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PREFACE

In recent decades, the paradigm of public service delivery in India has undergone a profound transformation. Historically viewed as a bureaucratic function, the introduction of the concept of citizen charters—borrowed from the UK—precipitated a significant shift in this narrative. These charters catalyzed an intellectual evolution among Indian policymakers, steering them towards conceptualizing public services as inherent rights of the citizenry. Consequently, there was a move to legally demarcate specific timeframes within which these services ought to be delivered. Such a legal safeguard, when viewed from the lens of rights, mandated that any failure in timely delivery should invoke a robust grievance redress mechanism. Escalating from the initial complaint, an appellate structure was envisaged, culminating in penal action against defaulting public functionaries. This progressive framework has been adopted by over 22 states within the Indian union. However, the empirical examination of these legislations reveals a dearth of data, making it challenging to gauge their efficacy and identify potential areas for refinement. In this context, the efforts of organizations like Centre for Civil Society (CCS) become particularly salient. Their rigorous process audit of 26 public services in Punjab has shed light on the interstitial intricacies and larger structural inefficiencies, providing a holistic understanding of the status quo.

Over the past five years, India's trajectory on the World Bank's Ease of Doing Business Index has been remarkable. Yet, there remains a palpable disjunction between policy formulation and its tangible realization, particularly in the context of micro, small, and medium enterprises (MSMEs). These entities, integral to India's economic fabric, are often encumbered by a labyrinthine regulatory environment. Post the 2020 pandemic, the optimization of this milieu becomes even more exigent. CCS, demonstrating an unwavering commitment to MSMEs, undertook an analytical sojourn to unravel the regulatory impediments in Punjab. Their collaborative initiative with the Punjab Government rendered a granular insight into systemic lacunae. Despite Punjab's legislative

strides towards transparency, the actual implementation exhibits discernible gaps. Manifestations of these gaps range from the non-enforcement of the "One Government" principle to inconsistencies in documentation processes. This preface, through an academic lens, underscores the need for a bifurcated approach encompassing stringent disciplinary mechanisms coupled with a competitive evaluative framework to enhance departmental efficacy.

In the ceaseless evolution of governance and its interconnected facets, the dimensions of public service delivery, political integrity, transparency, and accountability form the cornerstone of a robust democratic structure. The forthcoming papers in this edition weave a tapestry that underlines the dynamism, challenges, and imperatives within these dimensions, contextualized majorly within the Indian scenario.

"Criminalization of Politics: The New Normal?" delves deep into the underbelly of politics, spotlighting a disconcerting trend within Indian democracy. As politicians with criminal antecedents secure electoral victories, the paper augments the clamour for urgent electoral reforms, extending its implications to global democracies.

"Evaluation of the Performance of the Enforcement Directorate in Combating Corruption in India" offers a critical lens into the challenging terrains of India's fight against corruption, underscoring both the vulnerabilities and the rigour of the Enforcement Directorate.

The role of Civil Society Organizations (CSOs) in buttressing the frameworks of public accountability receives due focus in the "Civil Society Organisation’s Involvement in Promoting Accountability: Study of Social Audit of MGNREGA in Jharkhand''. The study exemplifies the confluence of civil society and state machinery in enhancing transparency.

Within the academic sphere, "A Critical Examination of Plagiarism Control System & Corruption in the Publication of Higher Education"

starkly captures the challenge of plagiarism, pointing towards the pivotal role of research ethics in fortifying academic sanctity.

International investment receives its critique in "Combating Corruption in Foreign Investment Through WTO's Investment Facilitation Agreement", which delves into the layers of corruption protection mechanisms and articulates the necessities in the WTO's evolving framework.

"From 'Honey-Trapping' to 'Privacy': Deconstructing The Dilemma of Public Servants in India" offers a poignant exploration of the intersecting realms of personal privacy, professional integrity, and the vulnerabilities faced by public servants, marking an urgent call for legal clarity and enhanced protection mechanisms.

Lastly, "Aadhaar Enabled Public Distribution System (AePDS) - An e-Governance Initiative of Accountable, Transparent and Time Bound Service Delivery" showcases a transformative initiative in public service delivery. As India grapples with challenges in its Public Distribution System, technological interventions like AePDS promise strides in transparency and efficiency.

This edition, in its entirety, is a testament to the multifaceted challenges and innovations in the broader spectrum of public service delivery and governance. It aims to spark informed discourse, inspire action, and fortify the pillars of democracy for the betterment of society.

Acknowledgments

It is a privilege to pen this preface for a journal that epitomises academic excellence. I extend my heartfelt gratitude to J S Mann, the editor of this esteemed journal and the Director of the Centre for Transparency and Accountability in Governance (CTAG), for bestowing upon me this honour. The invaluable support from the Atlantic Council's Freedom and Prosperity Centre and the Atlas Network has been instrumental. Through their patronage, the Centre for Civil Society (CCS), in collaboration with CTAG and the National Law University, Delhi, successfully orchestrated a seminal conference on public service

delivery in India. My most profound appreciation extends to my colleague Arjun Krishnan for his invaluable assistance and Sanskriti Shree, the diligent Project Manager at CCS, for her impeccable coordination efforts.

I express my profound gratitude to all the erudite authors who have contributed their insights. I fervently hope that this discourse catalyses an informed debate on public service delivery, illuminating the extant gaps and charting a path for future reforms.

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THE CRIMINALIZATION OF POLITICS: THE NEW NORMAL?

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Shelly Mahajan Program & Research Officer, ADR New Delhi

Abstract

This paper explores the issue of criminalization in politics with a focus on India, highlighting its global relevance. It aims to assess the extent, causes, and implications of this phenomenon, employing a rigorous research methodology that includes data analysis and international case studies. The study reveals a troubling trend of politicians facing serious criminal charges enjoying electoral success. It underscores the urgent need for electoral reforms to fortify democratic institutions and rebuild public trust. This research has broader implications for global democracies, emphasising the importance of international cooperation to combat the prevalence of criminality in politics.

1. INTRODUCTION

"Elections and their corruption, injustice and the power and tyranny of wealth and inefficiency of administration will make a hell of life". - C Rajagopalachari

"If the people who are elected are capable and men of character and integrity, then they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. It requires men of strong character, men of vision, men who will not sacrifice the interest of the country at large for the sake of smaller groups and areas…We can only hope that the country will throw up such men in abundance"

-- 26th November 1949, before putting the motion for passing of the Constitution on the floor, Dr. Rajendra Prasad, President, Constituent Assembly of India.

25 years before independence, as far back as 1922, Mr. C Rajagopalachari had anticipated the present state of affairs and wrote the above prophetic words in his prison diary. From the time of independence till the sixties, the dominant political party, Congress, had stalwarts of great intellect, integrity, and moral authority who took over the reins of governance of India. These early leaders and statesmen of different political parties laid the foundation of democracy in India and framed the Indian constitution.

Undoubtedly in the early decades after independence, India made great strides in economy, science, and technology. But along with the steady rise of the GDP, agricultural and industrial growth rates, living standards, and the reduction in the percentage of citizens below poverty line, there was a steady decline in the purity of the political system. This fall is evident from the entry of personnel with criminal backgrounds into political parties and the rise of the twin demons – "money and muscle power" in politics in the seventies. This negatively affected the quality of democracy, sharply increased inequality, and injected caste, religion, community, and identity-based politics (vote bank politics) into the system.

An enormous amount of illegal money was being pumped into the electoral process due to extensive links with the criminal underworld. Big money and voter intimidation distort electoral outcomes. One of the reasons for the entrance of criminals into politics was a desire to avoid or subvert judicial proceedings through political patronage. The law, in its present form, is incapable of curbing the growing cancer of criminalization of politics.

Also, there is a lack of transparency in the funding and functioning of political parties. There is no law regulating political parties. There is a lack of inner party democracy and financial accountability due to lax laws and judicial delays. For the Financial Year (FY) 2021-22, 66.04% of the total income of National parties came from 'unknown sources' (income specified in the annual audit report whose sources are unknown), while only 23.74% came from 'known sources' (details of donors as available from contribution report submitted by parties to Election Commission)

and 10.22% came from 'other known sources' (e.g. sale of assets, membership fees, bank interest, sale of publications, party levy etc.). Political parties and candidates routinely report much less than the actual expenditure.

ADR's research and analysis have shown a direct linkage between money and muscle power. A rich candidate with a criminal background has twice the chance of winning an election compared to a "clean candidate." In the 15th Lok Sabha, 30% of sitting Members of Parliament (MPs) had criminal cases and their average assets were Rs 5.36 crores. In the 16th Lok Sabha, this rose to 34% of MPs with criminal cases and average assets of Rs 14.70 crores and in the 17th Lok Sabha, this increased to 43% MPs with criminal cases and 88% crorepati MPs with average assets of Rs 28.93 crores. When political parties receive large corporate donations, obviously the principle of quid-pro-quo is in force. The corporates funding the political party coming to power expect policies/decisions in their favor giving rise to crony capitalism.

This raises several questions. Where do we stand now, and what needs to be done? There seems to be a lack of political will to address issues that would hurt the interests of the political parties. Whenever any issue/measures which may hurt the interests of the political parties are suggested by the civil society or the judiciary, the political parties bury their differences and join together to block/subvert the move (e.g,: Jan Lokpal Bill, bringing Political Parties under RTI, capping of political expenditure, banning candidates with criminal cases from contesting elections and so on). The suggestions/recommendations of various committees/commissions appointed by the Government on electoral and political reforms have been pending with the Government for decades, as are other pending reports on judicial, police reforms and so on. Meanwhile, people's faith in the political system is steadily decreasing.

Elections in India are called the "festival of democracy". The Election Commission of India (ECI) is one organization amongst a few others like the Comptroller and Auditor General of India (CAG), judiciary, and the

armed forces which still command the respect of the people. ECI needs to be complimented for the smooth conduct of various Lok Sabha/State Assembly Elections without any major hiccups. However, over the last few years, people have started questioning the credibility and non-partisanship of the ECI. Some people also question the conduct of elections for a prolonged period of 30 to 40 days. They say, "What kind of a democracy is this where voting has to be conducted under the protection of security forces?" But we know that without security forces, there would be violence and electoral malpractices like booth capturing, voter intimidation, communal violence etc. Is the voting free and fair when a common man's voting choice is subverted by the political parties plying the voter with cash, liquor, freebies, etc? The total seizure reported by the ECI at the end of the 17th Lok Sabha elections was a humongous Rs 3475.76 crore (in contrast to Rs 299.943 crore seized in 2014 elections). This is, of course, the tip of the iceberg. At the time of writing this paper, after the announcement of the Karnataka state assembly elections, as per Economic Times report dated 16 April 2023, the ECI and other Enforcement agencies have made seizures of cash, liquor, drugs, goodies worth Rs 170.27 crores from 29 March when the Model Code of Conduct (MCC) was invoked.

For the common man to get their due, it is important that we elect the right type of people to govern us. To recover the money spent during election campaigns, many politicians aim to amass a huge amount of wealth during their tenures, as is evident from the manifold increase in the assets of elected representatives after being in power. Hence we must create an environment where capable, honest, law-abiding citizens are elected to our Lok Sabha/State Assemblies. Since there is a lack of political will to improve the democratic system, there is a requirement to apply constant pressure from the judiciary, civil society organizations, and institutions like CAG and ECI. It is also imperative to bring about voter awareness. Voters must understand that politicians who buy their vote today, will sell their interest in the future.

