security, identification etc. Now it's not that the technology is accurate right now. Of course, it is getting more accurate as it trains on more data, but right now the technology is nowhere near a hundred per cent accuracy so it results in exclusion that's the first thing to consider.

Quite often people say, what's the harm? But if you tie it with a very critical function like payment of somebody's wages, rations, or somebody being able to cast a vote in an election, it can have a dramatic

impact. It can lead to somebody not being able to access something which is guaranteed to them, which is the very basis of why this country was created and why we threw out the British. The second thing is that, as these technologies also become much more accurate they're used not for one purpose, but for multiple purposes. Where the same camera is used not for only the identification of a person who commits a crime, but also for watching everybody who passes through that time frame. When you integrate that with a large enough database and you have everyone's face on it you can track everyone's movement over a period of time, and then you can impose systems of behavioural change. Of course, it will make a lot of people happy, who say that there's too much littering in our cities or people don't have traffic sense etc.

But imagine a society which is based on fear and coercion, say for instance, China, where they have a social credit score system in which if you do something socially undesirable you're not allowed to do certain things. Now there may be people who may say let's take the China and Singapore path but I'm not those people, we disagree in principle if you are that person. But for the people who believe that in a democratic framework, you do need to have penalties but you need to enforce them in a way where there are adequate safeguards and you can't have these large systems of surveillance, I would like to get into that a little much more.

Now what's happening quite often is that there's a project that we built on the Internet Freedom Foundation, which is called panoptic which actually comes from the panopticon (panoptic.in). If you go to it, you will discover that there are about 70, 90, 120 projects where thousands of crores are being spent. But there's not one law, no legislative basis for ensuring that the facial recognition systems which are implemented, have audits and security systems in place to ensure that the data does not leak. But most importantly, it is the use for which the facial recognition technology are being deployed. Say, somebody who is implementing facial recognition technology for beneficiary welfare entitlements, rations, does not get to use that same data for law enforcement purposes. Of course, it's more efficient, but it's also a data creep in that sense. Moreover it's also illegal, and you need to go ahead and pass another law and it needs to stand the crest of constitutionality. So quite often what we have noticed is that, through executive action notifications, these kinds of things have happened and the courts unfortunately, despite pending legal challenges, have not yet been able to deliver judgments as to a declaration of the illegality.

> *"The court did not in fact get into the orders which were passed by the central government for shutting down the internet. It did not actually see the orders and say that the law which we are laying down, whether it's been followed in those orders or not."*

Gaurvi

In recent years, India has come under attack of some high-profile data breaches such as the CoWIN platform breach, the Employees' Provident Fund Organisation (EPFO) breach in August 2022 and the ransomware attack on the All-India Institute of Medical Sciences (AIIMS) in November 2022. Can a robust National Cyber Security Strategy help plug these breaches?

Adv Gupta

Data breaches are essentially a gateway to impersonation, financial fraud and making our entire goals of digitilasation very susceptible, because it puts into a person's hands, the data of possibly thousands or millions of people and that kind of personal data then is used over a period of time not only to surveil a person but to impersonate them and try to

siphon off their bank accounts. Quite often it's done on people who either lack digital literacy or even people who are very sophisticated with digital literacy. So when, for instance, you are getting a call from somebody who knows your Aadhar number, your driver's license number, when you last insured it and says they are calling from a bank and then also give you the details of your last bank statement, you'll very likely talk to them for two or three minutes.

Now imagine that's your grandparents. These are the kinds of issues that are manifesting themselves regularly because the entity which looks after data breaches by public departments, which is called the Computer Emergency Response Team, I don't think so has the adequate funding skills and expertise to account for the scale of challenge which is happening.

Now India's making a very ambitious government-to-citizen digitisation transformation and that's also being reflected by the private and the larger public sector. You may have heard things about digital public codes etc. But at the root of all of that are leaky databases because they're gathering more information and the security itself, I admit, is tough to implement. But I don't think, it's been done properly. There are enough resources which are being deployed towards it, particularly towards how much data should be gathered and how should we think about, let's say, architecture of these services. If you're linking everything to one Aadhar number there's a larger likelihood that people will be able to connect two leaked databases and put them together and thereby have more information on an eventual victim. I don't think enough thinking is going into a lot of this. It's been thought about as something inconvenient and we shouldn't deal with it.

What you might also notice is that data breaches are happening repetitively. So if you look at the railways, it's had data breaches in 2020, 2021, and 2022. Why is it happening? You need to ask these questions. So I think it's a mix of incompetence and people in the public sector not wanting to own up to accountability and here I think a national cyber security policy will help. The last one was made in 2013 and one has not been made since then.

Gaurvi

The parliament recently passed the Digital Personal Data Protection Bill, 2023. The legislation makes it mandatory for companies collecting user data to obtain explicit user consent before processing it. However, it includes “certain legitimate uses” as an exemption for data collection without user consent and also to a certain extent exempts the government on many matters. As someone who has been in this field for a long time can you elucidate on the implications of the bill, its relationship with the right to privacy and the role of the government in the future?

Adv Gupta

So the digital data protection bill should be considered as a law which has been made not to protect individual citizens, but to protect the state in its data collection practices. So it's essentially an act of parliament which increases the power of the central government to determine how the law actually will be implemented, because the law in various portions, provides the central government with complete flexibility to whom it will apply, and how it will apply. The basis of the statement actually comes from not only the exemptions which are within the law, for instance, the law without any clear criteria provides the central government with the power to exempt not only a group of companies but also one single company or one single government department.
So I find it very peculiar, that the exemption is for an entity, which means for the company or the department, rather than a specific purpose. This means that if you're doing that activity and you're this government department the activity is not exempted the entire department or the entire company is exempted. What it does at the same point in time is that the implementation of the law to a large extent does not occur through a regulatory body, which means that if you look at data protection law in different countries, there needs to be a government body which is established to develop a regulatory framework in which it not only enforces the law in which it investigates whether the law is being applied or not. But it also then issues practice guidances for instance there is an MSME unit, medium micro small medium enterprise unit, which is engaged in let's say industrial manufacturing for which it keeps a payroll

of about 300 to 400 people, how should it manage that data? So that kind of advice comes from what is called a data protection office agency/authority etc in foreign countries. We have not established that, we've established a data protection board to which complaints are sent, and which then adjudicates and decides them and this is picked by the government. So the standards and the application and its determination are still left to the central government, which ultimately means the Ministry of Electronics and Information Technology.

So for instance, if you go to the Twitter timeline of the Minister of State, Mr Rajesh Chandra Shekhar, only three days ago he met the public policy head from Meta Platforms Joel Kaplan, and quite ordinarily this law will apply there. It brings a good faith query on fairness conflict of interest in which the political interest, as well as the government's interest, may intersect.

What I mean by that is if the minister himself is determining how the data protection law will apply to companies without any regulatory body which will be independent. Then this kind of apprehension will be there even in the mind of the people who will be ideologically aligned with the government of the day. So it's a design flaw that's what I'm trying to say. It's a peculiar data protection law. I think it's the only data protection law in the world and I say this with seriousness which imposes a duty on us with the threat of penalty like you and me who do not collect data who give data, it says you have to give complete and accurate data to any data fiduciary. And if you give incorrect data there'll be a twenty thousand rupee fine.

It also says that you need to give your complete ID etc and quite often I know my female friends don't give complete data or their government data to a lot of people because it may be used to stalk them or just cause an unpleasant encounter. It's a safety method, it's not like somebody's lying just because they want to evade their taxes or things like that. It's done for personal safety reasons it's a choice, right? It also says if you file a false complaint with a data protection board which means that if you complain and it's found to be false you will get a fine. Now here's the thing a lot of sophisticated methods, technical methods, cannot be established to the certainty of evidence. Sometimes there has been a data breach and they have collected more data than they promised they would. You can complain, you may have apprehension, and you may be wrong so why should there be a fine? It's going to discourage people from seeking enforcement of the laws in any way.

I think it's not looking towards enforcement in terms of bringing in what the minister likes to call "guard rails" for the internet or for the digital world I don't think it is going to attract and discourage people you know selling their data and so it places any kind of guardrails for there. I think it's actually pouring water on a bathroom floor.

Shubh

The Ministry for Information & Broadcasting has recently introduced the Broadcasting Services Regulation Bill 2023. The extent of the bill's reach is extortionately wide and also concerns citizens who are sharing information and misinformation on social media and other channels. We would like to know your interpretation of the bill, how it can impact the framing of future mainstream discourse and its effect on those who are not intricately aware of its provisions.

Adv Gupta

So, the Broadcasting Regulation Bill has been released recently for public consultation. And I think people can send in comments till about the 8th or 10th of this month to the Ministry of Information and Broadcasting. What it aims to do as the statement of the Cabinet Minister for Information and Broadcasting, **Mr. Anurag Thakur**, is to modernize the regulatory framework, because the previous law was actually focused towards cable television regulation. This is called the **Cable Television Regulations Act of 1995**. It was first made as an ordinance.

Here the primary method for both entertainment as well as business, news and current affairs, is either an internet-based media ecology, they're shared, or either of them are shared through the internet. It's essentially reasoned by the government that this is why this law is necessary. Now, based on this, a lot of people will say, yeah, what's the problem? The law should be there. So, let's look at what the law is. I think the government basically is increasing its control over individual media, individual YouTube creators, okay, not only OTT television channels. And it's also bringing in a censorship system. And it's doing it all under very vaguely themed proposals. In fact, it's saying that every time **Netflix** or **Amazon Prime** or, you know, **Jio**, they need to make a show, an OTT series, there needs to be a content evaluation committee and the name of the members of that committee need to be made public who, give the go-ahead for the show to be there and for you to watch it.

The problem in a country like India is that not only do people disagree with each other, but sometimes they disagree violently. Something or the other ends up offending someone or the other. And this is why the internet is a great thing. You can switch a tab. Or you can like watch the 10,000, 10,000 is a low number, of titles on Netflix. It may seem like, oh, there are no 10,000 movies, but there are actually, like 50, 60,000, which will be available at a point in time. So, you know, you can shift from one to the other very easily. So there's also a very different kind of medium. You don't have about 200 static channels in which the programming is determined for you, right? So you have that ability of choice to move away from, you know, your discomfort, your offence towards something you want to watch. And here, I think the government is bringing a huge amount of control by saying that, oh, implement the censorship system and we can also do this. Again, it's not setting up an independent regulatory authority, which is called the Broadcasting Advisory Council. In fact, all the decisions will be made again at the ministerial level because they will receive the advice ultimately and then decide what to do.

So essentially what's happening is that we are going to see Doordarshan-type programming over a period of time on OTT channels, which means that, what are good Indian values will be shown. Things which basically parents can sit with their children and watch together, which is great. But sometimes parents and children also want to watch shows separately on their smartphones, right? I know for a fact, my parents love Narcos. Now under the program code, if you don't allow obscene language, okay, people won't watch it. I know for a fact that one of the top shows in India is Mirzapur. So there's a sense of hypocrisy also in our society, right? What we want to watch, and what we think others should watch, and I think the government is weaponizing that a little bit.

The second thing which really concerns me is the regulation on news anchors who have shifted from mainstream news channels towards forming their own YouTube channels. Now the government is bringing this program code again on these independent channels, independent YouTubers like people like Ravish Kumar who have massive followings now. The entire reason they had to leave a television channel is because they stated they had a sense of censorship which is due to the corporate ownership of media and the control of the corporate ownership by the government. So essentially my argument also is that if the self-censorship system is so great right, how has it worked because you're copying the same model which is there for the television to the internet?

So just open the television and I mean not your OTT app switch to a television news channel debate and even if you like what they are saying in terms of the content you are a great fan of the Prime Minister and the Bhartiya Janta Party, it's six men usually yelling at each other. Talking over each other, your heart rate is bumping up, in that sense it's a show it's a theatrical representation and themes quite often are partisan. Either the defence of the government that we are in such a great space and time because of the political

eadership in this day and age or it is tropes which attack minorities. You may love that but that's all that's happening so there's no media diversity in a sense which is left any longer.

This is why I think this regulation is essentially going to lead to the kind of content you see on television and if you're not happy with what you see on television which is why you purchase that smart TV this Diwali and you stream your OTT shows you should think that well the television is same television content is going to be there on your OTT app again it is the same regulatory system which is coming in.

> *"I think it's the only data protection law in the world and I say this with seriousness which imposes a duty on us with the threat of penalty like you and me who do not collect data, who give data, it says you have to give complete and accurate data to any data fiduciary."*

Shubh

There has been widespread criticism of the government's power to curtail dissenting voices through legislative provisions. With that in mind, how would you interpret the seizure of journalists' media devices like phones and laptops and do you think the ambit of protection of digital media should be enlarged?

Adv Gupta

So constitutionally it's always been recognized that freedom of the press is a component of the freedom of speech and expression and it comes through a whole bunch of cases, which are called the press cases. In which what we saw earlier when governments were not fond of a specific newspaper they used to essentially challenge their building permit and try to get the office sealed. Or try to say that you don't have this fire license etc things like that. So it's done indirectly because the government can't really directly say that what you're writing we don't like, that also happens but this is done at a much more systemic scale over a period of time. What you are noticing today is that direct threats are being made against journalists, just if you look at the number of journalists who are killed yearly, the number of cases which are filed the contraction of economic opportunity. People need money to live right and it's a tough media atmosphere when you don't have that level of opportunity to write and publish what you want.

Also environment of threat where not only laws which are essentially contained in the Indian Penal Code but special laws in which there are allegations today of money laundering or people being associated with anti-national activities, potentially unlawful activities which are security-based laws. So it's a terrible situation, a lot of this leads to criminal investigations and quite often the digital devices of journalists are seized. It's done in a way in which safeguards are not followed. For instance, if a digital device is seized first thing which should be done which is also in the interest of the investigator is to ensure that an electronic hash value is created and that the data we have gathered will not be tampered with at a later point in time. This is the state of all the data on this hard disk we've generated on the basis of cryptographic technology. Even if one file is deleted, added or renamed, the hash value changes.

We share this hash value with the person we are investigating. So we can agree that this evidence that we have gathered is actually the evidence which will be presented in court at a later point in time if the prosecution goes towards a trial. Unfortunately, none of this is being done and also the seizure of complete devices one needs to remember is not like the seizure of a file or a physical folder. Our smartphones are repositories and extensions of our own personality

they reveal all our relationships over a period of time. If you scroll through anybody's photo album that's the most intimate feature of their life.