This paper shall discuss the problem of criminalization of the Indian political system, the role of the Judiciary and the Executive and lastly and

most importantly, the role of the citizen, the common man, the voter in reducing criminalization. In conclusion, we will suggest various recommendations which are essential to make our electoral system:

- More representative.
- Fair and transparent.
- Prevent the proliferation of political parties.
- Introduce stability in governance.
- Strengthen our democracy.

2. GENESIS OF CRIMINALISATION IN INDIAN POLITICS

It would be a mistake to believe that the criminalization of politics is a new or recent phenomenon. The current trend has its seeds in the past. In the initial two decades post-independence, the majority of politicians had participated actively in the struggle for independence and were of high moral character and ethical in their public life. Till the sixties, Congress was the dominant political party. After the demise of Pandit Jawaharlal Nehru, gradually, other smaller parties and regional parties started gaining momentum and started competing for space in the political arena and Congress started ceding space to them. Along with this, political parties started indulging in electoral malpractices like booth capturing, rigging, intimidation of voters from the weaker sections, distribution of freebies, and outright violence in which opposing party workers were assaulted physically and even killed. For the above-mentioned illegal activities, the political parties commenced using the services of the miscreants, goondas, and the criminal mafia who were paid in cash and kind and also granted favours for their services when the party came to power. This system flourished for a couple of decades, after which realization dawned on the criminal elements that if they could help political parties to win elections with their muscle power, why not join politics, contest elections and become legislators?

This is how the criminalization of the political parties and further degradation of the electoral system came into effect. All efforts of the ECI, the judiciary, and Civil Society Organisations (CSO) to reform, clean, and

decriminalize the system have failed in the face of the intransigence of political parties towards any attempts to cleanse the system. As a result, the tainted elements are now firmly entrenched in the Indian political system, and their percentage is growing steadily with each passing election.

In this paper, we will examine the perplexing cohabitation of criminality and democratic politics and attempt to address the following questions:

- Why do political parties select candidates with serious criminal records and, at times, compete with each other to welcome them into their folds?
- What are the reasons for voters to support and elect politicians with criminal records?
- What are the implications for the involvement of the criminal politicians in our democracy and accountability?

3. ANALYSIS OF GROWING CRIMINALISATION IN POLITICS

Association for Democratic Reforms (ADR) has been collecting data regarding criminal offences by MPs and Members of Legislative Assemblies (MLAs), as declared by them through affidavits submitted to the ECI. It is noticeable that the involvement of MPs and MLAs in criminal cases and serious criminal cases has been increasing over the years. As per ADR, the percentage of MPs in the 2004 Lok Sabha involved in criminal cases was 24%. It increased to 30% in the 2009 Lok Sabha, 34% in the 2014 Lok Sabha, and 43% in 2019 the Lok Sabha.

24% of Rajya Sabha MPs have declared criminal cases, out of which 12% have declared serious criminal cases against them. 11 MPs have declared cases relating to murder, 30 have cases related to attempt to murder. 6 MPs who have declared cases related to kidnapping and 13 related to robbery. Our MLAs are also not far behind in this race. We have 45 MLAs who have declared cases related to murder, whereas 181 have declared cases related to attempt to murder. There are 49 MLAs accused of kidnapping.

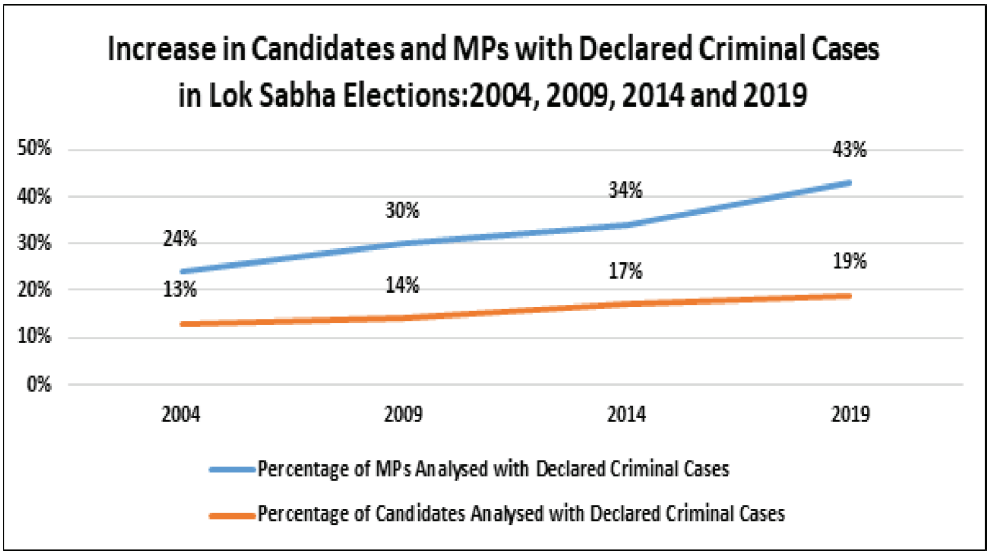

Figure I

As per the report released by ADR on 'Crimes against Women' from 2009 to 2019, there was an increase of 231% in the number of candidates contesting in Lok Sabha Elections with declared cases of crime against women.[1] From 2009 to 2019, there was an increase of 850% in the number of MPs with declared cases of crime against women in Lok Sabha. There are 18 MPs and 58 MLAs who have declared cases related to crimes against women. We have 3 MPs and 6 MLAs who have declared cases related to rape. During the period 2009-2019, 73 candidates had declared cases related to murder while 278 candidates had declared cases related to Attempt to murder (IPC Section-307).

[1] Analysis of MPs/MLAs with Declared Cases Related to Crimes against Women, Association for Democratic Reforms, available at: https://adrindia.org/content/analysis-mpsmlas-declared-cases-related-crimes-against-women-3, last seen on 05/04/2023.

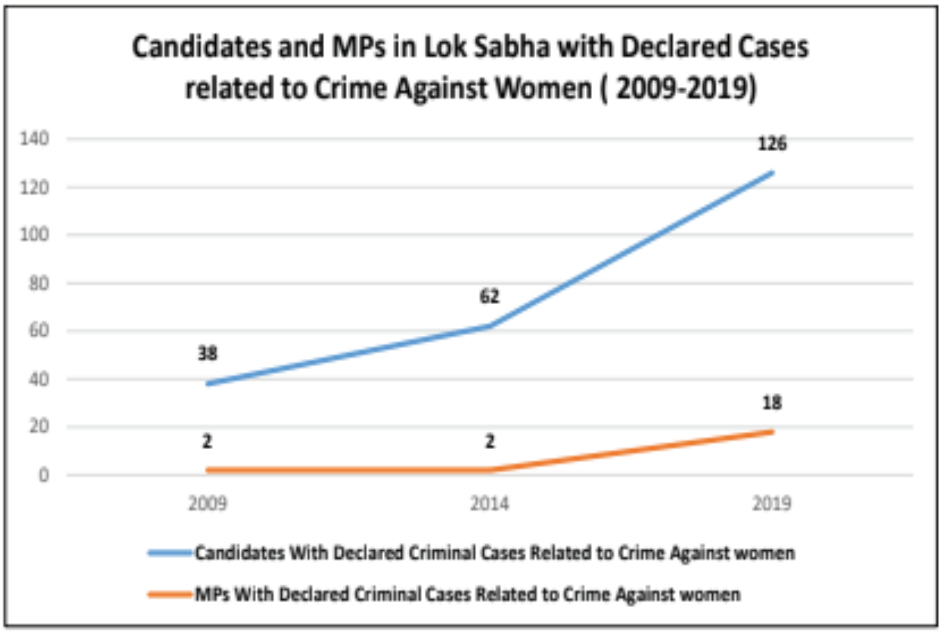

Figure: Candidates and MPs in Lok Sabha with Declared Cases related to Crime Against Women (2009-2019)

Figure II

An analysis by ADR found that of more than 47,000 candidates who contested State & National elections between 2009 and 2013, only 0.03% had been convicted by a court of law, given that 17% of these candidates faced criminal cases at the time of filing their nomination papers, with 8% facing serious criminal cases.[2]

The conviction rate for serious crimes has been falling over the years. More importantly, the time taken for trials is also unduly long. As per '*Crime in India, 2018 and 2019' (A Government of India publication)*, the all-India charge sheeting rate for crimes under the IPC that were investigated in 2019 was 67.2%, a slight dip from 68.1% in 2018, while the conviction rate improved marginally to 50.4% from 50% in 2018.

[2] Comparison of pending cases and convictions declared by elected representatives, Association for Democratic Reforms, available at:https://adrindia.org/content/comparison-pending-cases-and-convictions-declared-elected-representatives, last seen on April 05/04/2023.

Kerala (85.1%) topped the conviction rate for all IPC crimes in 2019, followed by Tamil Nadu (63.2%). In rape cases, the conviction rate slightly rose to 27.8% in 2019 from 27.2% in 2018. In Uttar Pradesh, which was in the news due to the Hathras atrocity, the conviction rate for IPC crimes was 59.2% in 2019, while the conviction rate for crimes against women was 55.2%. As per the 'Crime in India' data for 2019, the disposal of crimes registered under the Special and Local Laws (SLL) such as Dowry Prohibition Act, Excise Act, Arms Act, and Protection Of Children from Sexual Offences (POCSO) Act in 2019 was 93.3% all-India charge sheeting rate and 80.3% conviction rate in 2018.The states with a low conviction rate in 2019 were Bihar (6.1%) and West Bengal.

The Executive and the Legislature are reluctant to undertake any kind of electoral or political reform because of the obvious conflict of interest. Only persons of strong character and vision should foray into the electoral process. Sadly, in the Indian political system, such stipulation, resolve, and intent hold no ground. As a matter of fact, political establishments have completely disregarded or intentionally sidelined the reforms suggested by various committees, citizens, and civil societies. It is on the record that various recommendations given by several committees dated as back as 1999 are lying on the back burner. These include the recommendations of the Vohra Committee Report, 1993; The 170th Report of Law Commission of India on Reforms of the Electoral Laws (1999);The National Commission to Review the Working of the Constitution, 2000; The Department Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice (2007); Ethics in Governance Report: Second Administrative Reforms Commission, 2007; The 244th Law Commission of India Report on Electoral Disqualification; Justice J.S. Verma Committee Report on Criminal Law Amendment; are few of these Commissions which had repeatedly emphasized the need to weed out criminal elements from politics by giving various remarkable recommendations but have been quite conveniently overlooked by various governments in the last 20 years.

There is no dearth of solutions to curb the ever-growing problem of criminality in politics. *What is required is the courage and will to do the same*. *Lawmakers will not frame laws that ban the unimpeded and*

unchecked entry of politicians with criminal cases. Constitutional bodies and institutions will continue to take refuge under reasons like 'lack of power'. In fact, on 20th July 2021, while hearing the contempt petition[3] against the publication of reasons for the selection of candidates with criminal cases by political parties, the Bench headed by Justice R.F. Nariman and Justice B.R Gavai had added, "*We are certain that the legislative branch will not take this forward, not only in the foreseeable future, but at any time in the future*". Given the current situation, where all political parties stand united and determined to stall any attempts to bring accountability, transparency, and fairness in our electoral process, it becomes imperative to remind the key duty holders of their role in preserving, protecting, and defending the Constitution. The only way to remedy the existing problem of criminalization is to immediately act upon the plausible solutions offered by the judiciary, various committees, civil society, and citizens.

The Supreme Court (SC) in its judgment dated 25th September 2018 in W.P (C) No. 536/2011 had noted that criminalization has become *'fatal to democracy'* and expressed *'immense anguish'.*[4]

> *"118…. A time has come that the Parliament must make law to ensure that persons facing serious criminal cases do not enter into the political stream. It is one thing to take cover under the presumption of innocence of the accused, but it is equally imperative that persons who enter public life and participate in law making should be above any kind of serious criminal allegation…."*

[3] CONMT.PET.(C) No.-000656 / 2020
[4] Public Interest Foundation v. Union of India, (2019) 3 SCC 224

3.1. Judicial delay

There are a large number of MPs/MLAs who have criminal cases against them in various courts pending from 10 to 20 years. The Representation of Peoples Act 1951 (RP Act 1951) empowers the people to file an election petition against electoral malpractices of any candidate within 45 days of declaration of election results. Given the pendency and delays in our justice delivery mechanism, it is seen that the accused MP/ MLA completes his/her 5-year term without the conclusion of the trial! Hence, there is a need to fast track the pending cases in a time bound manner. Recently, Supreme Court has also passed an order that the trial of cases against sitting MPs and MLAs, who have charges framed against them for offences specified in Section 8(1), 8(2) & 8(3) of the RP Act shall be completed within a year from the date of framing of charges. However, what is concerning is that the fast-tracking process is moving at snail's pace and information regarding the progress of such cases in the fast-track courts is not available in the public domain.

As per the analysis conducted by ADR regarding *'pending criminal cases against MPs/MLAs who have declared criminal cases where charges have been framed under Section 8 (1), (2) and (3) of the RP Act, 1951'* the average number of years of criminal cases pending against MPs and MLAs is seven years. 24 Lok Sabha MPs have 43 criminal cases pending against them for 10 years or more, whereas 111 MLAs have a total of 315 criminal cases pending against them for 10 years or more.[5] Some of the MLAs with criminal cases pending for the longest period are reproduced below:

[5]Analysis of MPs, MLAs and Ministers Against Whom Charges Have Been Framed by The Court for Offences Falling Under Section 8(1) (2) & (3) of The R.P Act,1951 for the Period 2019 to 2021, Association for Democratic Reforms, available at: https://adrindia.org/content/analysis-mps-mlas-and-ministers-against-whom-charges-have-been-framed-court-offences-falling, last seen on April 05/04/2023.

Table I: Some of the MLAs with criminal cases pending for longest period					
Name	**Party**	**Constituency**	**Election**	**Years of Pendency**	**Nature of Offence**
Ram Narayan Mandal	BJP	Banka	Bihar Assembly 2020	31	Joining unlawful assembly armed with deadly weapon, punishment of criminal conspiracy and assault or criminal force to deter public servant from discharging duties
Manoranjan Bapari	AITC	Balagarh	West Bengal Assembly 2021	30	Voluntarily causing hurt to deter a public servant from his duty.
Mithilesh Kumar Thakur	JMM	Garhwa	Jharkhand Assembly 2019	29	Murder, Punishment for Rioting and Rioting, armed with deadly weapon
Soumya Ranjan Patnaik	BJD	Khandapada	Odisha Assembly 2019	29	Assault or criminal force to deter public

					servant from discharge of his duty, voluntarily causing hurt to deter public servant from his duty and Punishment for theft.
Mungantiwar Sudhir Sachchidanand	BJP	Ballarpur	Maharashtra Assembly 2019	28	Mischief causing damage, punishment for rioting and assault or criminal force to deter public servant from discharge of his duty
Sudam Marndi	BJD	Bangriposi	Odisha Assembly 2019	28	Criminal intimidation and Rioting, armed with deadly weapon
Prasanta Kumar Jagadev	BJD	Chilika	Odisha Assembly 2019	27	Criminal intimidation and voluntarily causing hurt to deter public

					servant from his duty
Aswini Kumar Patra	BJD	Jaleswar	Odisha Assembly 2019	26	Criminal intimidation and voluntarily causing hurt to deter public servants from his duty.
Ramesh Chand	BJP	Bhadohi	Lok Sabha Elections 2019	26	Mischief by destroying or moving, etc., a land-mark fixed by public authority, mischief by fire or explosive substance with intent to cause damage.

3.2. Why do Political parties field criminal candidates & Indian voters vote for them?

The primary reason political parties field candidates with criminal cases pending against them is the "winnability factor". It is borne out by ADR statistics that the chances of winning for a tainted candidate are almost double that of a candidate with a clean background. In our highly competitive electoral politics, huge amounts of money are required to contest elections. Apart from the legitimate campaign expenditure by

political parties and candidates on rallies, transport, media, publicity, etc., a major chunk is spent on freebies to lure voters. Parties also prefer candidates with money power as they not only purchase the ticket from the party but also self-finance their election campaign.

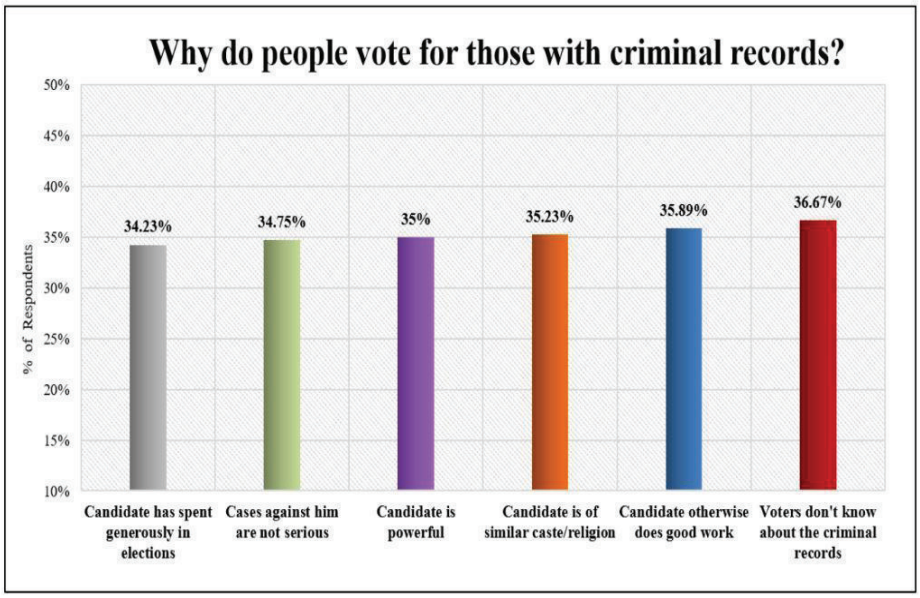

Figure III

The reason behind the acceptability of criminal candidates among voters is that they view these strongmen as someone who can get things done. This also reflects poorly on the functioning of the government machinery which is supposed to provide basic necessities and welfare services to the common man. This is especially true in places where there are sharp social divisions driven by caste/religion/regionalism.

ADR conducted a national survey in 2018-19 in 530 Lok Sabha constituencies.[6] The survey tried to ascertain voter awareness regarding the accessibility of information on the criminal background of contesting candidates. Only 35.20% of people knew that they could get information

[6] All India Survey On Governance Issues And Voting Behaviour 2018, Association for Democratic Reforms (ADR), available at: https://adrindia.org/sites/default/files/All%20India%20Survey%20Report%202018_English_9thDec19_update_0.pdf, last seen on 07/04/2023.

about the criminal records of their candidates easily. 36.67% of voters stated that they did not know about the criminal records of the candidates. However, 87% of voters said that people with criminal cases should not be in the legislatures.

When asked why they voted for candidates with criminal backgrounds, 35.23% said the candidate spent generously in elections, 34.75% said cases against him are not serious, 35% said the candidate is powerful, 35.23% said the candidate is of similar caste/religion and 35.89% stated that the candidate otherwise does good work.

Milan Vaishnav in his book "When crime pays" states -

> "Pure information campaigns in which the civil society or the media provide factual information of the criminal antecedents of politicians will have only limited success in contexts where voters are already aware of politicians' criminal reputation…. Scholars working in UP designed an experiment in which an NGO conducted meetings and puppet shows to urge people to vote in the coming elections and to vote on issues and not on caste lines. The experiment succeeded in raising voter turnout and reducing caste-based voting. The decline in caste-based voting was highly correlated with a measurable decline in voter support for candidates charged with serious crimes."[7]

4. ILL EFFECTS OF CRIMINALISATION OF POLITICS

The criminalization of politics is like cancer, eating away the body of democracy. It seriously threatens democracy by undermining the rule of law and democratic institutions. When lawbreakers become law-makers, they use their power to subvert the justice system. When such politicians occupy public offices, they serve their interests rather than those of the voters who elected them. This leads to poor governance and widespread corruption. When tainted politicians gain control of political parties and use them for personal gains, it further weakens democratic institutions

[7] Milan Vaishnav, When Crime Pays: Money and Muscle in Indian Politics, 279 (HarperCollins Publisher, India, 2017).

and undermines the rule of law. Eventually, this erodes public trust in the political system and leads to apathy, disillusionment among the public, and loss of faith in democratic institutions and the rule of law.[8]

5. EFFORTS OF THE JUDICIARY TO CURB CRIMINALISATION OF POLITICS

To curb the practice of giving tickets to candidates with criminal background, the Indian SC has given four orders:

1. **10th March 2014** ***(Trial within one year)***[9]***;***
2. **1st November 2017** ***(Special 11 fast-track courts)***[10]**;**
3. **25th September 2018 (*Publication of criminal cases*)**[11]**;**
4. **13th February 2020 (*Reasons for giving tickets to candidates with criminal cases*)**[12].

Unfortunately, none of these orders have been able to dissuade the parties from giving tickets to candidates with criminal backgrounds and increase the entry of *clean, credible, and honest candidates.*

On 13th February 2020 the Supreme Court had directed political parties *to list out the reasons on their website, including their social media platforms, for nominating candidates with criminal background within 72 hours of the selection of such candidates.* This direction of the Apex Court had come in the light of a contempt petition filed against the non-implementation of its earlier order dated **25 September 2018** on publication of criminal cases by candidates and political parties, which clearly were not taken very seriously. Consequently, the Supreme Court reprimanded political parties for failing to widely publish the details of criminal cases pending against the candidates they selected. Going one

[8] Chetanya Sharma, " An Analysis: Criminalization Of Politics In India" Legal Service India, available on https://www.legalserviceindia.com/legal/article-10366-an-analysis-criminalization-of-politics-in-india.html, last seen on 17/04/2023.
[9] Public Interest Foundation v. Union of India, (2015) 11 SCC 433.
[10] WRIT PETITION (CIVIL) NO(S). 699/2016
[11] Public Interest Foundation v. Union of India, (2019) 3 SCC 224.
[12] Rambabu Singh Thakur v. Sunil Arora, (2020) 3 SCC 733.

step further, the Supreme Court also specifically instructed political parties *to give reasons for such selection and why other individuals without criminal antecedents could not be selected as candidates.* As per these mandatory guidelines, the reasons for such selection must concern the *qualifications, achievements, and merit of the candidate* concerned. Sadly, even these directions of the Supreme Court have not affected the selection of candidates by political parties as they have again followed their old practice of giving tickets to candidates based on *'Muscle and Money power'*. On 15 July 2021 and 20 July 2021, the Supreme Court again considered the contempt by political parties against the wilful disobedience of the Apex Court's order dated 13th February 2020. While observing the egregious default by political parties, the Supreme Court also stated *that neither the Legislature nor the Political Parties will ever be keen on taking steps to stop the entry of candidates charged with criminal cases.*

5.1. ECI's Letter Dated 6th March 2020 in Compliance with Supreme Court Directions Dated 13th February 2020 stated:

1) It is mandatory for political parties at the Central and State level to upload on their *website detailed information regarding candidates with pending criminal cases including the nature of offences, relevant particulars like whether charges have been framed, the concerned court, the case number etc.*

2) Political parties will also have to give reasons for such selection and why other individuals without criminal antecedents could not be selected as candidates.