What it does is not only a degree of threat to their sources to that person, it results in a huge amount of mental and psychological trauma. This is why I also think a lot of young people will be dissuaded from picking up journalism as a profession, they may say it's just not worth it. I think this is why we need a greater degree of safeguards towards criminal investigation, especially towards device seizures and electronic evidence. I've written about this in The Hindu as well. I like to present analysis around these issues in national newspapers that's my primary mode of unbundling these things in my own head. What should be the direction law and technology should take?

Gaurvi

The Bharatiya series bills introduced in the monsoon session, in your opinion if passed how can the Bharatiya Nyaya Sanhita, Bharatiya Nagarik Suraksha Sanhita influence the cyber world and data privacy alongside penalties for violations? And what can be the role of The Indian Computer Emergency Response Team in the same?

Adv Gupta

I've already commented on the Computer Emergency Response Team so I won't speak more on that. In terms of these three bills, I've not looked at them deeply so I won't be able to comment on what's the digital evidence provisions etc. I think **Project 39A** which is a centre at the **National Law University, Delhi** has done a great analysis and I'll request readers to look at it.

One thing I did see is that there's some amount of plagiarism, for instance even offences which we think were colonial for instance, criminal defamation or sedition, they have been brought in with different words but it's the same offence in some way or the other. It kind of puts into question a lot of things for me.

You are remaking the criminal laws of this country and why can't you make it constitutionally consistent? and why can't you adopt practices which have been adopted globally? For instance, criminal defamation has been repealed globally in a lot of colonial countries after they gained independence. Why are we still here? The country which gave us criminal defamation, the United Kingdom repealed it in 1996. So I think it's a weird kind of colonial mindset which has not gone away irrespective of us gaining independence and makes me fairly sad.

Shubh

There have been many criticisms levied upon the current regime on matters pertaining to censorship, which you have written and spoken about extensively. In the run-up to the elections, what impact do you think the said censorship can/or would have? And how do you think the same can be overcome? Also, can the legal mechanisms help with the same?

Adv Gupta

So I think there is a role for the courts for institutional frameworks to act through, there's been an immense centralisation of institutions that have become partisan in the application of the constitutional principle which means that if you stand on the side of power then the rule of law all of a sudden will safeguard you. But if you challenge it with a dissenting voice who's most deserving of the rights but lacks in social socioeconomic power that you're challenging you don't have that.

So I think what's required alongside institutions acting and growing a spine is for people not to lose hope. I think it's really important for people who believe in constitutional values to talk about them to have programs like this, and to read books, I would like to mention some thinking shared by the philosopher **Hannah Ardent** who's written on totalitarianism. Forgive me for repeating how she's phrased it because I think she uses men as a denominative of a human being but if you read her book **Men in Dark Times** which is essentially about people who fought fascism, it was about the personal

relationships they had with the other friends.

If you then read her book about totalitarianism you will, especially in volume three what you'll realize that she says that loneliness is the essential condition in which authoritarianism can rise. You may ask why what's the link Apar, a person being lonely and all of a sudden a political system of repression arising? Yes, because you know communities which are formed and are necessary need to be reshaped in which the state can control everyone. So everyone should feel alone, should feel threatened, and the only sense of community and bond that they have is not even with their families, with their friends, or with people from other communities. It is with the state.

So what's important is for people to form book clubs, discussion avenues, spaces and venues like this, in which even if you may disagree with Apar and say, oh, he's a critic of the government or he's partisan, etc. He's a blinkered lefty or something like that. Even then, a diverse forum like this, in which you possibly can invite a person who can basically provide you with very different answers to all the questions you've posed to me is important. So I would say that my takeaway is that irrespective of the results of the next general elections, there's a centralization of power. This culture is not going to go away immediately. It's a duty, especially for older people to encourage younger people. And for younger people to have fun and create forums of discussion, which can be diverse, and exploratory. It's very, very important in times like today.

For more from Adv Gupta, you can follow him on his social media channels

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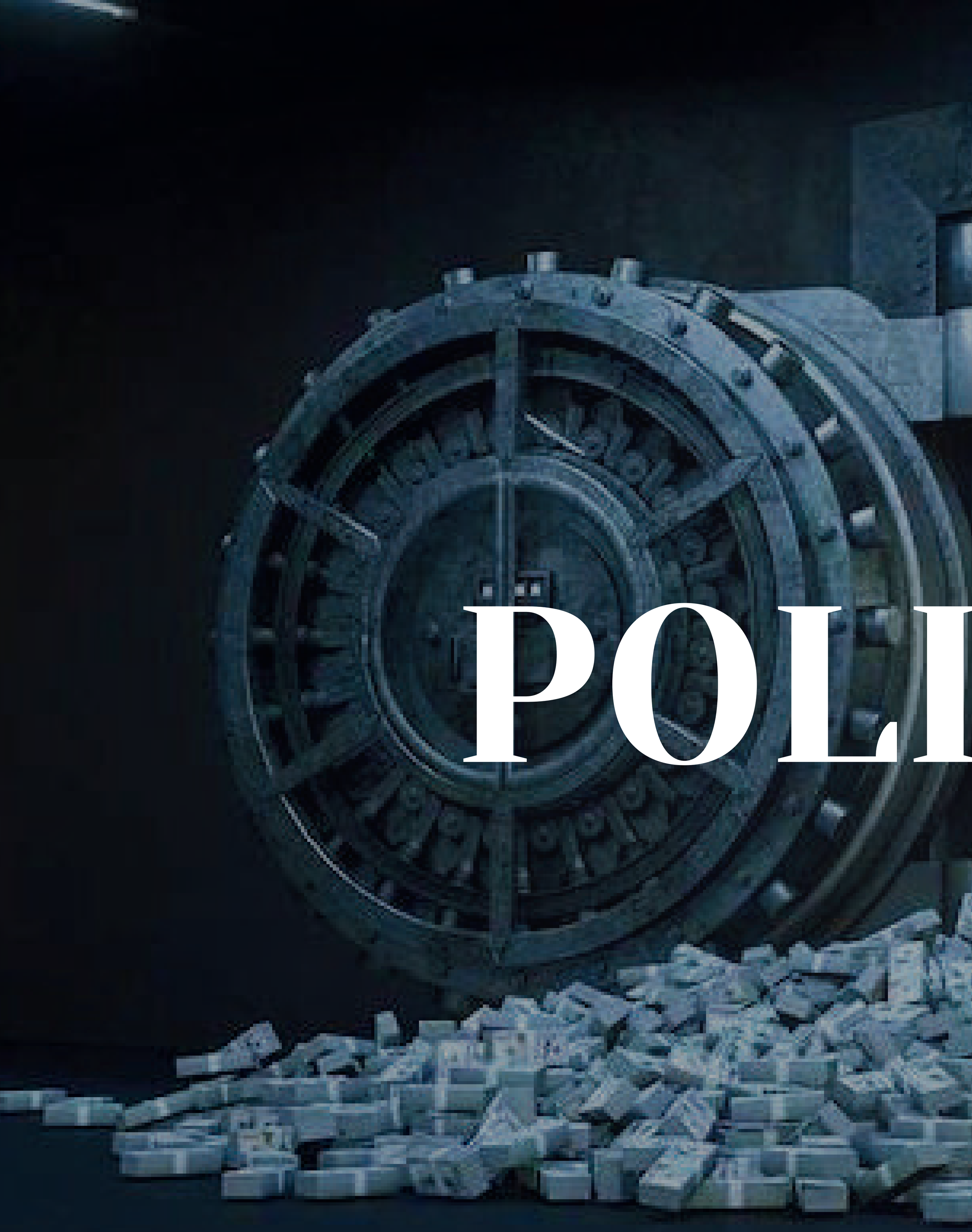

POL

TICS

BEHIND CLOSED TRANSACTIONS :

How Democracy is Bought and Sold

by Arpit Singh

> *"The Crisis of Modern Democracy is a profound one. Free and Fair elections mean little when the free market has reduced them to commodities available on sale to the highest bidder."*
>
> *Arundhati Roy*

On October 31st, 2023 a Constitution bench led by the honourable Chief Justice of India Dr DY Chandrachud and comprising of Justice Sanjiv Khanna, Justice B.R. Gavai, Justice J.B. Pardiwala and Justice Manoj Misra, commenced the hearing of a collection of petitions filed by CPI (M) along with the NGOs Association for Democratic Rights and Common Cause. The petitions challenge the Finance Act of 2017, commonly known as the Electoral Bond Scheme. The petitions date back as far as 2019, when a Bench led by former CJI Ranjan Gogoi decided not to interfere in the implementation of the scheme, emphasising the importance of a thorough hearing due to the serious issues at stake. Subsequently, petitioners returned to the court multiple times, in November 2019, October 2020, and early 2021. Recognizing the significance of the matter, on October 16, 2023, the CJI referred the case to a five-judge Constitution bench which then began its proceedings on 31st October. The case is one of utmost importance, as it strikes at the very core of Indian democracy. The Finance Act of 2017, presented as a money bill in Parliament on March 22nd 2017 and notified on January 2nd 2018, introduced a series of amendments to several key legislations, including the Representation of People Act (1951), Income Tax Act (1961), Foreign (Contribution) Regulations Act (2010), and Companies Act (2013). These amendments also introduced a novel method of donating to political parties, termed electoral bonds. Electoral bonds function much like physical currency and provide a means for Indian citizens and corporations to contribute to political parties while maintaining their anonymity. The bonds come in various denominations, at a minimum of 1,000 rupees, and can an be obtained from the State Bank of India. Donorscan present the said bonds to political parties if they meet the 1% vote share requirement per the Representation of People Act of 1951. The parties can redeem these bonds within a 15-day timeframe. The unique feature stems from the fact that the donor's identity is known only to the State Bank of India and law enforcement agencies (in case of any investigations).

Nevertheless, the amendments have been subjected to an extensive wave of criticism surged forth from political parties, activists, and legal experts alike.

The resounding fear echoed by them is that the foundation of citizen empowerment will be eroded owing to the spectre of corruption that could ascend to unprecedented heights due to the anonymity propagated by the scheme. And the Indian Parliament, once a bastion of citizen-centric governance, could potentially transmute into a haven for corporatist interests.

In the current state of affairs, India, as a democracy, finds itself in the nascent phases, necessitating meticulous nurturing for the realisation of its complete potential and authentic emergence. Consequently, any notion that poses a potential threat to this emerging democracy demands scrutiny with both caution and scepticism. Therefore, this upheaval holds not only significance for the political landscape of India but also for the very essence of democracy in its entirety.

Finance Act of 2017

The Finance Act of 2017 featured significant amendments.

Firstly, it amended the People's Representation Act of

1951, removing the requirement to report political party donations exceeding 20,000 rupees if made through electoral bonds. As a consequence, this situation ultimately led to the withholding of crucial information from citizens concerning the financiers of political parties and the ideologies aligned with such sponsors, thereby fostering an uninformed electorate.

The second change concerns Section 182 of the Companies Act of 2013, which previously imposed a cap (7.5% of average net profits over the past three years) on corporate donations to political parties and mandated disclosing the recipient parties. However, the new amendment eliminated these requirements.

This legal change means that companies are no longer required to have a minimum existence of three years to donate to political parties. Additionally, the previous requirement for corporations to be profit-making (to donate) was removed. This allowed recently established subsidiaries, including those who are battling losses in their businesses, to contribute to political parties through the means of electoral bonds.

The third pertains to the Foreign Contribution (Regulation) Act (FCRA). The amendments now permit foreign contributions to individuals and political parties by allowing foreign establishments to form subsidiaries to fund political parties. Before this amendment, foreign contributions to political parties were not allowed under any circumstances.

The confluence of the Second and Third Amendments collectively empowered both Indian corporations and foreign entities to establish shell companies as subsidiaries for the sole purpose of contributing to political parties.

The fourth amendment impacts Section 13A of the Income Tax Act(1961) which previously compelled political parties to maintain records of donation sources. The new amendment removed the obligation to keep records of donations received via electoral bonds both for the political parties and the companies.

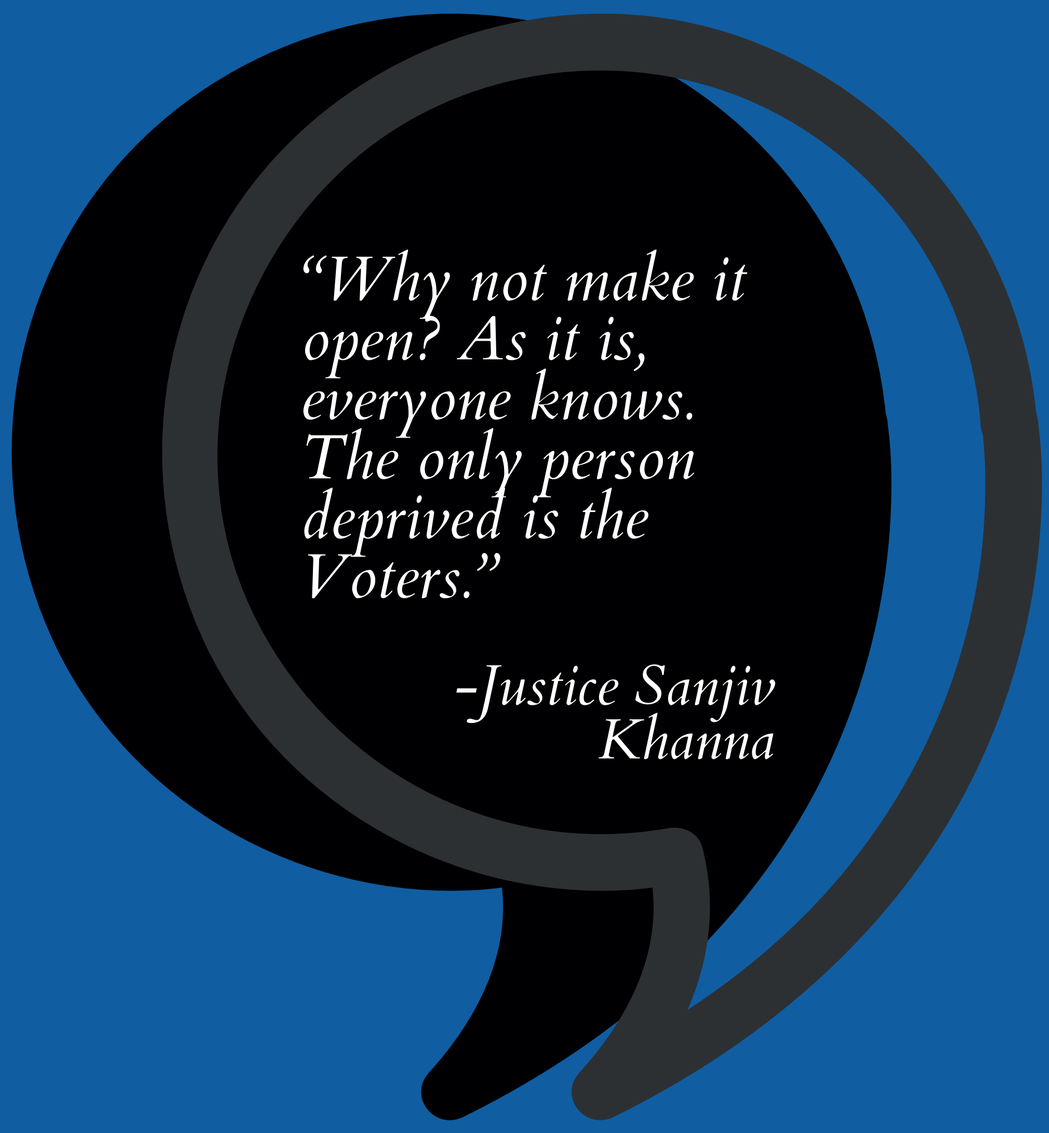
Another key issue that arises with the Finance Act is that only the State Bank of India is authorised to issue electoral bonds. Each bond is assigned a distinctive code, which helps the State Bank of India monitor the transactions associated with the bond, much like how the Reserve Bank of India oversees the circulation of conventional currency.