3) The reasons as to selection shall be with reference to the qualifications, achievements, and merits of the candidate concerned, and not mere "winnability" at the polls.

4) This information shall also be published in: (a) One local vernacular newspaper and one national newspaper; (b) On the official social media platforms of the political party, including Facebook and Twitter.

5) These details shall be published within 48 hours of the selection of the candidate or not less than two weeks before the first date for filing of nominations, whichever is earlier. For ensuring periodic awareness of electors during the campaign, ECI has now prescribed the following timeline for publicity of criminal antecedents during the period starting from the day following the last date of withdrawal and up to 48 hours before, ending with the hour fixed for conclusion of poll,

- Within first 4 days of withdrawal of nominations,
- Between the next 5th - 8th days.
- From 9th day till the last day of campaign (the second day prior to date of poll) the day

6) The political party concerned shall then submit a report of compliance with these directions with the Election Commission within 72 hours of the selection of the said candidate.

7) If a political party fails to submit such a compliance report with the Election Commission, the Election Commission shall bring such non-compliance by the political party concerned to the notice of the Supreme court as being in contempt of this court's orders/directions.

5.2. ECI's Letter Dated 10th October 2018 in Compliance with Supreme Court Directions Dated 25th September 2018:

5.2.1. For Candidates:

1. Each contesting candidate shall fill up the form as provided by the Election Commission and the form *must contain all the particulars as required* therein.

2. It shall state, *in bold letters, with regard to the criminal cases pending against the candidate.*
3. If a candidate is contesting an election on the ticket of a particular party, *he/she is required to inform the party about the criminal cases pending against him/her.*

5.2.2. For Political Parties:

1. The concerned political party shall be *obligated to put up on its website the aforesaid information pertaining to candidates having criminal antecedents.*

5.2.3. Both Political Party and Candidates:

1. It is mandatory for **political parties** and **candidates** with criminal antecedents to publish the declaration *at least on three different dates from the date following the last date of withdrawal of candidatures and up to two days before the date of poll.* The matter should be published in font size of at least 12 and should be placed suitably in newspapers. In case of *declaration in TV Channels, the same should be completed before a period of 48 hours ending with hours fixed for conclusion of poll.* There is a format provided by ECI for such a declaration by the candidates and political parties.
2. In case of non-compliance of the direction by the *candidate/political parties, the returning officers will give a written reminder* to them and in the event of non-compliance till the end of the elections, *the returning officer will report to the state's Chief Electoral Officer who will intimate ECI. ECI will take a final decision in the matter.*
3. *All political parties; recognized parties and registered unrecognized parties shall submit a report to the CEO of the concerned state stating that they have fulfilled the requirements of the directions and enclosing herewith the paper cuttings containing the directions.* This shall be done within 30 days of the completion of elections. Thereafter, within the next 15 days, the CEO should submit a report

to the ECI confirming compliance and pointing out cases of defaulters.

5.3. Format/Forms issued by ECI in pursuant to the aforementioned SC Directions

It is to be noted that **Form C7 and C8** should be *duly signed by the office bearer of a political party with proper name and designation.* Form C8 shall also bear the seal *of the concerned political party.*

Table II: Format/Forms issued by ECI in pursuant to the aforementioned SC Directions		
Format/Form	**Action to be taken by**	**Platform**
C1	Candidates	To publish information regarding criminal background in Newspapers and TV.
C2	Political Parties	To publish information regarding criminal background in Newspapers, TV and Political party's website.
C7	Political Parties	To publish information regarding criminal background ***along with reasons*** in Newspapers, social media platforms, websites of political parties.
C8	Political Parties to the Election Commission of India	Compliance Report with respect to the SC judgment dated 13th Feb, 2020.

Association for Democratic Reforms (ADR) has analysed **Format C7** of **1,178** candidates, who contested in the **Uttar Pradesh, Uttarakhand Goa, Manipur and Punjab assembly election 2022.**

This data has been compiled from political parties' websites as well as social media handles that were functional before and during the period of the above-mentioned State assembly elections. Most political parties published details as per form C7 on their social media handles such as Twitter. It must be noted that in some cases, parties may have published these details (elsewhere) and it may not have appeared in the records of ADR.

Table III: Analysis of Format C7

S. No.	State	Total Contesting Candidates	Number of Political Parties Analysed	Contesting Candidates Analysed from Shortlisted Political Parties	Number of Candidates Analysed with Declared Criminal Cases	No. of Candidates with Criminal Cases having a Published Format C7
1	Uttar Pradesh	4442	7	1991	827	689
2	Uttarakhand	637	8	366	76	64
3	Goa	301	7	206	57	28
4	Manipur	265	4	189	41	39
5	Punjab	1304	7	463	177	146
Total		**6949**	**33***	**3215**	**1178**	**966**

6. ANALYSIS OF FORMAT C7 – UTTAR PRADESH ASSEMBLY ELECTIONS, 2022

6.1. Political Parties Analysed:

Out of all the National and State political parties which contested in the Uttar Pradesh 2022 Assembly Elections, the following 7 political parties have been analysed:

1. Bharatiya Janata Party
2. Bahujan Samaj Party
3. Indian National Congress
4. Samajwadi Party
5. Rashtriya Lok Dal
6. Aam Aadmi Party
7. All India Majlis-e-Ittehadul Muslimeen

6.1.1. Reasons furnished by Candidates with criminal background

- **Candidates with Criminal Cases:** Out of **1991** contesting candidates analysed, **827 (42%)** candidates belonging to the above-mentioned political parties have declared criminal cases against themselves.
- **Candidates with Serious Criminal Cases:** Out of **1991** contesting candidates analysed belonging to the above-mentioned political parties, **623 (31%)** have declared serious criminal cases against themselves.

6.1.2. Reasons furnished for Nominating Candidates with criminal antecedents:

- Out of **827** candidates with criminal cases, reasons have been furnished for **689 (83%)** candidates.
- Out of **623** candidates with serious criminal cases, reasons have been furnished for **511 (82%)** candidates.
- For **138 (17%)** candidates with criminal background, no reasons for their selection have been provided by political parties.

6.1.3. Reasons given for top 3 candidates_with highest number of total criminal cases:

Table IV: Reasons given for top 3 candidates with highest number of total criminal cases

Name of Candidate	No. of cases	Serious IPC Counts	Political Party	Reasons for selection of candidate with criminal background	Reasons as to why other individuals without criminal antecedents could not be selected
Mohammad Azam Khan	87	234	SP	He has been an asset for the party and has been elected MLA from this constituency from 9 times and presenting he is the member of the parliament decides, he remained cabinet minister for 4 times and leader of opposition for 1 time, he has also been nominated as	No other candidate could compete with the present elected applicant until now.

				member of Rajya Sabha. He is one of the Founding Members of Samajvadi Party. He has been Falsely Implicated in all the cases for political reasons.	
Mohammad Abdullah Azam Khan	43	48	SP	The Candidate won the earlier election by a comfortable margin of more than 53 thousand from his nearest rival. Besides, the candidate highly qualified as he being M.Tech from the Galgotias University that is why conceded his academic qualification and popularity in general public. He is the	Obviously, because of the reason that the candidate is highly qualified, popular and one of the best amongst all the candidates. He has been falsely implicated because of ulterior motives and for the

				best candidate amongst all.	political reasons.
Atul Pradhan	38	26	SP	Atul Pradhan is being made a candidate from the legislative assembly constituency, Sardhana, 44 because he has worked among the people from last many years, his political popularity is very good, Atul Pradhan is has been the former State President of Samajwadi Chhatra Sabha. Atul Pradhan has most experienced in politics specially in Election Management.	All those cases are present in most of them are in public interest & political laws. There is no candidate for this constituenc y better than Atul Pradhan.

6.1.4. Top commonly stated reasons by political parties for selection of candidates with criminal background:

***6.1.5. Political parties that did not publish reasons for selection of candidates with criminal background*:**

Table V: Top 5 commonly stated reasons by political parties for selection of candidates with criminal background	
Reasons for selection of candidate with criminal background	**Reasons as to why other individuals without criminal antecedents could not be selected**
He is a sitting MLA	He has been implicated in the case due to political rivalry.
His name has been forwarded by the district unit of the party.	He is better than other applicants
He has been socially and politically active member of the society	All the cases are pending against him in court and have not been proven yet
Alleged case against him is out of political vendetta.	No other candidate with similar ground support
A party volunteer working to implement the vision of the party	He is extremely popular in his constituency

Table VI: Political parties that did not publish Format C7 for candidates with criminal background			
Political Party	**Total no. of contesting candidates with criminal background**	**No. of Candidates without Format C7**	**Percentage of candidates without Format C7**
SP	224	4	2%
BJP	169	17	10%
INC	160	19	12%
BSP	153	3	2%
AAP	62	56	90%
AIMIM	40	38	95%
RLD	19	1	5%

**At the time of making this report, format C7 data of some political parties was not available on the websites and social media handles. However, it may have been posted earlier by the parties and removed later.*

6.1.6. Top 3 candidates with highest criminal cases whose reasons for selection have not been published:

Table VII: Top 3 candidates with highest criminal cases whose reasons for selection have not been published		
Name of Candidate	**No. of cases**	**Political Party**
Ali Yusuf Ali	17	INC
Abhishek Singh Rana	15	INC
Chandra Prakash Mishra Matiyari	10	BJP

6.2. Other discrepancies in Format C7 of some candidates:

Table VIII: Other discrepancies in Format C7 of some candidates	
Name of the Party	**Remarks**
BSP	Around 70% of the candidates with cases against them have given the same word to word reason as to why other individuals without criminal antecedents could not be selected as candidates.[13]

From the above analysis, it is clear that the various judgements of the SC and directions of the ECI have had little impact on the fielding of candidates with criminal background. Whatever reasons may have been offered by the political parties, the "winnability factor" remains the primary reason for the allocation of tickets to candidates with criminal cases. Hence it is observed that as a thumb rule, almost all parties continue to give 30%-33% of their tickets to candidates who have criminal cases and are moneybags. As a matter of fact, the ADR statistics reveal that the chances of winning for a candidate with declared criminal

[13] "Format C-7 for General Assembly Elections 2022" Bahujan Samaj Party, available at: https://bahujansamajparty.net/?page_id=2643, last seen on 15/04/2023.

cases in the Lok Sabha 2019 was 15.5% whereas for a candidate with clean background, it was 4.7%.

7. WITHDRAWAL OF CASES AGAINST POLITICIANS BY THE RULING PARTIES

Another worrying issue is the withdrawal of criminal cases against its cadres when a party wins elections and comes to power. Prof Jagdeep Chhokar says that in 2017-18, several State governments started the withdrawal process of cases against politicians. Some of the newspaper headlines are reproduced below:

1. "Yogi govt issues order to scrap case against Yogi Adityanath" *The Indian Express*, December 27, 2017.[14]
2. "Process to withdraw 20,000 cases against politicians, including Yogi Adityanath, takes off in Uttar Pradesh" *The New Indian Express*, December 27, 2017.[15]
3. "Protests erupt across Kerala as CM Pinarayi Vijayan mulls to withdraw vandalism cases against MLAs" *The New Indian Express*, January 21, 2018.[16]
4. "How Some States are Subverting the Rule of Law to Drop Criminal Cases Against Politicians" *The Wire,* February 12, 2018.[17]

The legal provisions for withdrawal of criminal cases are contained in the Criminal Procedure Code (CrPC), Section 321 of which reads as follows:

"**321. Withdrawal from prosecution**. —The Public Prosecutor or Assistant Public Prosecutor in charge of a case may, with the consent of the Court,

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[14] Manish Sahu, "Yogi govt issues order to scrap case against Yogi Adityanath" The Indian Express, Dec. 27, 2017.

[15] Namita Bajpai, "Process to withdraw 20,000 cases against politicians, including Yogi Adityanath, takes off in Uttar Pradesh" The New Indian Express, Dec. 27, 2017.

[16] IANS, "Protests erupt across Kerala as CM Pinarayi Vijayan mulls to withdraw vandalism cases against MLAs" The New Indian Express, Jan. 21, 2018.

[17] Jagdeep S. Chhokar, "How Some States are Subverting the Rule of Law to Drop Criminal Cases Against Politicians" The Wire, Feb. 12, 2018.

at any time before the judgment is pronounced, withdraw from the prosecution of any person either generally or in respect of any one or more of the offences for which he is tried; and, upon such withdrawal, —

(a) if it is made before a charge has been framed, the accused shall be discharged in respect of such offence or offences;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted in respect of such offence or offences…"

Fortunately, the SC has ruled that the State governments cannot unilaterally withdraw pending cases against MPs/MLAs.
Writ petition civil No. 699/2016 of Ashwini Kumar Upadhyaya vs UOI the SC ruled as under[18]:

> *"Misuse of Prosecutor's Power u/s 321 of Cr.P.C.*
> *7. Learned amicus has drawn our attention to various instances across the country, wherein various State Governments have resorted to withdrawal of numerous criminal cases pending against MPs/MLAs by utilising the power vested under Section 321, Cr.P.C. It merits mentioning that the power under Section 321, Cr.P.C. is a responsibility which is to be utilized in public interest and cannot be used for extraneous and political considerations. This power is required to be utilized with utmost good faith to serve the larger public interest."*
>
> *"8. In view of the law laid down by this Court, we deem it appropriate to direct that no prosecution against a sitting or former*

[18] Ashwini Kumar Upadhyay v. Union of India, 2021 SCC OnLine SC 629

M.P./M.L.A. shall be withdrawn without the leave of the High Court in the respective Suo-motu writ petitions registered in pursuance of our order dated 16.09.2020. The High Courts are requested to examine the withdrawals, whether pending or disposed of since 16.09.2020, in light of guidelines laid down by this Court."

8. RECOMMENDATIONS

Until and unless these trends are not reined in, our current electoral and political situation is bound to deteriorate further. It is, after all, the electorate which suffers on account of criminalization and often can do little but helplessly participate in the election of the mighty and moneyed criminal elements. The following recommendations are proposed that need to be acted upon immediately *without further delay and damage to our participatory democracy and Rule of Law.*

I. Under the existing law, only those people who are actually convicted are debarred from contesting elections. The law needs to be amended to ensure the following are precluded from contesting:
    a) Those against whom criminal charges have been framed.
    b) Persons who are charge sheeted for offences where punishment is imprisonment for 5 years or more.
    c) A person convicted for any heinous offence/crime like murder, rape, dacoity, kidnapping, smuggling etc. should be permanently debarred.

    Appropriate amendment to Section 8 of Representation of the People Act (RPA), 1951 is required to be passed.

II. ***Criteria for selection of candidates:*** There should be a strict criterion for selection of candidates by political parties. As per the

Supreme Court judgment dated *13th February 2020*, political parties are already required to give *reasons for selection* of candidates and *why other individuals without criminal antecedents could not be selected as candidates.* As per the judgment the reasons as to selection shall be with reference to the *qualifications, achievements and merit of the candidate concerned* and not mere "winnability" in the polls.

III. ***Disqualification on charges framed:*** Problem of criminalization can be tackled if such tainted candidates are banned from entering the electoral process based on both stage and degree of crime. This can be achieved by *disqualifying candidates from contesting elections to the public offices against whom 'charges have been framed by court' for having committed serious criminal offences punishable by imprisonment of at least 5 years, and the case is filed at least 6 months prior to the election in question.*

IV. ***Permanent disqualification for heinous offences:*** It is reprehensible to have lawmakers charged/convicted of heinous crimes making laws for citizens and policies for the nation. *There should be a permanent disqualification of candidates convicted of heinous crimes like murder, rape, smuggling, dacoity, kidnapping, robbery etc.*

V. ***List of political parties to be prepared and shared by ECI***: The Election Commission of India is expected to implement the 25th of September 2018 and 13th February 2020 SC orders in its letter and spirit by listing out names of such tainted candidates selected by the political parties, along with reasons for such selection. *This list needs to be religiously prepared and submitted to the Supreme Court after every election and the same should be uploaded on ECI's website for public inspection*.

VI. ***Contempt action against its orders by Supreme Court:*** The Supreme Court of India, being the ultimate custodian of "Justice and Rule of Law", should take note of the current situation and

reprimand political parties and politicians for such contempt, complete lack of will, reprehensible predilection, and absence of required laws. In addition, the Supreme Court should also *immediately take a strict contempt action against political parties, their office bearers, and candidates for blatantly bypassing its 25th September 2018 and 13th February 2020 orders.*

VII. ***Cancellation of Tax Exemption given to the political parties:*** *Tax exemption given to the political parties* under Section 13A of the Income Tax Act, 1961 and Section 29 C (4) of the Representation of People Act, 1951 *should be cancelled for those parties who have deliberately side-lined the SC orders by* giving tickets to *undeserving, dishonest, corrupt, moneyed, and tainted* candidates.

VIII. ***De-recognition of political parties:*** *Failure to abide by the Supreme Court directions dated 25th September 2018 and 13th February 2020 should be treated as a serious breach under Paragraph 16A of the Election Symbols (Reservation and Allotment) Order, 1968*. Paragraph 16A gives power to the Commission to suspend or withdraw recognition of a recognised political party for its failure to observe Model Code of Conduct or follow lawful directions and instructions of the Commission. Therefore, *the Election Commission of India should invoke its powers under Paragraph 16A read with Article 324 of the Constitution and suspend or withdraw recognition of a recognized political party for its incessant failure and disobedience of the SC directions*.

IX. ***Parties must face consequences for breach***: Political Parties must realize that the above -mentioned *SC directions are mandatory and therefore the compliance is not optional*. Parties should be held accountable for defying the Supreme Court's order dated 25th September 2018 and 13th February 2020. *There should be a heavy financial penalty levied* on them for *making insufficient disclosures, invalid and common reasons, selection of candidates*

based on winnability, failing to submit the Compliance Report on time etc. *Officer in-charge of a political party pertaining to submission of a compliance report should also be held accountable for such a breach.*

X. ***Strict and immediate action needs to be taken by the Election Commission of India***: ECI should also not hesitate from using its wide powers given under Article 324 of the Constitution. Since the power of *superintendence, direction, and control of elections* lies with the Election Commission, therefore *without causing any delay, the Commission should immediately report such a default to the Supreme Court during each election.* In addition, ECI must ensure that the Supreme Court's directions are being truly implemented by political parties by taking concrete steps in the light of reasons given by political parties in Form C7 and C8, diligent publication of reasons in newspapers, T.V channels, party website etc and strict and constant reminders by ROs to the defaulters.

XI. ***Officer bearers of a Political Party to file annual information on criminal antecedents:*** *Political* party should *annually file the information on criminal antecedents of their Office Bearers* such as President, Secretary, General Secretary, Chairperson, Convenor, Treasurer etc and make such records available to the public, *including NIL records*.

XII. ***Prior announcement of candidates contesting elections:*** *List of candidates* contesting elections should be *announced at least 3 months prior to elections* and they should be required *to submit affidavits stating specific reasons for changing/joining a particular party* and *approximate amount to be spent by them in the next elections and of the source thereof.* All this information should be placed in the public domain.

XIII. ***False affidavit should lead to immediate disqualification:*** Furnishing of false information in the affidavits by candidates should not be taken lightly by the ECI. *It is, after all, the first and foremost step in the direction of 'free and fair elections.'* Section 125A of the RP Act 1951 has not been able to deter candidates from furnishing wrong/incorrect information as it only leads to a six-month imprisonment or fine or both, and therefore doesn't attract disqualification. *There should be an immediate disqualification of candidates who furnish misinformation, no information, false information in the election affidavit.*

XIV. ***More power to NOTA:*** The Supreme Court judgment dated 23rd September, 2013 on provision of NOTA buttons on the EVMs needs to be implemented in its letter and spirit by ensuring a) *if NOTA gets more votes than all the candidates, none of the candidates should be declared elected, and a fresh election should be held; b) in the fresh election, none of the candidates in the earlier election, in which NOTA got the highest number of votes, should be allowed to contest.*

XV. ***Fast tracking of cases for MLAs/MPs:*** All pending cases against MPs and MLAs should be fast tracked and brought to conclusion *within a period of one year as mandated by the Supreme Court orders dated 10th March 2014 and 1st November 2017.* This will also help in ensuring that the arbitrary and unbridled power given under Section 321 of the Cr.P.C is not misused by the governments of the day by ordering withdrawal of cases pending against powerful politicians, ministers and other rich and powerful people.

XVI. ***Declare Political parties as Public Authorities:*** It is political parties that form the government, man the Parliament, and run the governance of the country. Bringing political parties under the ambit of Right to Information Act,2005 will usher transparency and accountability in the functioning of political parties and party

leaders at one hand, on the other, it will also give a chance to the citizens to play their part in a democracy by acting as a watchdog. *Bringing parties under the RTI law will not only empower the citizens to question, audit, review, examine, and assess information like inner party elections, criteria for ticket distribution but it will also allow people to seek definite and direct answers from the office bearers for the kind of candidates being fielded by our political parties. Therefore, it is high time that the Supreme Court of India takes note of this current predicament and upholds and implements the 3rd June 2013 CIC order by bringing the parties under the ambit of RTI Act.*

XVII. ***A comprehensive law to regulate political parties' affairs:*** Political parties are the ultimate repository and guardian of our whole constitutional, democratic, social-economic set up, but *we don't have a single comprehensive law entirely dealing with political parties*. *In absence of a comprehensive law*, citizens cannot *question, appraise* and *audit* the *functioning of political class and politicians.* Therefore, there is a dire need for a comprehensive legislation *regulating the functioning of political parties, recognition of their party constitution, election at various levels of party organs, conditions for registration and de-registration, compulsory maintenance of accounts, women representation at organisational positions*, as recommended in the *'170th Law Commission Report, Part III, Chapter I'* and *Chapter 8 of the NCRW report.*

XVIII. ***Introduce provisions for inner-party democracy within political parties:*** In spite of being one of the largest democracies in the world, political parties which run this democracy are painfully undemocratic in their functioning. Political parties have miserably failed in their 'Code of conduct' and self-initiated reforms for themselves. Therefore, mandatory provisions should be made to *introduce inner-party democracy, transparent decision-making, ticket distribution, elections of office bearers,*

financial transparency and stronger organisational discipline within the political parties. This should include *mandatory secret ballot voting for all elections for all inner party posts and selection of candidates, as suggested by the 170th Law Commission Report*.