The State Bank of India is the sole entity with the capability to trace the unique code from its acquisition by financiers to its redemption by the political party since SBI is the exclusive issuing authority. No other organization in India possesses the capacity to undertake this analysis. The implications of this matter lie in the fact that the State Bank of India maintains records of individuals acquiring bonds and subsequently redeeming them through political parties, all while remaining exempt from any obligation to disclose such information. Moreover, as a publicly owned institution, the central government can readily access this data without incurring any specific obligations.

Consistently, it is discerned from the aforementioned arguments that the amendments introduced by the Finance Act of 2017 bestow upon electoral bonds an exemption from disclosure obligations stipulated in the People's Representation Act, Companies Act, and Income Tax Act, among various other statutes.

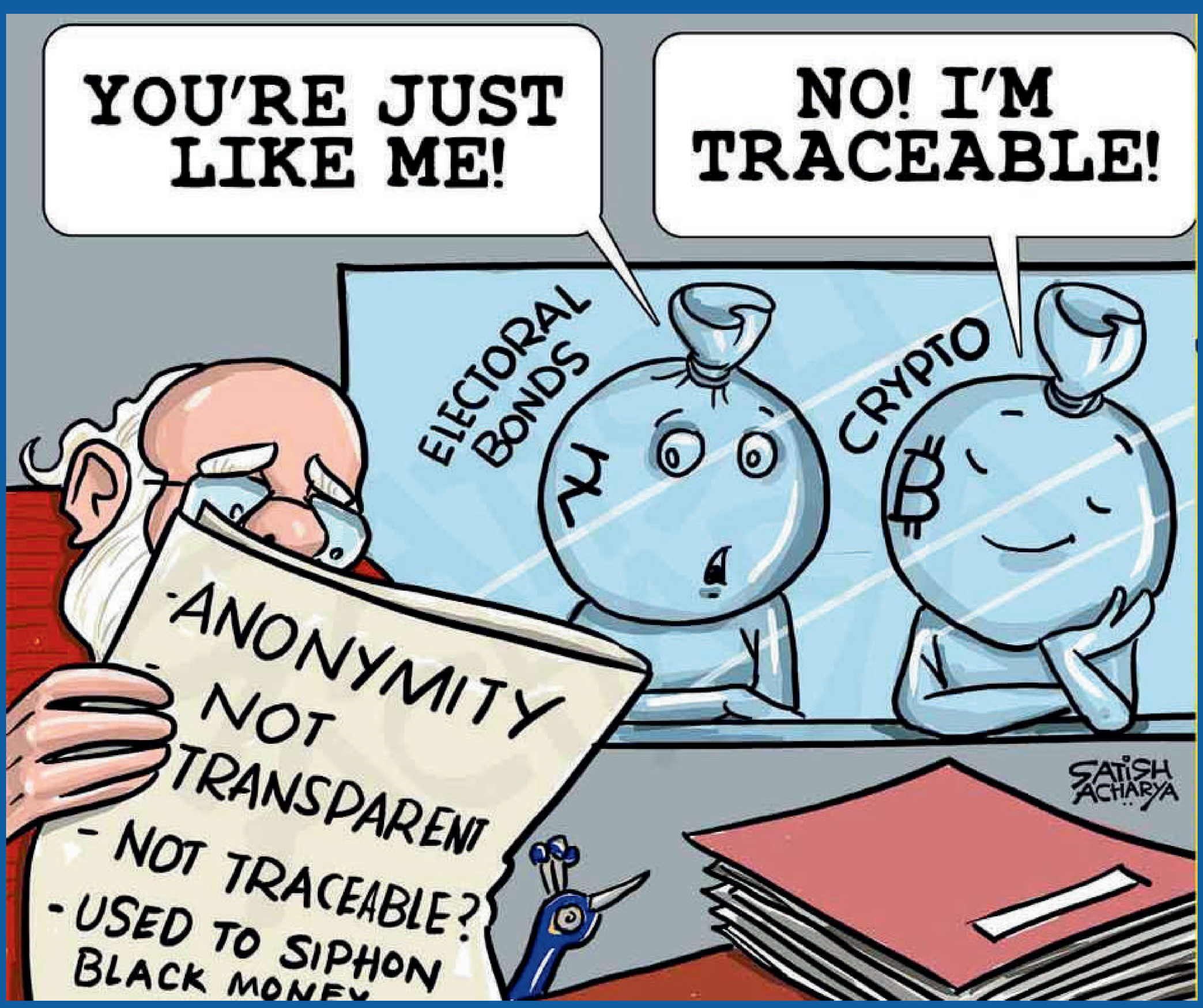
While on the other hand, the government possesses access to details about both contributors and recipients. What this leads to is the unravelling of the foundational threads of democracy and the dismantling of the core tenets of democratic principles, wherein transparency and anonymity find themselves at odds in a narrative that is extensively explored and examined within the later pages of the article.

Right To Information



The remark was made by Honorable Justice Sanjiv Khanna, at the hearing of Association of Democratic Rights & ANR versus Union of India on 2nd November 2023, perfectly sums up why Electoral bonds seem to violate the Constitution of India.

Electoral bonds, by their inherent nature, appear to raise concerns about citizens' right to access information regarding the origins of political funding—a right acknowledged by the Supreme Court as a fundamental entitlement under Article 19(1)(a). Although this observation remains subject to ongoing review by the Supreme Court of India, nevertheless, in multiple previous judgments of the Supreme Court, such as Association of Democratic Rights vs. Union of India (2002) and its subsequent ruling in People's Union for Civil Liberties (PUCL) vs. Union of India(2002), the Supreme Court held that every citizen possesses a fundamental right to be informed about candidates' assets, liabilities, and criminal backgrounds through affidavits. Moreover, when the government attempted to change this verdict through legislation by introducing Article 33b in the People's Representation Act, the legislation was declared null and void on the basis that citizens have an inherent right to be informed about candidates. Consequently,if citizens have the right to access information about candidates' assets and liabilities, it logically extends to their right to know about the funding of political parties. The citizens' right to information regarding political parties, including donor details, is crucial. This transparency is essential for people to identify which corporate entities or individuals are backing a specific political party and to assess potential policy influence. Even before the enactment of the RTI Act in 2005, the Supreme Court stressed that people's right to information is an inherent component of Article 19(1)(a), ensuring freedom of speech, and Article 21, safeguarding the right to life and liberty. Court rulings, such as the five-judge bench decision in the State of UP versus Raj Narain(1975), the seven-judge bench decision headed by Honorable Justice P.N. Bhagwati in SP Gupta versus Union of India(1982), and cases like Reliance Petrochemicals versus Proprietors of Indian Express Newspapers(1988) and Janata Dal (M) v. H.S. Chowdhary(1992) have affirmed the right to information and transparency as fundamental rights and integral aspects of democracy. Nevertheless, during the case hearings, the Union of India asserted that reasonable restrictions can be imposed on rights under Article 19(1)(a) through Article



19(2). But this is still wide of the mark. These restrictions must meet specific criteria. Firstly, they must be genuinely reasonable and proportionate. Secondly, these restrictions must align with one of the specified grounds listed in Article 19(2), such as public order, decency or morality, defamation, or in the interests of the security and sovereignty of India and friendly relations with foreign states etc. It is more than evident that the funding of political parties cannot be justified within any of the grounds outlined in Article 19(2), which have been aforementioned, as valid reasons for imposing restrictions on this fundamental right under Article 19(1)(a). Currently, electoral bonds make up a substantial portion of political party financing. By perpetuating opacity, they effectively undermine citizens' fundamental right to be informed about the origins of political party funding, the legitimacy of their financial sources, and whether these funds are associated with illegal activities or funnelled through front companies. Accordingly, the prevailing circumstances infringe on the basic right to access information regarding public figures, a fundamental entitlement celebrated as a freely flowing cornerstone guaranteed within the purview of both Article 19(1) and Article 21 of the Constitution.

Fostering Corruption

The statement, delivered by Senior Advocate Mr Kapil Sibal during the hearing of the case Association of Democratic Rights & ANR vs. Union of India on October 31, 2023, highlights the fundamental issue inherent in the electoral bond scheme.

The Election Commission of India in its Annual Report of Political Party Contributions, from 2017 to 2021, reported that 95% of these bonds are of denominations exceeding 1 crore, which (according to some commentators) implies that bonds are primarily purchased by corporate entities. Further analysis made by the Association of Democratic Rights shows that over 50% of electoral bond donations go to the ruling central party, with the rest favouring state-level ruling parties. Opposition parties and individual candidates receive less than 1% of these funds.

Significant contributions, often running into hundreds of crores, from a single corporate entity to a political party, typically result in political favours. This practice enhances corporations' influence on policy decisions and subsequently tightens their grip on democratic processes within the country. The contested amendments have both facilitated and legitimized the previously mentioned practices.

Notably, both the RBI and the Election Commission strongly cautioned the government regarding the potential misuse of electoral bonds. However, their concerns were overridden in the quest to introduce electoral bonds. These disputed amendments have legitimised unlimited corporate funding, even from foreign companies.

As to why opaque corporate donations are promoting corruption, companies donating to a particular political party expect the recipient to enact favourable policies and secure beneficial contracts for the donating company, their associates, and allies. This practice, termed quid pro quo, involves a calculated and intricate understanding between political parties, politicians, and corporate entities. Rather than overtly breaching rules, the system is discreetly manipulated to benefit corporate donors and affluent contributors.

Electoral bonds, according to Mr. Sibal's arguments seem to violate Article 21 by facilitating corruption through anonymous contributions, often leading to quid pro quo relationships between political parties and corporate entities or individuals which enables political parties to receive substantial funds from undisclosed sources leading to quid pro quo agreements, legalizing kickbacks and preferential treatment for the funding entities, i.e., corporations.

The use of electoral bonds promotes the very system described above. Corporate donations for similar reasons indeed existed before the introduction of

electoral bonds. However, what this argument overlooks is the crucial point that before the introduction of electoral bonds, there was traceability and accountability between the donating companies and the receiving parties. In the event of any kickbacks or quid pro quo arrangements, companies could face corruption charges. Yet, with the introduction of electoral bonds, companies can contribute unrestricted amounts without fear of prosecution.

An illustration of this scenario was highlighted by Adv. Mr Prashant Bhushan in his argument dated 31st October 2022 in the Supreme Court. A Business Standard report dated June 20th, 2023, highlighted that Vedanta Limited, a multinational mining company based in Mumbai, had contributed a substantial 457 crores to political parties over the past five years, as revealed in the stock market disclosures. In the fiscal year 2023, Vedanta's political donations amounted to 155 crores, exceeding the 123 crores donated in the previous fiscal year via the subscription of electoral bonds. Notably, despite various reports indicating Vedanta's significant financial challenges and mounting debt, the company continues to make sizable contributions. This prompts pressing questions about the motivation behind such substantial donations, especially when the company is already burdened with debt. An investigative report conducted by the International Investigative Group, the Organized Crime and Corruption Reporting Project, exposed behind-the-scenes lobbying between Vedanta and the Union government, resulting in alterations to critical environmental regulations in favour of Vedanta, a significant contributor to the BJP. Moreover, in FY23, Vedanta Limited secured preferred bidder status for various mining licenses, including the Bicholim iron ore block in Goa, the Sijimali bauxite and Ghogharpalli coal blocks in Odisha, and Kelwar Dabri in Chhattisgarh. From the aforementioned illustration, it's not an exaggeration to conclude that the quid pro quo between the Union government and private companies, through the means of electoral bonds, may not only be untraceable but also will be unprosecutable. This, (allegedly) fosters the most severe form of corruption in India's history, that of legalized corruption. Furthermore, the practicality of electoral bonds reveals that they still need to fulfil their intended purpose. While they were introduced to reduce corruption, in practice, they appear to promote corruption.

ELECTORAL BONDS

Erosion of Democracy

“ Electoral Bond scheme hits at the very core of constitution which is our Democracy”

-Sr Adv Meenakshi Arora

Electoral bonds undermine the essence of democracy in the country by creating an uneven playing field between ruling and opposition parties. Over the past five years, contributions to political parties through electoral bonds have significantly outweighed other donation methods. Notably, the party in power at the centre, according to the Annual Report of Political Party Contributions by ECI, has received over 5,000 crores in this short period, a striking figure considering that the legal expenditure limit for each candidate is less than 1 crore. With approximately 500 Lok Sabha seats, fielding candidates for all constituencies adds up to 500 crores every five years, but the funds received exceed this by tenfold.