XIX. ***Annual Report by MPs and MLAs:*** Elected MPs and MLAs should be required to submit an '*Annual Report' to their constituency giving details of their accomplishments for the previous year and the plan for the next year.* This report should be made available at the Lok Sabha/Rajya Sabha/ State Assembly website and on the Election Commission's website.

XX. ***Mandatory display of candidate's background details outside the polling booths:*** Such a banner/list should carry the names of all candidates contesting elections highlighting complete details of criminal cases pending against such candidates. This list/banner should include details of cases such as FIR Nos., cases where a candidate is convicted, pending cases containing information where cognizance is taken, and charges are framed by the court. It may be mentioned that in 2017 during *Maharashtra Local body elections,2017,* the then *Maharashtra SEC Mr. J.S Saharia* had passed written directives and made it mandatory for the 2017 and all future civic bodies elections to put up *display boards outside polling booths showing a summarised version of candidates' affidavits*. The polling booths displayed details of the *candidate's name, age, education qualification, criminal records, assets and liabilities*. It is to be noted that there were over 8,000 polling booths in Mumbai alone when such directives were given.

XXI. ***Number of political Parties:*** As on 23rd September, 2021, there were 2858 parties existing in India, this is perhaps the largest number in any democracy globally. Out of these, only 43.39% (1240 parties contested out of 2858 parties) contested elections. The remaining parties seem to only exist to collect donations/

convert black money into white and avail 100% income tax exemption on their income. The ECI needs to carry out a regular weeding out exercise for parties which do not contest elections or are otherwise defunct due to various reasons.

9. THE INTERNATIONAL SCENARIO

If we examine the global scenario of criminalization and corruption in the political and electoral systems, we find that India is not the only country facing this malaise. Politicians in most democracies across the world indulge in corruption and other illegal/criminal activities while holding public office. Some of them get punished by the Courts after trial, but a number of them just get away using legal loopholes, or due to judicial delays or other dubious methods.[19]

Some examples are given below.

Brazil: Brazilians have coined a Portuguese phrase to describe a politician known to run afoul of the law yet perceived to function as an effective representative: "rouba, mas faz" (He robs but gets things done).

Colombia**:** Outlawed paramilitary groups and other criminal organizations in Colombia have used their extensive political connections and deep pockets to get their members elected to local and national political office.

Southeast Asia: A tradition of 'Godfathers' (known as "Chao pho" in Thailand) tied to criminal activity, plays a leading role in regional politics.

In democracies such as Jamaica and Nigeria, candidates for public office compete not on the basis of ideas and policy platforms but on their connections to criminal gangs.

[19] Milan Vaishnav, When Crime Pays: Money and Muscle in Indian Politics, 16 **(**HarperCollins Publisher, India, 2017).

USA: Even in the USA, the world's oldest democracy, it is not unheard of for the candidates to thrive politically despite past run-ins with the law. For instance, convicted felon Edwin Edwards campaigned in the 1991 Louisiana gubernatorial race on the slogan "vote for the crook, It's important". Edwards won the race by more than 20 percentage points. Of the unapologetically corrupt former 4 -term Governor, one admirer warmly recalled "We all knew he was going to steal…. but he told us he was going to do it." From former Massachusetts governor James M Curly- who served not one but two jail terms- to the convicted ex- Mayor of the District of Columbia, Marion Barry, criminal rap sheets have not always been a barrier to high office.

9.1. International Judgements on Criminalization of Politics[20]

1. In 2012, Brazil's SC found 25 politicians guilty of vote buying and money laundering. The Court banned these politicians from holding public office for 8 years and ordered them to pay heavy fines.

2. In 2013 the Italian Supreme Court upheld the conviction of former PM Silvio Berlusconi of Italy for tax fraud. He was sentenced to 4 years in prison and banned from holding public office for 5 years.

3. In 2017, the Pakistan Supreme Court disqualified Nawaz Sharif of Pakistan from holding public office for life after he was found guilty of corruption and ordered to pay back millions of dollars in ill-gotten gains. Former PM Imran Khan, ousted from premiership by a no-confidence motion in the Parliament in April 2022, is facing trial for corruption, contempt of court and several other charges.

4. In 2018, South Africa's Constitutional court ruled that former President Jacob Zuma had violated the constitution by refusing to repay public funds used to renovate his private residence. Zuma was ordered to repay the money and banned from holding public office.

[20] Supra 8

5. In 2019 a judge issued an arrest warrant for former Governor Javier Duarte of Mexico on charges of organized crime and money – laundering during his tenure as Governor.

10. CONCLUSION

The words of Dr. B.R. Ambedkar in the Constituent Assembly on 25th November, 1949 and the sentiments echoed by Dr. Rajendra Prasad on 26th November, 1949 are reproduced below:

Dr Ambedkar said:
"As much defence as could be offered to the Constitution has been offered by my friends Sir Alladi Krishnaswami Ayyar and Mr T.T. Krishnamachari. I shall not therefore enter into the merits of the Constitution. Because I feel, however good a constitution may be, it is sure to turn out bad because those who are called to work it, happen to be a bad lot. However bad a constitution may be, it may turn out to be good if those who are called to work it happen to be a good lot. The working of a Constitution does not depend wholly upon the nature of the Constitution. The Constitution can provide only the organs of State such as the Legislature, the Executive and the Judiciary. The factors on which the working of those organs of the State depend are the people and the political parties they will set up as their instruments to carry out their wishes and their politics. Who can say how the people of India and their parties will behave? Will they uphold constitutional methods of achieving their purposes or will they prefer revolutionary methods of achieving them? If they adopt revolutionary methods, however good the Constitution may be, it requires no prophet to say that it will fail. It is, therefore, futile to pass any judgment upon the Constitution without reference to the part which the people and their parties are likely to play."

The words **of Dr. Rajendra Prasad**, which ring true even today, are:-

"Whatever the Constitution may or may not provide, the welfare of the country will depend upon the way in which the country is administered.

That will depend upon the men who administer it. It is a trite saying that a country can have only the Government it deserves. Our Constitution has provisions in it which appear to some to be objectionable from one point or another. We must admit that the defects are inherent in the situation in the country and the people at large. If the people who are elected are capable and men of character and integrity, they would be able to make the best even of a defective Constitution. If they are lacking in these, the Constitution cannot help the country. After all, a constitution like a machine is a lifeless thing. It acquires life because of the men who control it and operate it, and India needs today nothing more than a set of honest men who will have the interest of the country before them."

Over the years the erosion of democratic values has resulted in a total lack of democratic representational legitimacy leading to disenchantment with institutions of democracy and demoralization of society. The most adverse impact of lack of constitutional democracy has been on our electoral and political systems. Corrupt electoral practices, high cost of elections, abuse of money and muscle power and lack of representational legitimacy have eaten into vitals of our democracy. Hence, there is an imperative need for electoral reforms to ensure free and fair elections, to make elections more meaningful and reflective of the will of the people. Let us all work together to make the world's 'largest democracy' the world's 'best democracy'.

EVALUATION OF THE PERFORMANCE OF THE ENFORCEMENT DIRECTORATE IN COMBATING CORRUPTION IN INDIA.

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Abstract

This study delves into the issue of corruption within India's public service, with a primary focus on the Enforcement Directorate (ED). Through interviews with 46 key stakeholders, including former politicians, retired bureaucrats, and experts, we sought to comprehend the root causes of corruption. Our findings underscore several factors contributing to corruption among public servants, including political party funds, election expenses, low salaries, opulent lifestyles, and tax evasion. Moreover, the study highlights the challenges that ED confronts, particularly in evidence collection, securing search warrants, and facing threats, predominantly from political entities. While ED has shown an improvement in performance post-2014, concerns persist regarding its selective targeting of politicians, potentially driven by political motivations. This research underscores the critical importance of combating corruption for the sake of fostering a fair and transparent government.

1. INTRODUCTION.

Corruption is an epidemic in day-to-day affairs. Politicians, bureaucrats, and common individuals even in judiciary, civil society, and non-governmental organizations have witnessed illegal graft at large. The Indian government has declared a battle against the menace of corruption in the last seven decades. However, there are still many cases of political and bureaucratic corruption, theft of public funds, dishonest purchasing procedures, and judicial corruption throughout the nation. Corruption is just another form of Dictatorship; corruption is on par with oppressive and harsh government authoritative rule and misuse of

power. On the other hand, corruption is a battle that the average person has to fight every day to keep their constitutionally guaranteed fundamental rights and other benefits. In the public sphere, corruption is the illegal exploitation of public resources and offices to further one's interests. According to World Bank, Corruption is *"the abuse of public power for private benefit"*[1] Accumulation of wealth, property, and misuse of power by public servants is collateral damage to good governance. Yet scientific research needs to be carried out to measure the adverse impact of corruption in India but it is a potential impediment to the development of India and good governance as well.

The article aims to evaluate the effectiveness and efficiency of the Enforcement Directorate as an anti-corruption institution for the implementation and application of legal strategies of the Prevention of Money Laundering Act of 2002 (PMLA), Foreign Exchange Management Act of 1999 (FEMA), Fugitive Economic Offenders Act of 2018 (FEOA), and The Benami Transaction (Prohibition) Act of 2016 (MTPA) in reducing and combating corruption in India. This article exhibits the role and performance of the Enforcement Directorate in the combination of non-doctrinal and doctrinal methods, and their valuable role in preventing and punishing those corrupted by the respective laws was explored thematically. A well-structured interview schedule was employed, with forty-six random respondents. Thick descriptive field narratives of qualitative data were thematically analysed for desired inference. The doctrinal method of data such as, ED's annual reports, case laws, and related judgments, was analysed along with field data.

2. LAW ENFORCEABLE BY THE ENFORCEMENT DIRECTORATE.

The Enforcement Directorate is bestowed with the power to examine and inspect the economic crimes and violations of forex. Its hierarchy changed a lot, in 1956 it was primarily an enforcement unit later renamed as Enforcement Directorate (ED). Currently, it has around 40 branches across India. The investigation of economic crimes and transgressions of foreign currency legislation is the responsibility of the multidisciplinary Directorate of Enforcement. The Prevention of Money

Laundering Act of 2002 (PMLA), effective in 2005 onwards, curbs the conversion of Black Money into White, and the Prevention of Money Laundering Amendment Act of 2012 is empowered to attach and confiscate property secured in these laundering activities.[1] The Act combats money laundering of financial institutions, Banking Companies, including RBI, Insurance Companies, Mutual Funds, and other financial intermediaries, etc, (Foreign Direct Investment (FDI), and External Commercial Borrowing (ECB). PMLA is a criminal statute that passed to stop money laundering, to provide for the confiscation of property derived from, involved in, or connected to money laundering, as well as for things related to or incidental to such activity. The ED's role is to carry out investigations to identify assets acquired through the proceeds of crime, to temporarily seize the assets, to ensure that offenders are brought to justice, and to ensure that the Special court seizes the assets.[2]

3. ED's POWER AND PROFICIENCY IN STANDUP WITH THE SPIRIT OF PMLA.

The PMLA was inducted to conduct target financial fraud against those who accumulated money and property against PMLA. Several revisions to the fundamental legislation have been made throughout time, and the powers of the ED have been amended and they are empowered to investigate and examine anybody, with no compromise on the investigation of financial crimes. While the goal of the broad powers granted to the ED under the PMLA may have been admirable, the outcomes have been fairly retrograde when viewed through the lens of basic criminal law. The subjective nature of the provisions pervades every facet of the legislation. The government has granted the ED extraordinary powers under the PMLA because it is a one-of-a-kind act addressing a major social issue, specifically money laundering.. Several justifications have been offered in support of the broad scope of powers, such as the low number of convictions of PMLA offences due to

[1] Heidenheimer, Arnold J. Political Corruption: A Handbook, New Brunswick, Transaction Publishers, 1989.p.156.