In line with the Law Commission's 2015 report, it is undeniable that financial superiority translates into electoral advantages before the introduction of electoral bonds. As demonstrated by Kanwar Lal Gupta versus Amar Nath Chawla (1974), wealthier candidates have a better chance of winning elections.

In its ruling of 1974, the Supreme Court emphasized that the expenditures of a party must be combined with those of its candidate, and the resulting total should not exceed the specified limit. This decision was made in consideration of the concern that, without proper regulation and oversight of political party finances, those with the highest funding would likely secure victory in elections.

Furthermore, since the ruling party enjoys a distinct advantage in securing a larger share of electoral bond funding due to its ability to reciprocate with government contracts and favourable policies as well as electoral bonds disproportionately channel allocations to the ruling party this poses a substantial threat to the democratic process.

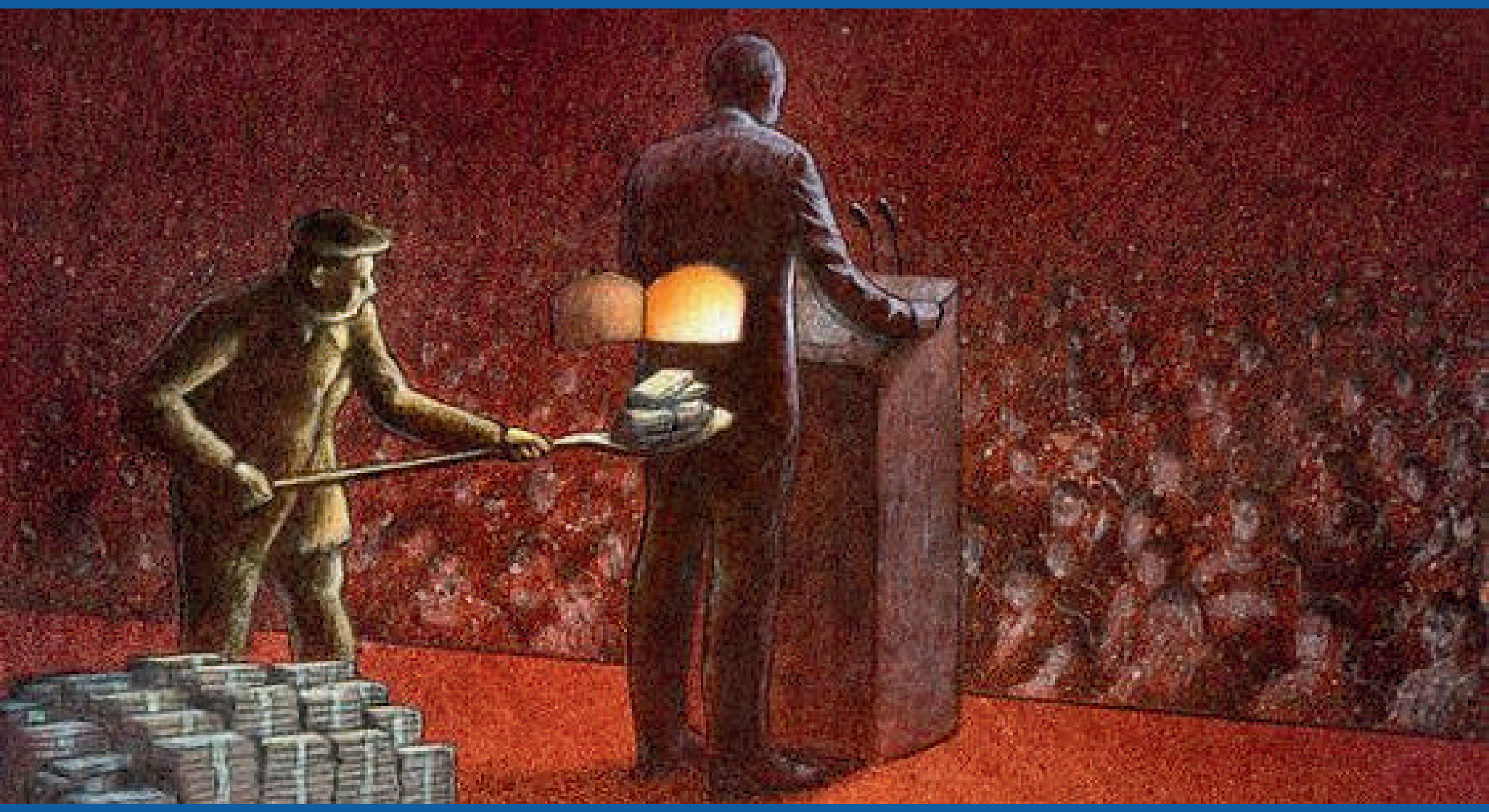
As things stand, electoral bonds seem to predominantly favour parties in power, with the central government receiving over 50% of the total electoral bond donations. The rest of the contributions are either enjoyed by Parties ruling at the State level or they are not enjoyed at all as smaller parties receive less than 1% of the votes, and individual candidates are ineligible to access electoral bonds. Consequently, this instrument further worsens the existing electoral imbalance by privileging ruling parties. One could argue that parties in power have historically held a more advantageous position compared to opposition parties, given their access to government resources, allowing them to potentially engage in quid pro quo arrangements with corporations to secure financial superiority. However, what this overlooks is that the argument following the introduction of electoral bonds, the corporations making donations remain entirely anonymous within the political system. This anonymity enables the potential existence of quid pro quo arrangements between the government and corporations, shielding the latter from scrutiny. Furthermore, only the central government, not even the Election Commission, can identify the donors and recipients of these funds. This places the central government in a nearly autocratic position concerning the distribution of funds to political parties. In this scenario, donors to the central government may be entirely shielded from scrutiny, while donors to opposition parties could face heightened government agency scrutiny. This situation contradicts the original purpose of electoral bonds, which aimed to protect donors' right to privacy.

Supreme Court’s Illustration

One of the most important illustrations that arose in the recent hearing in the Supreme Court was the argument by Sr Adv Mr. Kapil Sibal. In his oral argument on 31st October 2023, he showed that the money received through electoral bonds, which, by the government’s justification, can be used only for electoral processes, in actuality can legally be used by the parties in their daily operational costs. There is no legal obligation on the parties to utilize the money

received through the electoral bond for only electoral purposes. So in essence, the parties could potentially allocate the funds received through electoral bonds for constructing government offices, national infrastructure, or even running extensive advertising campaigns.

The crucial revelation came during the recent Supreme Court hearing pertaining to three significant FAQs from the State Bank of India (SBI) regarding electoral bonds. The first question inquired, "Is there a maximum limit for donations via electoral bonds?" The response was that there is no maximum limit. The second question that surfaced was, "Can a political party close its current account after the election?" The answer indicated that the party has the discretion to



do so. The third and perhaps most vital question asked was, "Can a Political party use this Current Account for other operations also?" The response was affirmative, stating that political parties can indeed use the account for various other operations.

Consequently, electoral bonds imply that political parties can receive virtually unlimited donations under the guise of electoral processes, subsequently close the account, and utilize the funds as they see fit. This, coupled with a lack of accountability through auditing to monitor how these funds are utilised, inevitably leads to the conclusion that the money is not earmarked for electoral participation but is instead for the party's enrichment.

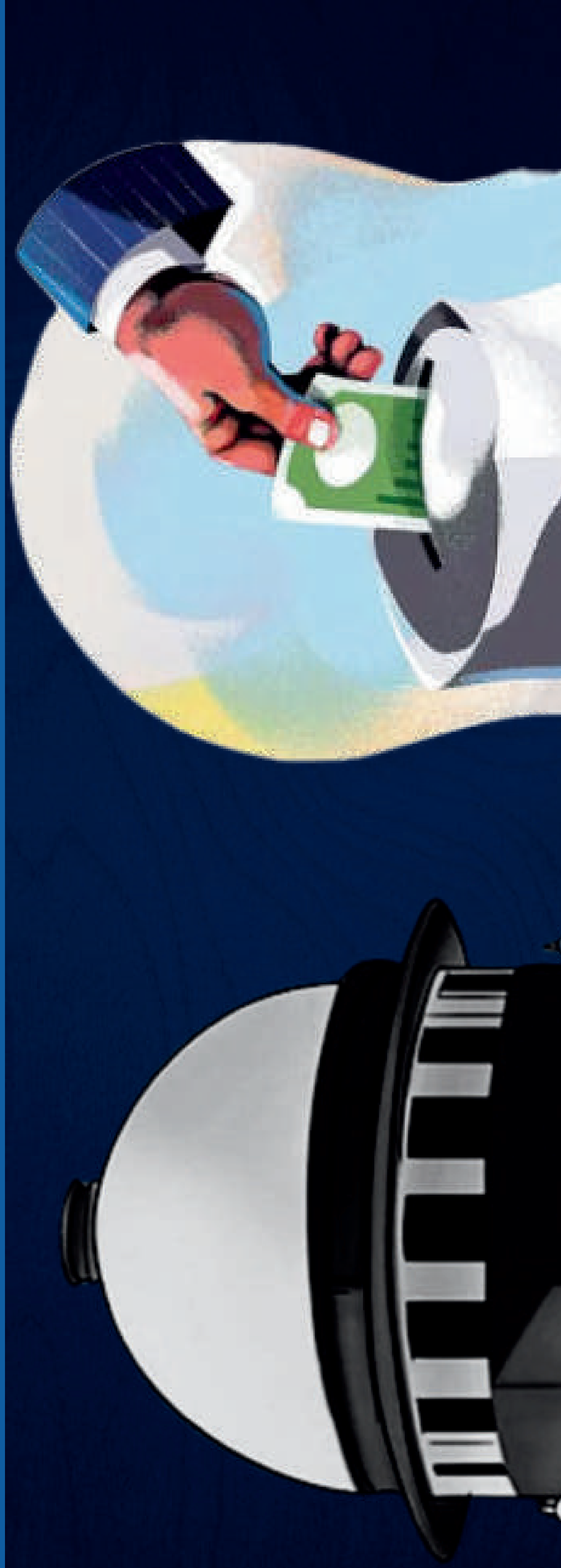
This is contrary to the spirit of free and fair elections, wherein the ruling party not only gets to receive virtually unlimited money without any sort of disclosure and the corporations are receiving quid pro quo without any sort of disclosure, but the spirit of democracy itself gets eroded. Another very astute observation made by the esteemed Chief Justice was: Suppose A procures a bond valued at x rupees through SBI's conventional banking avenues. Subsequently, A merely needs to physically transfer the bond to B. The nature of these bonds, being physical and fungible much like currency, results in no recorded exchange and no potential barrier to their trade. With this absence of transaction oversight between A and B, B could effortlessly swap the bond for, let's say, cash from A. B could then leverage these bonds to contribute to any political party of their preference.

In this scenario, although A appears to be the ostensible purchaser of the bond, it is B who donates to the political party. B's strategy involves acquiring someone's KYC details to present a front for procuring bonds from the bank. Furthermore, B could act as a bond aggregator, having 100 different individuals subscribe to bonds worth 1 crore each. What this leads to is a situation wherein the corporate houses acting as B are left completely immune to any sort of answerability to even their shareholders as they no longer will be legally contributing to the political parties. It is more than obvious that the kind of money

that would be used in such a transaction would be black money by nature. Moreover, since there is no record of such transactions happening, there will be no accusations of quid pro quo relationships between the government and the government.

Conclusion

As of the time of writing, the Supreme Court has yet to deliver its judgement on the constitutional validity of electoral bonds. However, across the nation, we witness a surge in political activists strongly asserting that the electoral bonds are fostering opaqueness in our democratic processes. There is an overarching concern that the ruling party is pursuing its financial interests at the expense of the nation's democratic integrity. Had the government been genuinely committed to combating corruption in electoral procedures, it could have pursued alternative avenues rather than introducing this opaque mechanism, which, by design, conceals the origins of political funding. Such opaqueness stands in direct contradiction to the foundational principles of free and equitable elections, which constitute an indispensable component of our constitutional framework. This opaqueness not only denies a level playing field among political parties but also anonymizes donors from the larger population while affording the central government the noticeable advantage of being able to access the information of donors. This advantage comes at the cost of violating citizens' fundamental right to information. The government possessed the capacity to undertake a variety of measures to mitigate the influence of black money in politics. For instance, it could have enacted legislation mandating that political contributions be conducted exclusively through transparent banking instruments such as checks and demand drafts. To bolster transparency in political funding, the government could have subjected political parties' donations to the Right to Information framework and imposed stringent regulations to curtail anonymous contributions. The integrity of democracy requires that judgements be made only based on merit, free from outside influences, in a political system where decisions are made via frank, objective debate. Therefore it inevitably implies that non-transparent corporate support of political parties will taint many aspects of democracy.



As history has seen in instances where huge business and financial interests sapped democratic systems in other countries, the fundamental foundations of Indian democratic institutions will be crippled if outcomes are determined by money instead of merit.

EXPERT ARTICLE

ELECTORAL BONDS: A Threat to Democracy?

by Major General Anil Verma (Retd)

The Probe Annual Issue-70

Maj. Gen. Anil Verma (Retd.) - B.Com (Hons), M.Sc. (Defence Studies), M.A. Political Science. In 1975, he joined the Indian Army and retired after 37 years of distinguished service. Currently, he is the Head of ADR since December 2013 and oversees all administrative and operational activities of the pan-India organisation.

Since the hearing of the electoral bonds PIL of ADR by the Constitution bench of Supreme Court in the beginning of November 2023, much has been said and written about electoral bonds and I daresay you haven't heard the last of it because the judgment has been reserved by the Supreme Court. Why it has become an important topic for discussion is because it has a direct bearing on the polity, political parties, the people, democracy and the government.

For the uninitiated, it would suffice to know that electoral bonds are bearer bonds (like a promissory note) which individuals, corporations, companies can purchase from the State Bank of India and deposit in the bank account of the political party to whom they wish to donate the amount. Electoral Bonds (EBs) are sold in the denominations of Rs. 1000, 10,000, 1 lakh, 10 lakh and 1 crore. Once every quarter during the year for 10 to 15 days, the window is open for the sale of EBs and they have a life of 15 days for redemption by the political party, failing which the unredeemed amount is deposited in the Prime Minister's relief fund. The most important feature of EBs is that the donors enjoys complete anonymity and of course the donation is fully tax exempt for the donor and the receiving political party. Since the introduction of the scheme in January 2018, till now Rs 14,940 crore worth of electoral bonds have been sold by the SBI. 94% of the EBs (by amount) sold are in the denomination of Rs 1 crore and 5% are in the denomination of Rs10 lakh. This indicates that the buyers/ donors are corporates and big companies and not the common man. Among national parties, 75% of the total electoral bonds donated have gone to BJP, 13.5% to Indian National Congress, 11% to TMC and 1% to NCP. ADR filed a PIL against electoral bonds in the Supreme Court in September 2017 and asked for AD scrapping of the electoral bond scheme due to the following reasons:

a) Anonymity of the donors was not acceptable as the citizen and common voter has the right to know which person/company or business house is donating to the political parties.

b) The electoral bond scheme was passed as a money bill in the Lok Sabha bypassing the Rajya Sabha.

c) The RBI Act, the Income Tax Act, the RPA Act, 1951, the Companies Act, all of these were amended facilitate enactment of the electoral bond scheme against the advice of the Election Commission of India, the Reserve Bank of India and the Civil Society. Some of the primary objections against the scheme were that it would lead to crony capitalism, dubious funds could be donated through shell companies, black money could be converted to white and even foreign entities could donate and influence the political discourse of the Indian polity.

d) It would skew the level playing field in favour of the ruling parties at the Centre or State level.

e) Removal of the corporate donations limit of 7.5% of profits would lead to unlimited funds being available to political parties.

Negative impact of money power in our political

system and elections is evident from the manifestation of horse trading of MLAs in various states like Madhya Pradesh, Karnataka and Maharashtra where duly elected governments were dislodged in the recent past. A humongous amount of money is spent by political parties on freebies and doles to the voters during election time, which is illegal and a corrupt practice. As on 20-11-2023, in the ongoing five state elections in Madhya Pradesh, Rajasthan, Chhattisgarh, Mizoram and Telangana, the Election Commission of India has seized Rs 1760 crore worth of cash, drugs, liquors, precious metals etc. This is seven times more than the seizures during the last assembly elections in these five states in 2018

During the last general elections in 2019, Rs. 55-60,000 crores were spent as per data shared by the Centre for Media Studies. This was equal or more than the amount spent in the last US presidential elections. Agreed that our population is 4 times the size of USA population, but as per the IMF, while the GDP of India was $3.39 trillion USD, the USA GDP in 2022 was 25.46 trillion USD (7.5 times)

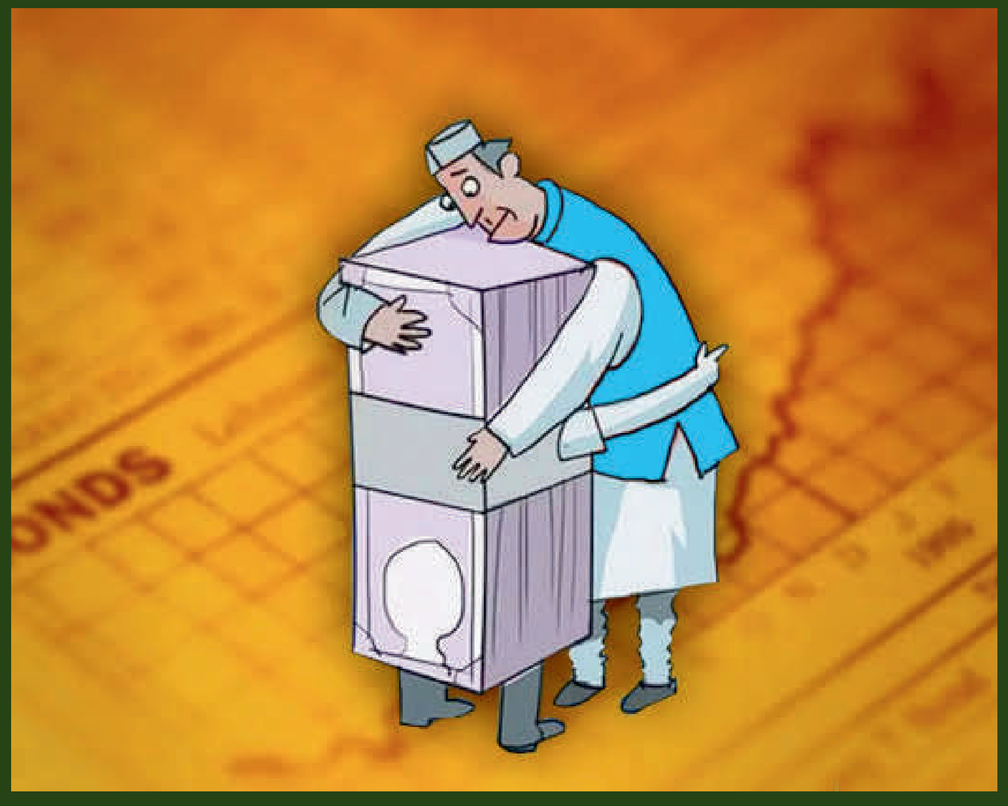
The moot question is, can India afford such expensive elections?

Though there is a ceiling on the amount a candidate can spend, (Rs 28-40 lakhs for State assembly elections and Rs 75-95 lakhs for general elections), there is no ceiling on the amount that a party can spend! It is also common knowledge that though in the expenses report submitted to the ECI, 99% candidates declare average expenditure of 60 to 65% of the authorized limit.

But in reality, the amount spent by each candidate ranges from Rs10 to 15 crore, bulk of which is black money or cash. Hence, a candidate who has invested some amount, once elected, recovers 5 to 10 times that amount. This further spirals the prevailing corruption which ultimately adversely affects governance. When the candidates with money and muscle power are elected, it leads to corruption on a large scale. Quid-pro-quo arrangements with the donors results in crony capitalism as Governments gives contract to favourites and there is no level playing field.

Politicians and bureaucracy nexus results in delays, poor infrastructure, slow growth and development, inflation and unemployment. If we study the various parameters which show the health of the economy and social factors, it reveals the dark underbelly of politics. The figures of unemployment, percentage of people below poverty line, corruption index, hunger index, malnutrition, lack of health and educational facilities are quite discouraging. Lot of work is also taking place to improve these figures, but things will move faster once the political system mired in corruption is cleaned up.

As we head towards the 2024 general elections, we have a political system lacking accountability, inner party democracy and transparency. We live in a fractured society, divisive politics, stifling of opposing views of any type by the government, be it the media, the civil society, activists or opposition political parties. In a democracy, the four pillars are independent of each other and have to provide checks and balances for the state and society to run like a well -oiled machine for the welfare of the people. However, if there is a systematic breakdown of important institutions like the ECI, CAG, judiciary and the media, then there exists an existential threat to the democracy. The fear of arrests, raids and incarceration makes people fall in line. That is why the electoral bond case is extremely important for the electoral and political system of our country. The Supreme Court has heard both sides and reserved the judgment. During the hearings, the Solicitor General representing the government is on record making a bizarre statement that the common man has no right to know the source of funding or names of the donors donating to the political party. In a functional and participatory democracy, it is the constitutional right of the citizen to know. Let us hope that the Supreme Court upholds the right and strikes down the opaque electoral bond scheme which is euphemistically called transparent by the government.



THE PROBE in 2023

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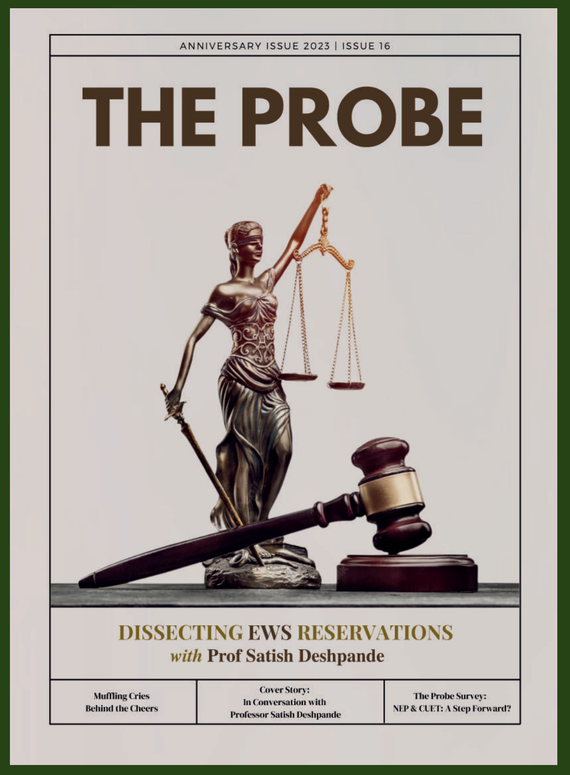

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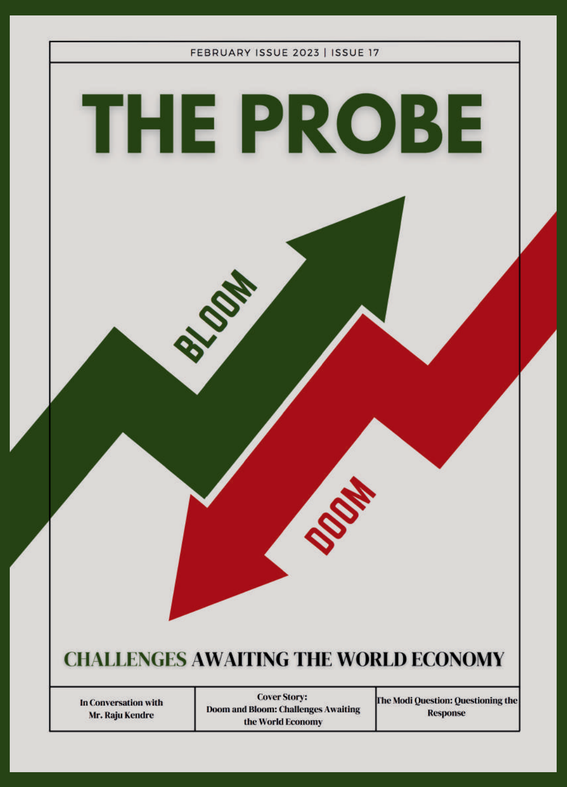

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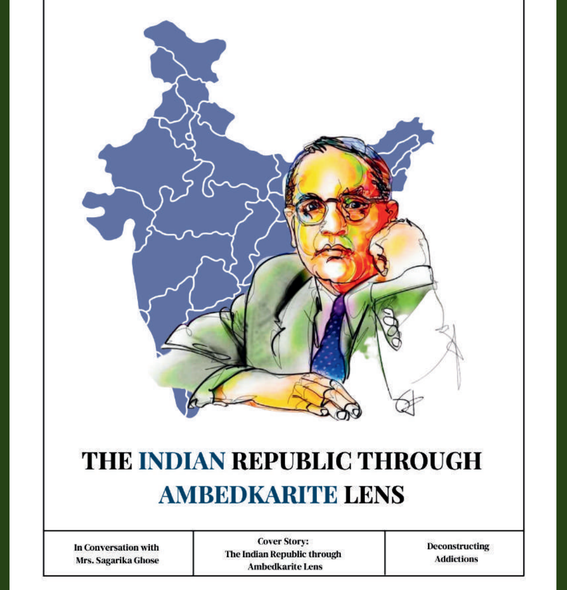

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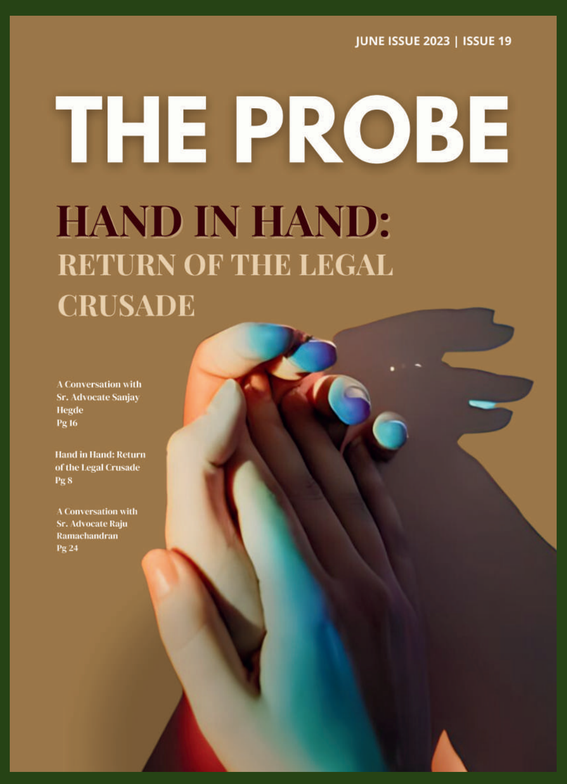

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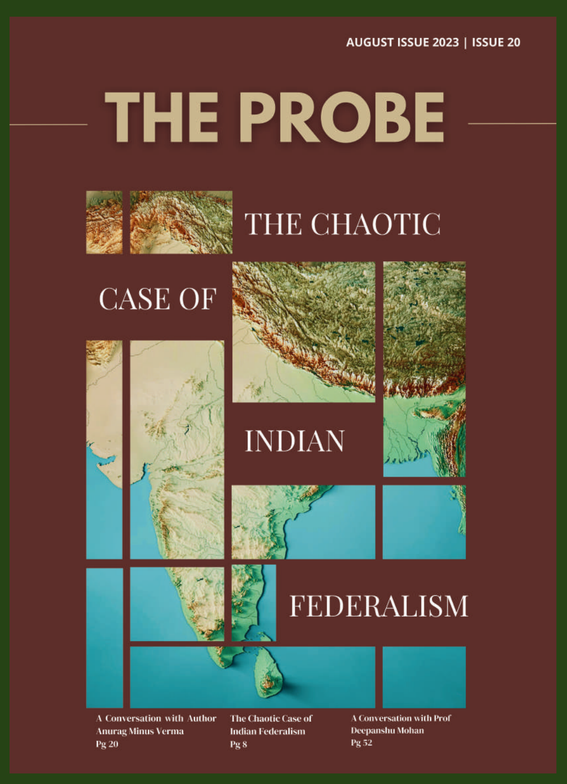

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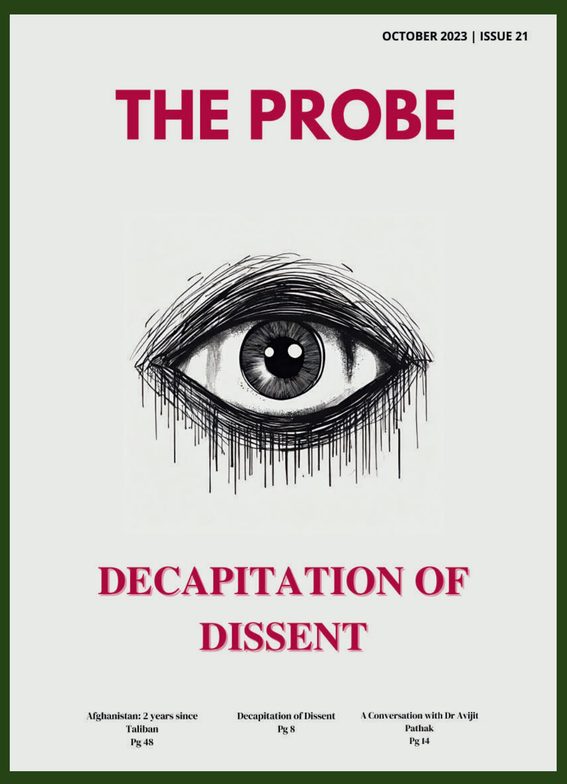

The Probe Annual Issue-73

ECON


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BEYOND PAPER:

India's E-Currency Saga

by Arnav Gupta

Ever wondered about the unseen mechanisms that power the seamless transfer of money in our economy? Let's unravel the intriguing world of Indian payment systems, where the Reserve Bank of India (RBI) acts as the driving force. In this financial landscape, payment and settlement systems play a pivotal role in orchestrating the smooth flow of funds. It is the base of the economic system in any nation. These systems contribute to the efficiency, security, and transparency of financial transactions, ultimately shaping the economic growth and stability of India.