[2] Das P.K., Anti-Bribery and Anti-Corruption Laws in India Along with Supreme Court on Acquittal of Public Servants from Corruption Charges, Publisher: Thakkar Law Publishers,2019. P.156.

administrative difficulties experienced by ED in tracking the source of criminal proceeds in socioeconomic offences. With this legislative reasoning in mind, the PMLA's fundamental aspects, such as custody, inspection, bail, and provisional seizure, will continue to be read in terms of black money criminality.

According to the Supreme Court's decision in the Vijay Madanlal case, any camouflage, procession, acquisition, adoption profits of crime, showing, or requests for money of a crime as unspoiled gravely invites PMLA to invoke against such crimes. It significantly enlarged the scope of this act's application to other financial offences. Anybody in possession of assets that the ED suspect is the result of a crime can be apprehended by the investigating agency. This is significant because, as with any law that extends broad powers, it greatly expands the scope of the ED's abuse of authority under the PMLA. Excessive search, arrest, bail, seizure, and attachment powers are granted. Section 5 of the PMLA allows the agency to blacklist fraudulently acquired assets if it can demonstrate that failure to attach will cause the proceedings to be delayed. In the end, though, this type of provision is required to deal with cunning and high-profile economic fraudsters. At the same time, there is a possibility for purposely misusing the law against individuals and party men with a political vendetta.

To prevent abuse of authority, Sections 17 and 18 of the PMLA initially permitted search-and-seizure operations only when a complaint or charge sheet was filed on a predicate offence. This prohibition was imposed to prevent officials from abusing their power[3]. In the year 2019, the safeguards were completely removed. The Supreme Court upheld its extensive authority to undertake searches and seizures in the Vijay Madanlal decision. Furthermore, the bail terms are highly stringent, and there is no way for the accused individual to obtain a copy of the Enforcement Case Information Report (ECIR). It's probable that the PMLA's reverse burden of proof provision, which declares that the accused is presumed guilty unless he or she refutes this assumption, will

[3] Sections 17 and 18 of PMLA, 2002.

be the final nail in the coffin. There is a lot of debate going on about the unfairness of the PMLA and the power of the ED. Despite the fact that the legislation's purpose is admirable and desperately needed, it is abundantly clear that there is a high risk of abuse of power in connection with the Act. However, in accordance with a revised appeal filed against the Vijay Madanlal judgment, the Supreme Court decided to reconsider key aspects of the decision. It will be fascinating to see how the Supreme Court handles the current difficulties, whether it decides to limit the ED's authority or whether it allows for fairly objective boundaries on the Directorate's powers under the Act[4].

Table-1. Apex Court's decision during Vijay Madanlal's case in PMLA.

Section	SC's Decision
Section 3 Definition of Laundering	*Projecting proceeds as untainted property are not necessary. Mere possession and concealment will suffice as a crime.* *Generating black money even without proof of actually laundering it or converting it to white money is laundering*
Section 5, 8(4),17 and 19 ED Powers	*Rejected that notion has been blanket powers of arrest, the search of person and property, and seizure.*
Section 24 burden of proof on accused	*The burden of proof on the accused is neither arbitrary nor unreasonable.*
Section 45 conditions of bail	*Upheld stringent twin bail conditions required under law for granting bail to accused*
Section 50 ECIR	*No compulsion for the enforcement authority to give a copy of the ECIR (Enforcement case information report)*

[4] Vijay Madanlal vs UOI, SLP(Crl.) 4634/2014

Money laundering clearly has a catalytic effect on heinous crimes such as terrorism and drug trafficking, as well as harming our nation's socio-economic fabric. However, there has recently been an increase in the number of ED visits. According to the records, the ED undertook 3100 searches between 2014 and 2022, up from 113 between 2004 and 2014. The number of ED raids has more than doubled. Despite their unique status, none of these agencies have been given substantial authority. Given this, it makes no logical sense to give ED such unrestricted power. Furthermore, no compelling reason for these powers has been offered. As a result, the ED's authority is regularly (mis)applied to settle personal and political grievances, further muddying the waters. In the context of the review of Vijay Madanlal's decision, the Supreme Court established guidelines and is considering whether to re-examine a few past decisions, such as the ECIR provision and the inverse responsibility toward the evidence. As a result, the full ramifications of the judgment are unknown. There is every reason to believe that the Supreme Court of India will re-establish a balance between the rights of those prosecuted and the need for specialised criminal law.

Recently, the Enforcement Directorate (ED) has been in charge of a number of high-profile investigations, including those involving the National Herald, INX Media[5], Patra Chawl, the SSR Death, and others. The ED is a department of the Ministry of Finance. The present government (Narendra Modi's) believes that these inquiries should be allowed to continue. The opposition, on the other side, has claimed that the government's inquiries are nothing but political witch hunts.

The Foreign Exchange Management Act of 1999 (FEMA) went into force in 2000 and covers irregularities involving NRIs and PIOs, an Indian operating an office, branch, or agency outside India, and an Indian operating an office, branch, or agency in India from outside the nation. It is a civil law that was created to modernise and unify the laws regulating external trade and payments, as well as to assist the orderly expansion and maintenance of India's currency market. Section 37 of FEMA

[5] P Chidamparam vs CBI, SLP, Crl. No.9269 of 2019.

empowers the Director and Assistant Director of ED to conduct FEMA investigations. It gives them authorization to carry out all of the investigation powers afforded to income-tax authorities under the Income Tax Act of 1961.

"In reality, Portion of section 37(3) contains no express reference to any section of the Income Tax Act," the Delhi High Court stated in the case of Suman Sehgal v Union of India[6]. The only logical conclusion that can be derived from this is that no 'process' against a specific or specified individual is required, nor is the prerequisite for exercising such power contingent on an existing judicial proceeding. Section 37(3) powers can be exercised by the relevant authority as long as identified problems are being investigated.[7]" The term "summons" is defined as "a call of authority to appear before a Judicial Officer. Under FEMA Section 37(3), it is not permissible to submit a writ of mandate in court to challenge a summons issued by the Director or Assistant Director of the ED. The Madras High Court made a ruling in KA. Manshoor v. Assistant Director, Enforcement Directorate, Government of India[8]. The petitioner sought to prevent the ED from issuing the summons under Section 37 of FEMA in conjunction with Section 131 of the Income Tax Act.

The petitioner's request to stay the ED's summons was denied by the court. In reaching its conclusion, the court considered the case of *T.T.V. Dinakaran v. Enforcement Officer, Enforcement Directorate,1995 (80) ELT 745 (Mad)*. This was awarded as a result of the now-defunct Foreign Exchange Regulation Act[9]. The court ruled that "When there is suspicion with regard to the involvement of the petitioner in any of the transactions which are forbidden under the FERA Act, it is open to the authorities to summon him for enquiry. Because the records are about him, it is impossible to say that the investigation has nothing to do with

[6]Section 37, Income Tax Act, 1961.
[7] Section 131, Income Tax Act, 1961.
[8] KA. Manshoor vs. Assistant Director, Enforcement Directorate, W.P. No. 2429 of 2009 and M.P. No. 1 of 2009.
[9] T.T.V. Dinakaran v. Enforcement Officer, Enforcement Directorate,1995 (80) ELT 745 (Madras).

the documents requested by the petitioner. When an investigation is launched, authorities cannot reach a conclusion regarding the involvement or non-involvement of any individual until the investigation is completed. During the investigation, if the authorities learn of any other people's participation, the concerned officer may summon those individuals as well in order to conclude the investigation. When Section 40(4) of the FERA Act expressly states that the processes taken by the authorities constitute judicial proceedings, the petitioner is barred from challenging the summons issued as ab initio void. Because he is not an accused, the petitioner cannot assert any rights under Article 21 of the Indian Constitution or Section 24 of the Evidence Act.[10] ED has been entrusted with the duty of conducting investigations into alleged violations of foreign exchange laws and regulations, making decisions, and punishing individuals found guilty of breaking the law.[11] The Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA), gives this Directorate the authority to sponsor instances of preventive detention involving violations of FEMA.

4. THE FUGITIVE ECONOMIC OFFENDERS ACT OF 2018 (FEOA).

This rule relates to Indian criminals who depart the country to evade prosecution. The ED can now seize the property of fugitive offenders who have departed our country in order to avoid prosecution. According to the External Affairs Ministry, there are at least 25 fugitive economic offenders living outside India including well-known businessmen like Chetan Jayantilal Sandesara, Nitin Jayantilal Sandesara, Diptiben Chetankumar Sandesara, Nirav Modi, Vijay Mallya, Mehul Choksi, Sabya Seth, Rajiv Goyal, Alka Goyal, Lalit Modi, and others. The Fugitive Economic Offenders Act of 2018 (FEOA) oversees economic offenders who flee India to avoid punishment, such as Nirav Modi, the mastermind of the Rs. 329.66 crore PNB fraud. The FEO Act forbids a person accused of such an economic violation from fleeing prosecution within Indian

[10] T.T.V. Dinakaran v. Enforcement Officer, Enforcement Directorate [1995 (80) ELT 745 (Mad)]

[11] 15.Kashyap, Subhash C., (Ed). Crime and Corruption to Good Governance, New Delhi, Uppal, 1997.p.121.

territory. This law was created to prevent economic criminals from dodging Indian legal procedures by avoiding the reach of Indian courts. It is a statute that gives the Directorate the authority to seize the property of economic criminals who have fled India and are wanted for arrest and to turn it over to the Government of India. On the one hand, the CBI is following cases involving 23 fugitives, while the ED is handling 13 cases. Vijay Mallya, Mehul Choksi, Nirav Modi, Jatin Mehta, Ashish Jobanputra, Chetan Jayantilal Sandesara, Nitin Jayantilal Sandesara, and Diptiben Chetankumar Sandesara are commonly found on both lists of CBI and ED. There are notorious fugitives namely Dharmendra Singh Anand: Moin Qureshi's close associate. Jatin Mehta: Winsome Diamonds Group Promoter, Ashish and Priti Jobanputra are the owners of Ahmedabad-based ABC Cotspin. Sabhya Seth is the owner of Dwarka Das Seth International in Delhi. Sterling Biotech lawsuit by Hitesh Narendra Bhai Patel. ED miserably failed to bring them before the special court, reasons are debatable with political mileage.

Public revenue is defrauded and the real owner is hidden, covering legal documents, tangible and intangible assets, rights on investments and securities, bonds, and precious metals.[12] The Foreign Account Tax Compliance Act of 2015 is a piece of legislation that aims to crack down on "black money" or undisclosed foreign income and assets. Any income or assets kept outside of India that are not reported by an Indian resident are subject to hefty taxes under the Act, as this is seen as an intentional attempt to avoid paying taxes in India. For instance, in *Tulsiram v. ACIT 2019 112* cases, 200 acres of land were purchased without a source of income, and 2100 cases of the Benami Transaction Prevention Act resulted in levies totaling Rs. 9600 crores in 2019.[13] similar to Rs.105 crores[14] in demonetized currency against the sale of the property in *Marg Realities Ltd. v. DCIT.*

[12] Thakur Bhim Singh (Dead) by Lrs and Anr. Vs. Thakur Kan Singh, (1980) 3 SCC 72.
[13] Tulsiram v. ACIT 2019 112
[14] Marg Realities Ltd. v. DCIT. Tax Case Appeal Nos.41 to 43 & 220 of 2017.