Overview

Historically, India had a predominantly cash-based economy, and people relied on physical currency for transactions. But over the course of time and as a result of ongoing technological advancements, individuals have progressively transitioned away from traditional payment methods, opting instead for the convenience and efficiency offered by various digital payment options. In view of enhancing the digital payment ecosystem of the country and complementing the UPI (Unified Payment Interface) system in the country in the long run, the RBI proposed E-Rupee in January, 2017). E-Rupee, also known as the Digital Rupee or Central Bank Digital Currency (CBDC), is a digital version of the Indian Rupee issued by the central bank of India, i.e., the Reserve Bank of India (RBI).

Characteristics of E-Rupee

The E-Rupee, or CBDC (Central Bank Digital Currency) is a sovereign currency issued by the RBI, i.e., it is the liability of the RBI to pay the bearer of the E-Rupee the amount written on it. E-Rupee acts as fiat money, and by the rule of law, no one can deny the payment made in the form of digital currency. E-rupee is also available in the same denominations as the paper currency and coins,i.e., tokens of 50 paisa, 1 rupee, 2, 5, 10, 20, 50, 100, 200, 500, and 2000 rupees. It is freely convertible against commercial bank money and cash. The government of India claims E-Rupee to be a fungible legal tender, i.e., to use E-Rupee, the customers need neither a bank account nor an active internet connection. Moreover, the beneficiary can avail various benefits of receiving an e-RUPI on their mobile phones in the form of an SMS or QR code, and can redeem the e-RUPI voucher at any merchant center that is enabled for e-RUPI acceptance.

E-Rupee operates on blockchain and distributed ledger technology, resembling aspects of cryptocurrency. However, it diverges significantly from cryptocurrency in several respects. Unlike cryptocurrency, the e-rupee is recognized as legal tender and classified as a currency in India. The Indian government imposes a flat 30% tax rate, plus a 4% surcharge, on gains from cryptocurrency trading, selling, or swapping, whereas E-Rupee is not subject to the same tax treatment.

Distinguishing itself further, E-Rupee functions as a comprehensive end-to-end digital solution, ensuring transparency and traceability throughout the issuance and redemption process. This contrasts with cryptocurrency, which tends to provide a higher level of transactional anonymity. Despite this, the Reserve Bank of India (RBI) maintains a certain level of transactional privacy for small transactions in the retail sector, particularly in peer-to-peer and small merchant transactions.

The Central Bank and its Role

There are three models for issuance and management of CBDCs across the globe that show the respective roles of the Central bank and the private sector in facilitating access to and use of a CBDC.

Direct Model :

A direct CBDC system would be one where the central bank is responsible for managing all aspects of the CBDC system, including issuance, account-keeping, transaction verification etc. In this model, the central bank operates the retail ledger, and therefore the central bank server is involved in all payments. In this model, the CBDC represents a direct claim on the central bank, which keeps a record of all balances and updates it with every transaction. This will put an additional burden on the central banks, which may prove difficult and costly for the central bank.

Indirect Model :

In the “indirect CBDC” model, consumers would hold their CBDC in an account or wallet with a bank or service provider. The obligation to provide CBDC on demand would fall on the intermediary banks, rather than the central bank. The central bank would track only the wholesale CBDC balances of the intermediaries.

Hybrid Model :

In the hybrid model, a direct claim on the central bank is combined with a private sector messaging layer. The central bank will issue CBDC to other entities and shall make those entities responsible for all customer-associated activities.

In India, the Indirect Model is best expected to work due to several reasons. The major reason being that the expertise of the banks and other such entities would come in handy, as they have the experience of successfully laying down the UPI network across the country. And this would also reduce the burden on the central bank. Another reason being that this would facilitate the acceptance and usage of E-Rupee, as customers would have more E-Rupee facilitator redemption branches of commercial banks as compared to the fewer branches of RBI all over the country. However, the major drawback with this model is that the customers will then have to open a bank account with the participating issuer bank to avail themselves of the facility of E-Rupee.

Why was there a need to introduce the E-rupee?

These were the three main reasons:

1.) Creating a robust Digital Payment System in India:

India is committed to creating a digital payments ecosystem with innovations that make 'Ease of Living' a reality and ensure that welfare benefits reach those who need them the most. According to the claims of the government, transactions in E-Rupee could be executed even if a person does not hold a bank account or does not have access to the internet ((Source: Press Information Bureau, Government of India). Funds could be transferred from the e-wallet of one person to the e-wallet of the other person just as the people physically exchange currency notes and coins. Furthermore, e-Rupee surpasses the efficiency and safety of currency held by the public, banks, and other financial institutions. This is attributed to its immunity from risks such as wear and tear or theft, coupled with the full backing provided by the RBI.

This stands in contrast to bank deposits, where the deposit insurance limit is Rs 5 lakh in the event of fraud or a bank run.

2.)***To save trees and printing costs required in physical currency:***
The absolute cost of printing the higher denominations is higher but as a percentage of the face value of the note, the lower denominations become more costly.

Note(in ₹)	5	10	20	50	100	500
Absolute Cost(in ₹)	0.48	0.96	1.5	1.81	1.79	2.5

The cost of printing currency notes escalated to ₹ 7,965 crore in 2016-17, the year when the government banned the high-value 500 and 1,000 rupee bills, the government has informed Parliament. Also, the printing cost came down to a substantial ₹ 4,912 crore in the following year, 2017-18, when the RBI had sufficed the shortage of bank notes that was caused by the government's demonetization move (Source: Mint Article published on 19 December, 2018). India required 22 thousand metric tons of paper per year for currency notes i.e., 88 lakh of rim. We get 16.67 Rim paper by cutting one tree. Hence for currency note printing we will have to cut 5,27,895 trees per year.

3.)Cover the cost and settlement risk in UPI Transactions:
UPI (Unified Payment Interface) facilitates real-time fund transfers from one person or merchant to another, against the (T+2) settlement cycle of the banks (trade date plus two days).However, the settlement among participant banks in UPI is on a deferred net basis i.e. funds are credited to the to the beneficiary customer immediately, the inter-bank settlement is done later according to a pre-defined settlement cycle which at present takes place four times a day. Facilitating this settlement requires the banks to put in place adequate systems and processes to address the settlement risk which causes additional cost to the system. However, the government has mandated a zero MDR (Merchant Discount Rate). MDR is a fee charged to a business by the company that processes its debit and credit card transactions. It varies from 1% to 3%. This fee is required to cover the cost of the transaction. for consumers and merchants on UPI since 2020. Thus, different stakeholders have

to collectively incur this cost. The government gives Rs 1,300 crore as subsidy, but the cost as low as even 0.1 % of the total transaction amount comes to over Rs 12,000 crore annually i.e. Rs 10 lakh crore monthly on an average (according to a report published by The Economic Times on September 7,2022). With this gap between the government subsidy and the actual transaction costs widening, banks and service providers may not be able to upgrade their systems, leading to technical issues in payment transactions.

4.)Lowering the Remittance Transfer Cost:

At present, customers have to pay a fee to the banks for cross-border payments. This is a percentage of the amount of money transferred. The fee is applicable to both inward and outward remittances. However, transfers through E-Rupee do not require intermediaries such as banks, as they are held directly between the sender and the receiver. Thus, this is expected to reduce the cost of cross-border payments to the extent of the conversion rate only i.e. the nominal fees that is levied for converting one currency to the other.

Development Stages of E-Rupee (Pilot Projects)

Wholesale Segment

The Digital Rupee for Wholesale (e₹-W) was launched on November 1, 2022. It will be used to settle secondary market transactions in government securities and to maintain bank reserves with the RBI. This will make interbank transactions more efficient by reducing the transaction cost, by eliminating the need for settlement guarantee infrastructure and collateral security.

The State Bank of India, Bank of Baroda, Union Bank of India, HDFC Bank, ICICI Bank, Kotak Mahindra Bank, YES Bank, IDFC First Bank, and HSBC were the participating banks in the pilot project e₹-W.

Retail Segment

Phase-1 of the pilot project for Digital Rupee for Retail (e₹-R) started on December 1, 2022, within a closed user group (CUG) comprising participating customers and merchants of specific banks.

The RBI has identified eight banks for phase-wise participation in the retail pilot project. The first phase includes four banks, namely the State Bank of India, the ICICI Bank, the Yes Bank and the IDFC First Bank

in the cities of Mumbai, New Delhi, Bengaluru, and Bhubaneswar.

Subsequently, another four banks, viz., the Bank of Baroda, the Union Bank of India, the HDFC Bank and the Kotak Mahindra Bank will participate in the retail pilot in the cities of Ahmedabad, Gangtok, Guwahati, Hyderabad, Indore, Kochi, Lucknow, Patna, and Shimla.

As per the RBI, Digital Rupee has reached 50,000 users and 5,000 merchants as of February 8, 2023.

Future Prospects

The Prime Minister stated that the e-Rupee voucher will play a huge role in making Direct Benefit Transfer (DBT) more effective in digital transactions in the country by guaranteeing that the stored money value reaches its intended beneficiary and can only be used for the specific benefit or purpose for which it was intended. This will create a minimal logistics and leak-proof delivery mechanism for a wide range of government Direct Benefit Transfer (DBT) programs across the country. Direct Benefit Transfer is a major reform initiative launched by the Government of India on 1st January, 2013. This programme aims to transfer the benefits of the government schemes directly into the bank/postal accounts, linked to the Aadhaar, of accurately targeted beneficiaries.

The RBI will also undertake cross-border transactions using the Digital Rupee during the pilot project. Central banks of other countries that have reserves in the RBI can transact in CBDC,making it easier to reduce counterparty risks.

RBI is also planning to integrate E-Rupee with the UPI interface. The UPI□CBDC interoperability feature will allow users to scan any merchant UPI QR codes and pay with a digital rupee (retail) wallet. The merchant doesn't need an e-rupee wallet or a separate QR code to accept the e-rupee payments from the sender.

Challenges in implementation of E-Rupee

Literacy :

The major challenge before the RBI is going to be to provide education to the mass population of India about the features and advantages of the E-Rupee. There is a massive lack of financial literacy in India. A

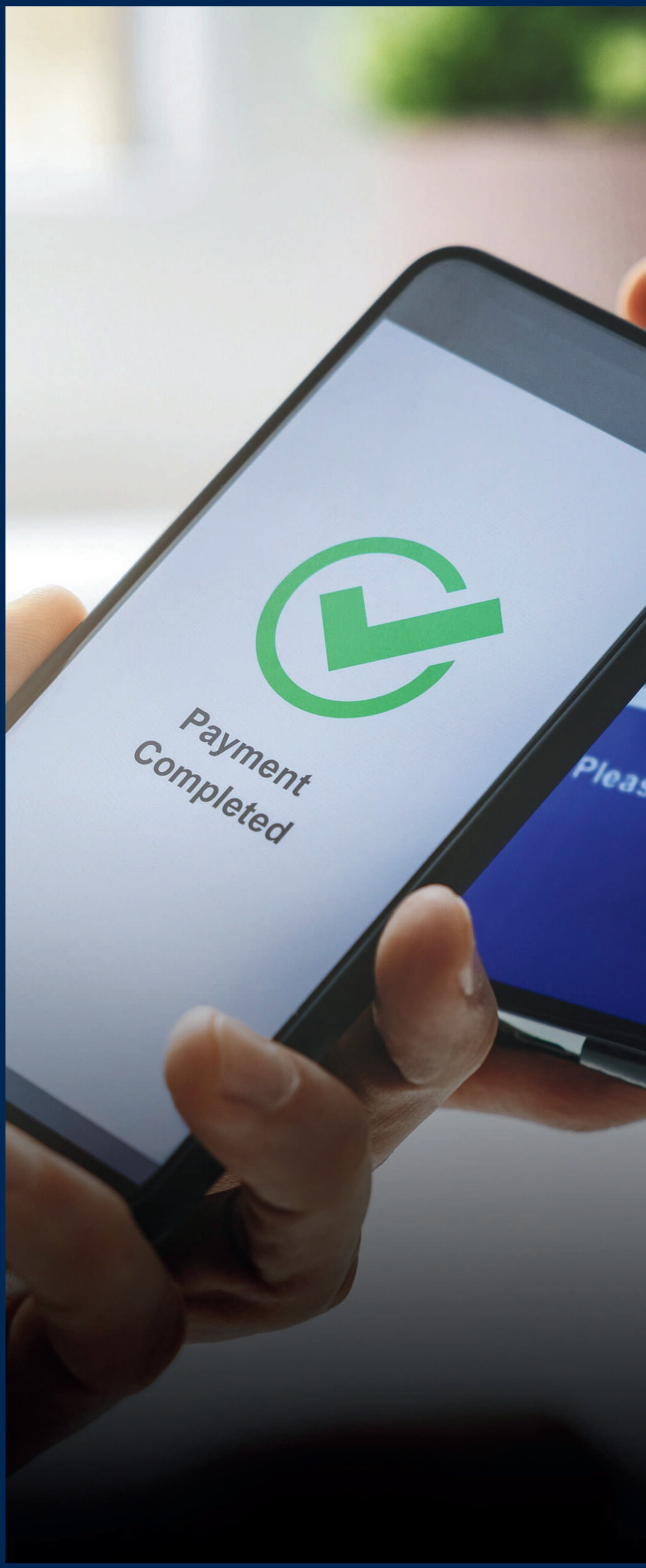
large number of people in India are unaware of the significance of different financial products and services. For instance, while 80% of the Indian population may have bank accounts, almost 45% of such accounts still remain inactive (according to a report 'Financial inclusion in rural India' published by Grant Thornton India LLP in January 2020). UPI, launched in 2016, accounted for 52 percent of the total 8,840 crore financial digital transactions with a total value of Rs 126 lakh crore in FY22, the government noted in its pre-Budget Economic Survey (Economic Survey 2023). However, according to 1Bridge, which is India's leading village commerce network, a mere 3–7 % of rural India actively uses any UPI platform to make payments. And about 40% of rural people surveyed have absolutely no knowledge of UPI and/or digital payments.

Adoption:

People, if they keep their money in bank accounts, get interest varying from 3% to 7% per annum. However, no such interest is provided when the money is stored in the digital wallet in the form of E-rupee. In the UPI system also, money deposited in the bank account earns interest unless it is deducted from the bank account in a transaction. Thus, the RBI needs to provide some incentive in the form of rewards or discounts or some additional earning opportunities to encourage people to adopt the digital E-Rupee. Therefore, the RBI needs to collaborate with commercial banks to spread awareness about the digital currency. The RBI is actively encouraging banks to make the E-Rupee interoperable with UPI through a QR code system to enhance its accessibility and feasibility.

Technical and legal framework:

RBI needs to develop a proper legal framework so that payments made in E-Rupee are accepted in all parts of the country while maintaining the same level of anonymity in retail transactions as the cash in hand promises. Otherwise, people would not be willing to move from cash to E-Rupee. Also, the implementation



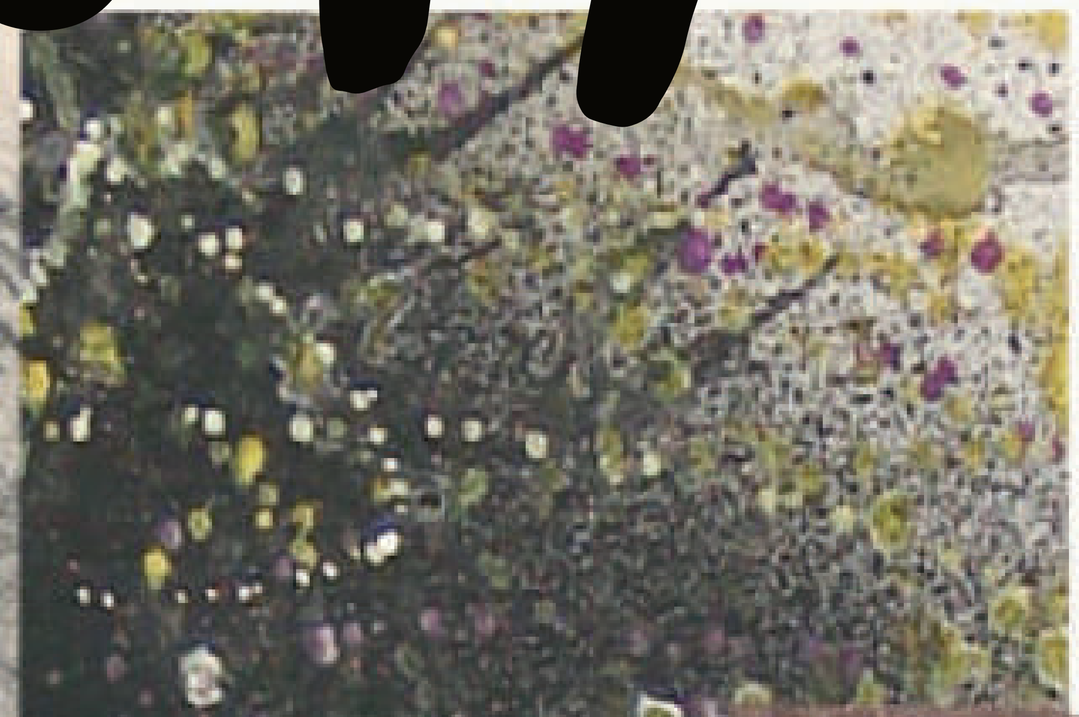
of the digital rupee requires robust technical infrastructure and significant investment in hardware such as servers and software such as databases to support large volume and speedy transactions. Cybersecurity measures also need to be strengthened to reduce the risk of hacks and decoding encryptions.

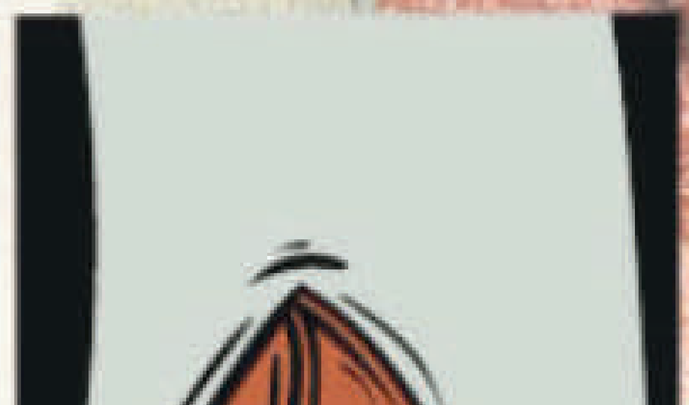
Conclusion

The introduction of the E-Rupee or India's Central Bank Digital Currency (CBDC), is a great initiative by the Government of India to boost the digital payment ecosystem of India. It is expected to overcome the hurdles involved in the current system of cash and bank payments, such as the risk of theft or leakages and the need to open a bank account with the intermediaries. It is also expected to overcome the settlement risk and costs borne by commercial banks in UPI transactions. The government needs to figure out a suitable model for the functioning of the E-Rupee in the context of India. Nevertheless, the government is bound to encounter various obstacles in the execution of this initiative, with the biggest challenge lying in the promotion of E-Rupee literacy among the vast population of India and encouraging their readiness for its integration. The collaboration of the Reserve Bank of India and other commercial banks is essential for ensuring the successful development of the E-Rupee in the future.

> *“There’s a massive lack of financial literacy in India.”*

SOCIETY





JUGGLING RESPONSIBILITIES AND SHAPING THE SOCIETY:

A tribute to all the Working Mothers and a Call for Societal Change

by Neelarka Roy

The Probe Annual Issue-86

It's 6:00AM in the morning. No sooner did the alarm ring in Mrs. Verma's phone than she put it off. Her husband and children had complained the other day that their sleep was being disturbed because of her loud alarm.

Mrs. Verma actually had no other choice but to set a loud alarm. Of late she has been suffering from knee and back pain. Every morning, there is a duel between her body and her mind, with her body ravenously demanding a bit more rest and sleep, and her mind reminding her that she has to cook breakfast and pack tiffin for her husband and children, and most importantly, that there is nobody else to do the same. Hence, as a way to stop this duel and get the body to work for another long and tiring day, a loud alarm works just fine.

Mrs. Verma wakes up and gets to work. After making the necessary arrangements, she sits in front of her laptop to go through the presentation she has to deliver today in front of 10 high profile investors who will be coming from the USA. She goes through her presentation that she had to work upon till 1 AM the previous night, while not for once forgetting to count the number of whistles made by the pressure cooker.

Around an hour later, after food has been prepared, her husband and her children wake up. They take a bath, have breakfast while grumbling that the food tasted less than what they had expected, get ready and leave.

Mrs. Verma has no time to rest. She has to reach her office by 9AM. She too gets ready quickly, packs her bag, and leaves.

At her office, hardly had she settled down at her desk when she is called upon by her boss to make the presentation. As she entered the conference room, she could sense 10 pairs of eyes gazing rather weirdly at her. In all probability, they had not expected a woman in her mid-40s, a mother of two, and someone who only until a few hours ago was busy cooking food, to deliver such an important presentation.

Mrs. Verma delivered the presentation to the best of her ability. Questions, and counter-questions were thrown at her, all of which she felt she could answer correctly and confidently. After the tiring job got over, she realised she was hungry. She had to eat, make a phone call to her home to the maid to enquire whether her children have returned home safely from school in time, and then complete her remaining task of the day.

She heads for the office canteen, where food is prepared with proportions of salt, sugar and oil which are often not in sync with each other. Employees, however, mostly eat without complaining because searching for better food outside is something their crunch schedule cannot afford, and also because the prices of food items in the canteen are lower than those in food outlets outside.

As Mrs. Verma orders her food, she tries to recall the last time she had brought food cooked at home to her workplace. It was back in her pre-marriage days that her late mother used to cook and pack her lunch lovingly. Post-marriage, she was allowed to continue with her job on the condition that the entire responsibility of cooking breakfast and dinner for the family would be bestowed upon her shoulders. Her husband and in-laws are fundamentally against the idea of hiring a cook. According to them, it's the duty of the women of the family to cook and do other household jobs as much as possible.

Pondering over the past is something Mrs. Verma can't afford to do for long. She takes her meal and returns to her desk without wasting a second. She then makes a phone call to her home, learns that her children have reached home safely from school in time, heaves a sigh of relief, and gets engrossed in her work.

It's 5:30PM now by the clock. Mrs. Verma felt that she should leave a bit early (the official working hours

being till 6PM) so that she could take some rest before cooking dinner at home. As she was about to leave, she could see her boss, Mr. Poonawallah, apparently not in the best of moods, approaching her. "Mrs. Verma, can you just stay back for an hour longer, and prepare a nice Excel file of the data that I have mailed to you? It's urgent, I have to submit it to the higher authorities by the end of the day."

Mrs. Verma unconsciously nods her head with a sigh. Saying 'no' is something that needs to be taught from early childhood, and a vast majority of women are not taught the same. After all, how can a woman say 'no'? According to societal definitions, a 'good' woman with 'proper' upbringing is someone who adjusts according to the whims of her surrounding people, and always remains at the beck and call of seniors and superiors, both at work and at home.

As she was logging into her email, Mr. Poonawallah walked a few steps before turning back towards Mrs. Verma, and said," By the way, Mrs. Verma, today's presentation of yours was probably not the best of presentations our company has made before investors. We had expected at least 6 of them to invest in our company, and only 4 of them have agreed to do the same. Do ponder over why this has happened. We do not want to let go prospective investors like this in the future. Hence, there won't be any room for slip-ups from here on."

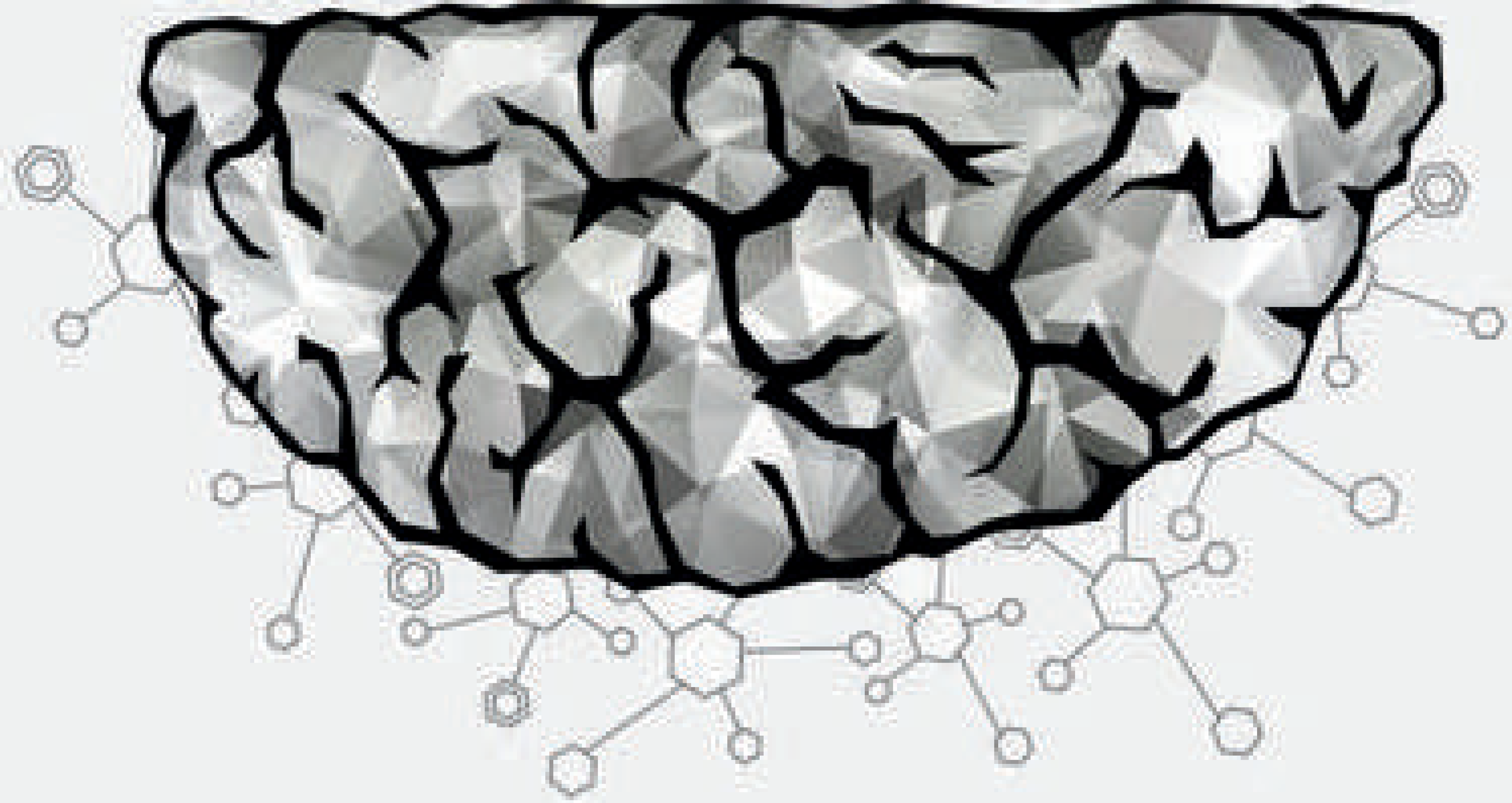
Saying so, Mr. Poonawallah gives a wry smile and leaves. Mrs. Verma lets out another sigh and gets busy with her work.

Thus is a quintessential day in the life of thousands of working mothers like Mrs. Verma, all of whom are undoubtedly 'women of impact'. They contribute to the country's GDP, lead to the empowerment of women in the society, positively influence people around (after all, there is hardly a better way to observe and imbibe the qualities of resilience, dutifulness, dedication, perseverance, and love than to watch closely the life of a working mother), as well as raise a generation of citizens, who, unless heavily influenced otherwise, will be more empathetic towards women and the problems faced by them, having seen the struggles of their mothers first-hand.

However, we, as a society, still have a long way to go in

being satisfactorily accommodative of the needs of working mothers, and addressing the day-to-day problems, stress and immense pressure faced by them. Sharing household responsibilities is the least we all can do to ease the lives of working mothers. Apart from that, however, the responsibility to look into their welfare lies on the Government, CEOs, and people occupying positions of authority as well. In the intense race for more and more materialistic achievements and economic prosperity, calls by billionaires and CEOs for a 70- hour workweek do not make the future look very promising. While reports saying that Indian employees are among the least productive in the world garner all the attention, reports to which most of our eyes are shut include the likes of the one made by the office commute platform MoveInSync which says that Indians spend more than 7% of their day in commuting to office, one of the highest in the world, another by the National Library of Medicine which says that 32.9% of married, working women in Bhubaneshwar, Odisha suffer from chronic depression and only about 10% of them sought professional help, and yet another titled "Predicament of Returning Mothers" by Ashoka University in 2018 which stated that a staggering 73% of working women in India leave their jobs after giving birth to a child, and among the ones who return afterward, 48% leave their jobs within 4 months.

Thus, there is still a lot of work to be done in promoting the welfare of working mothers to an extent that both their physical and mental health are adequately taken care of, and the unjust, heavy burden of responsibilities on their shoulders is shared as much as possible. A society can't claim itself to be a modern and progressive society if a substantial portion of its working women are forced to opt out of the labour force after giving birth to a child, and the ones who remain have to undergo undue stress, pressure and resulting physical and mental health issues. As India embarks on its vision to become a 5 trillion dollar economy within the next few years and marches ahead in the quest for economic prosperity and gaining greater global power and recognition, we as citizens do count on our Government, CEOs, and other people occupying positions of authority to ensure that the holistic well-being of one and all, especially of working mothers, who play such a pivotal role in the overall development of the society, is duly taken care of.



Why India Needs To Come Out Of The Closet

QUEER BRAIN DRAIN

by Gauri Garg

Introduction

The battle for equal rights for queer people, in India, has been a long one. From India's first-ever gay rights protest on August 11, 1992, led by the AIDS Bhedbhav Virodhi Andolan (ABVA) outside ITO Police Headquarters, New Delhi, to India's first-ever pride parade held in Kolkata in 1999. From the landmark Delhi High Court verdict in the Naz Foundation v. Govt. of NCT of Delhi case ruling that section 377 was in direct violation of fundamental rights protected by the Indian Constitution, to its decision being overturned by the Supreme Court in the case of Suresh Kumar Koushal & Anr. v. NAZ Foundation and Ors. in 2013, there have been many setbacks along the way.

The recent landmark judgement of the Supreme Court, Navtej Singh Johar v. Union of India (2018), found section 377 of the IPC to be unconstitutional and finally decriminalised homosexuality in India.

But is the fight over?

All eyes were on the world's largest democracy, in hope for a brighter future of marriage equality all over the world as India's verdict could have been a precedent for many developing democracies all over the world.

As the Supreme Court of India failed to legalise same-sex marriages on 17th October 2023, due to its limitations in the ambit of customary rights like marriage along with denying adoption rights to same-sex couples by a 3:2 majority, this article aims to shed light on the economic consequences of the judgement and unravel the phenomenon of "gay brain drain".

Repercussions of Gay Brain Drain for India

A country's legal system represents its heartbeat. Laws and statutes and their enforcement are like a pillar upon which the whole nation operates. These laws influence the state not only legally or socially but have a significant economic impact as well.

Lawyers, engineers, economists, doctors and others, are the products of the 'gay brain drain' because their country doesn't grant them the basic right to marry someone they love. This migration is not economic but arises out of the desire to live a life of dignity. This migration is costing India a huge loss in intellectual manpower and economic growth. "Gay Brain Drain" is a phenomenon that refers to a kind of migration that is not economic, but the main moving force for a person to migrate is their sexual orientation; it can be detrimental and hurts the economic growth of the source country. A world bank study estimates that India loses 1.3 per cent of its GDP because of higher rates of suicide and depression among queer community – a major problem that can be solved by granting equal rights to the members of the LGBTQIA+ community. There is a significant loss of revenue as the government relies on income taxes to fund its social programs and infrastructure projects. A mass exodus leads to a drop in tax receipts which can stunt economic growth and development, leading to higher taxation to compensate for the deficit.

In a report by the Ministry of External Affairs, 2.5 million people migrate annually and 13,383,718

Indians are currently living in foreign countries. Such staggering statistics show that India possesses a very high share of highly educated immigrants, but are undervalued and unutilised in their own country. While better economic opportunities and disparities in quality of education constitute a major proportion of this migration, according to BBC News, a significant proportion of migration is due to social reasons as many are fleeing persecution at home. Areas that see brain gain are also impacted as potential intellectual manpower from other countries migrating to India might be discouraged due to its laws deterring queer people abroad, especially in more progressive economies, from travelling to India. In light of these circumstances, is the preservation of such discriminatory laws justified? In their plea for granting marriage equality under the Special Marriage Act, the petitioners had stated that the Supreme Court was pretty explicit when it said, "The LGBTQ community possesses the same human, fundamental and constitutional rights as other citizens" when in 2018, it repealed Section 377 of the IPC. So, the fact that the Constitution gives the right to marry to heterosexuals and says 'homosexuals, tough luck', is inconsistent with precedent. While LGBTQIA+ people undoubtedly bear the highest-burden when it comes to the exclusionary policy of not allowing equal rights, it is critical to recognise that it has repercussions for every citizen of India, for the nation and the economy as a whole. Some reports also note that developing economies like India may be losing out on the ‘productive capacity of LGBTQIA+ people’ migrating to, or seeking asylum in, more tolerant societies that actively promote equality. The lack of legal recognition not only denies them the legal and social benefits that heteronormative people have access to but also increases the risk of discrimination and violence, especially in domestic spheres where many queer individuals are forced to be in heteronormative marriages owing to family and societal pressure. Furthermore, it is not just the ‘brain drain’ by LGBTQIA+ people that impacts the country’s economic prosperity, but also the ‘brain drain’ from a wider population and the unwillingness of highly educated workers from the country to live in an intolerant society.

What is India’s definition of “marriage”?

After 5 years of the Navtej Singh Johar case, marriage in India continues to retain its moral and cultural origins mostly arising out of colonial ideas of morality, in which lies the deeply rooted idea of heterosexual exclusivity of marriage and parenthood where queer couples are at best offered a whitewashed solution of cohabitation.

This narrow view of marriage and parenthood as a concept is often propped up using arguments about inheritance rights and personal laws, which are presented as hurdles to recognising the spousal rights of homosexuals. Be it the provisions of the Special Marriage Act, 1954, specifically stating “bride” and “groom” as parties to a marital contract, or the religion-induced limitations of other personal laws, amending which requires an assent of the legislature, remain the main roadblocks to the path of marriage equality in India.

Such a myopic outlook of marriage and its grounding in personal laws has resulted in the attribution of a religious character to a union which, in modern India, has acquired a more secular and legal viewpoint.

Despite the CJI’s recognition of the fact that “queer persons cannot be discriminated against and marital benefits and services flowing to heterosexual couples and denied to queer couples will be a violation of their fundamental right”, mere words cannot serve the needs of a large segment of the Indian population affected by these discriminatory legislations. As a result, citizens migrating away from countries has left India with a depleted population and a “brain drain” through the loss of a significant component of their educated citizens. This will have profound economic consequences and will hamper the government’s ability to provide basic services, removing working-age citizens from the economy, and thus slowing overall economic growth.

The need for progressive legislation and a responsive legislature

The exclusionary and discriminatory laws impact levels of economic development and economic output across the nation through factors such as ‘lost labour time, lost productivity, underinvestment in human capital, and the inefficient allocation of human resources and undervaluing of overall capabilities

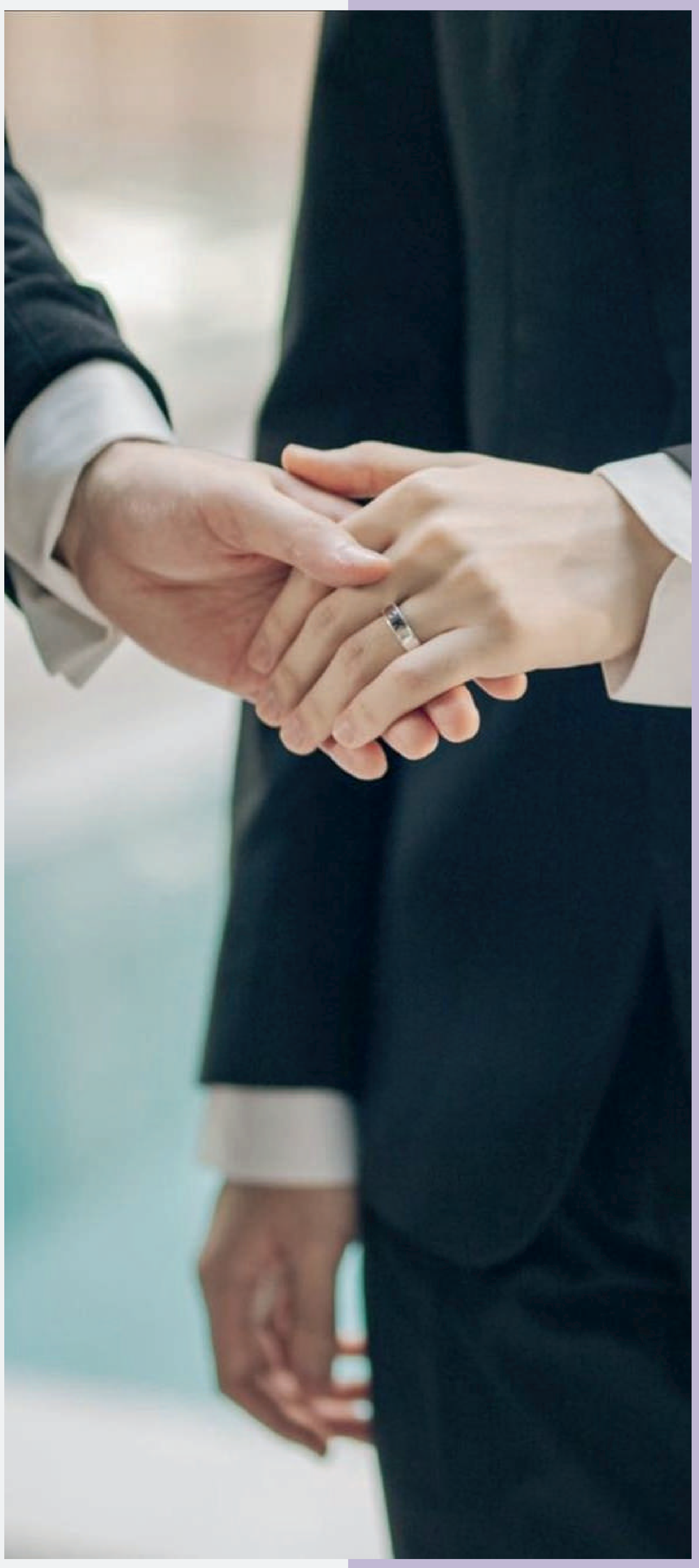
through discrimination in education and hiring practices'. The human capital approach requires that queer people must be socially and legally included in wider society to allow them to obtain the education that leads to improved productivity, equality in the labour market and the fulfilment of their economic potential. All essential ingredients in the quest for India to become a developed nation not just economically but socially, to rightfully reflect the tag of "world's largest democracy". Merely complaining about the fact that India is losing many young minds to Western countries when effectively denying them basic human rights is hypocritical and detrimental to the country's economic growth. Recognising the need to curb brain drain but not acknowledging its underlying factors is just negligent.

The queer community in India also experiences health disparities compared to the general population regarding HIV infection, depression and suicide, stigma and exclusion play a role in these disparities. Their experience of violence and sexual assault harms their mental and physical health, and unequal access to healthcare due to economic barriers and a lack of social support has economic costs by reducing their ability to work or invest in other forms of human capital.

Apart from a lack of social acceptance, the major legal arguments against the legalisation of same-sex marriage stem from amending some complicated wordings of the Special Marriage Act, intricately woven together to form a comprehensive document and its foundation itself would have to be transformed. But the Constitution of our country could not have been written and the first general election of the country would not have taken place had constitution makers paid heed to such similar arguments. There were identical arguments against legislation like the Hindu Succession Act of 1956, and The Special Marriage Act of 1954, itself. But the Hindu Marriage Act, 1955, interestingly employs the words 'spouse' and 'party' as opposed to 'husband' and 'wife' in its sections, which could act as a precedent for the amendment of The Special Marriage Act. If we keep holding onto traditions and hide behind such excuses, a nation can never evolve but will always remain static.

Conclusion

To conclude, marriage inequality is indeed dissuading business and investment in India which are vital for economic development. The brain drain and the social and economic vitality of the entire country is a significant problem and marriage equality and other rights go hand-in-hand with economic development. If the judiciary and the legislature continue to be coloured by such a discriminatory and exclusionary stance towards the queer community, it will impede not just an equitable and just social structure but also the economic development and prosperity of India.



Number of Pages- 96
Published on 2 February 2024
Circulated on 2 February 2024

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Published by Caucus - The Probe Annual Issue 2024