5. ZERO-ADJOURNMENT POLICY.

Adjournments are a significant issue for anti-corruption and vigilance cases since they increase the time that each case spends in limbo. Surprisingly, Section 4(4) of the Prevention of Corruption Act (POC) requires a special judge to hold an offense's trial on a daily basis if practicable. These courts are supposed to adhere to a "zero-adjournment policy." Even if unnecessary delays must be avoided, they must not impede a fair trial. In *V.K. Sasikala v. State Repetitive. by Superintendent of Police (2012) 9 SCC 771*, the appellant-accused sought certified copies of certain unmarked and unexhibited documents, as well as an inspection of those documents, in a proceeding brought under Section 13 of the Prevention of Corruption Act[15]. The court discovered that many papers are routinely seized throughout the process of an inquiry into a criminal situation. Even though only reports that support the judicial process are required to be forwarded to the Court under Section 173, the Court must make those documents available to the accused in cases where some of the seized materials and records do not support the trial but rather support the accused.

6. PROPERTY ATTACHMENT.

In order to achieve the aforementioned objectives, the temporary attachment of property during an inquiry is permitted by the PMLA's Section 5 (1). By issuing a Provisional Attachment Order. (1) When the Director, or any other officer not below the rank of Deputy Director authorised by the Director for the purposes of this section, has reason to believe (the basis for such belief shall be set forth in writing), on the basis of information in his custody, that (a) Any person is in ownership of any stolen funds, and (b) Such criminal proceeds are likely to be concealed, transferred, or dealt with in any manner.[16] The Directorate of Enforcement (ED) has attached assets worth Rs.7.90 crore in two NDPS cases involving *Gurdeep Singh Rano & others and Rajesh Kumar & others* under the Prevention of Money-laundering Act (PMLA), 2002. The attached assets include 16 immovable properties in Punjab comprising

[15] V.K. Sasikala v. State Repetitive. by Superintendent of Police (2012) 9 SCC 771
[16] Section 5(1) of PMLA 2002.

land and buildings belonging to Gurdeep Singh Rano and his family members, and 11 immovable properties in Punjab belonging to Rajesh Kumar and his family members.[17]

The assets attached also included movable properties such as bank account balances, cash and gold ornaments seized by the LEA, and so on. The ED launched a money laundering inquiry based on an FIR filed by the Special Task Force of the Punjab Police under different sections of the NDPS Act, the IPC, and the Arms Act. It was also claimed that Gurdeep Singh Rano has connections with other suspected illicit drug smugglers, notably Simranjit Singh and Tanvir Bedi, who are both living in the United States[18]. The ED launched a money laundering probe against Rajesh Kumar and others based on an FIR filed by Punjab Police at PS City Faridkot under the NDPS Act of 1985. According to the FIR filed against Rajesh Kumar, he was selling intoxicant drugs under the cover of a medical establishment he owned. According to the ED investigation, the majority of the immovable properties in both PMLA cases were purchased in cash, and the accused were unable to offer any documentary evidence to support the source of funding[19].

Table-2. Provisional Attachment Order

Registered cases	Attachment orders	Value of assets attachment	Confirmed case PMLA	Assets valued Adjudicating authority	Arrested	Cases in trial	Convicted
5422	1739	104702 Crores	1369	58591 Crores	400	992	25

Source: Annual Report, ED, Government of India, 2021.

[17] Gurdeep Singh Rano & others and Rajesh Kumar & others, No.44/DCIT(BP)/2019-20.
[18] Times of India, 22 months after heroin bust, ED raids 9 places in Punjab, October 10, 2021.
[19] Ibid.

6.1. **ED Case Status Property Attachment of PMLA-2002 as of 2022**.

According to Section 8(3) of the PMLA, 2002, the Provisional Attachment Order has confirmed if the Adjudicating Authority determines that the property is used for money laundering. Once a Section 8(3) order has been made, the property is subject to attachment for 365 days or until the end of any relevant legal processes.[20] When the Adjudicating Authority determines under subsection (2) that any property is involved in money laundering, he shall, by written order, confirm the attachment of the property made under subsection (1) of section 5 or the retention of property or record seized or frozen under section 17 or section 18, and record a finding to that effect. Thereafter, such attachment or retention or freezing of the seized or frozen property] or record shall—(a) continue for a maximum of 364 days while the investigation is ongoing, or for the duration of any proceedings related to any offence under this Act before a court or under the applicable law of any other country before the appropriate court of criminal jurisdiction outside of India,[21] as applicable; and (b) once the Special Court issues a confiscation order in accordance with Section 8's Subsections 5 and 7, Section 58B, or Section 60's Subsection 2A; section 8(4) When the temporary order of attachment issued pursuant to subsection (1) of Section 5 has been upheld pursuant to subsection (3), the Director or any other officer designated by him in this regard shall immediately take possession of the property so attached or so frozen pursuant to subsection (1) of Section 17 in the manner that may be prescribed.

The ED attached Amway India Enterprises Private Limited's assets worth 757.77 crores, accusing it of running a multi-level marketing scam (Pyramid scheme) by enrolling lakhs of people as members and offering them lucrative commissions on exorbitantly priced products as long as they kept adding members below them[22]. The investigation revealed that Amway was operating a pyramid scheme camouflaged as a direct marketing network. "It has been observed that the costs of the majority

[20] Section 8(3) of PMLA, 2002.
[21] Section 17, 18 PMLA, 2002.
[22] The Hindu, ED attaches Amway's assets, April 18, 2022.

of the products given by the company are unjustified, and there was little focus on the product in comparison to the alternative popular products of recognised manufacturers available in the open market.

Table-3. Case Status of FEMA/PMLA

2014-15		2015-16		2016-18		2019-20		2020-21		2021-22	
FEMA	PMLA	FEMA	PMLA	FEMA	PMLA	FEMA	PMLA	FEMA	PMLA	FEMA	PMLA
915	178	1516	111	1993	200	3360	562	2747	981	5313	1180

Source: Annual Report, ED, Government of India, 2020.

Only 23 defendants have been found guilty in the past 20 years under the application of the PMLA, for a success rate of just 0.5%. But the ED is actively executing the law now against the accused; over the past five years, the number of PMLA cases has increased by up to 187%. There is a noticeable surge in corruption cases under FEMA and PMLA from 2019 to 2022. 14,143 cases were reported, however, only 4, 913 (with a 6% rise) cases were reported from 2014 to 2019.[23] In contrast to the 4,913 cases reported between 2014-17, the Directorate of Enforcement (ED) has registered 14,143 cases between 2019–22. However, very few cases were reported from 2002 to 2014, and ED was dormant.

6.2.Recovery of Black Money.

By May 2021, 166 cases had raised Rs 8,216 crores under provisions 10(3) and 10(4) of the Black Money Act. In the same period, taxes totalling Rs. 2786 crores were imposed on an unreported income of Rs. 8,465 crores. Unreported black money from abroad of Rs. 11,010 crores were collected. Rs 20,078 crores of rupees had been located in the same year according to the Panama Papers. A comparative analysis of cases has been given in the matrix.

[23] Annual Report, ED, Government of India, 2020.p.145.

Table-4. Case Matrix of Black Money- 2016-2021.

Case Details	2016-17	2017-18	2018-2019	2019-20	2020-21	Total
Prosecution Complaints in the Court	1252	4527	3512	1226	173	10690
Cases Compounded	1208	1621	2235	1410	537	7011
Conviction order passed	16	75	105	49	16	261

When it comes to FEMA, there are significant inferences shown that the investigation, disposal, show cause notices, and adjudication are for effective monitoring. In accordance with the PMLA's provisions, assets worth Rs. 19,111.20 crores have been attached as a result of the ED's investigation. Rs. 15,113.91 crores, assets from this group have been returned to Public Sector Banks.

Table-5. Status of Cases under FEMA and FEOA-2022.

FEMA Cases 2022				**FEOA Cases 2022**		
Cases under investigation	Cases disposed	Cases /show cause notice issued	Special Court Adjudicated	Number of cases/Persons	Persons/ cases declared suitable	Properties Confiscated
30716	15495	8109	6472	14	9	433 Crores

Source: Directorate of Enforcement, Department of Revenue -Comparative Analysis of Data of FEMA and FEOA-2022.

Accordingly, 84.61% of the total deceived funds in these cases have been attached or confiscated, and 66.91% of the total damage to the banks has been given to the banks or confided in by the Government of India.

Additionally, by selling assets that the Directorate of Enforcement had transferred to the group of banks led by SBI, they were able to raise Rs. 7,975.27 crores. During the last eight years, ED issued a Red Corner notice against 20 corrupt persons who absconded from India, the same is sent to Interpol for further follow-up to identify their whereabouts.

7. CAUSES AND CHALLENGES-FIELD DATA ANALYSIS.

A structured interview was administered with forty-six respondents composed of former people's representatives, retired bureaucrats, experienced retired investigating officials, and a few media experts to find the potential factors of corruption among public servants. Public servants, either way, are found corrupt to do the law full of things and unlawful things for example for transfer to their hometown the low-grade public servant bypasses the procedures and graft the high-grade officials.

Table-6. Causes for Corruption among Public Servants.

Respondents	Party Fund	Election expenses	Low salary	Lavish Life	**Tax Evasion**	To do legal duty	To do illegal duty
Ex. People's Rep. (10)	70% (7/10)	90% (9/10)	40% (4/10)	40% 4/10	**70% (7/10)**	60% (6/10)	70% (7/10)
A, B, C Grade Public Servants Rtd. (15)	53% (8/15)	60% (9/15)	80% 12/15	53% 8/15	**40% 6/15**	60% 9/15	80% 12/15
Rtd. Investigators (8)	87.5% 7/8	87.5% 7/8	75% 6/8	87.5% 7/8	**75% 6/8**	87.5% 7/8	87.5% 7/8

Stakeholders Media/ NGOs/Social Movement (13)	84.6 % 11/13	92% 12/13	84.6 % 11/13	92% 12/13	**84.6% 11/13**	46.5 % 6/13	38.5 % 5/13

Source: Field Data -Emerged from the short survey conducted in the field with forty-six respondents.

7.1.Challenges Faced by the Investigating Officers.

ED is an enforcement wing that conducts an investigation, search, seizure, and attachment of unlawful property to the government. Its role and performance are crucial in bringing the corrupt before the special courts. it faced numerous challenges but, despite them, it performed well, especially in the last eight years. The below-given table shows that it faced critical problems during the collection of evidence, with around 83% of the respondents expressing that it was not easy. 77% said they faced serious problems obtaining a search warrant. 81% said they have faced a physical threat in various ways. 79% of respondents said that they faced a threat from a political party. The same proportion faced criticism from the media.

Table-7. Threat Faced During the Search.

Responses	Evidence Collection	Search warrant	Physical Obstacles faced	Local Community threat	Party Threat	Media Critics
Yes	83%	77	81%	68%	79%	79%
No	17%	23%	19%	22%	21%	21%

Source: Field Data -Emerged from the short survey conducted in the field with forty-six respondents.

7.2.Political Interference.

Many viewed political interference as a potential factor for the success or failure of public enforcement authorities in preventing and punishing corrupt persons. There are instances where officers were transferred to another department to mute the efficacy of the action on the given cases. For example, 87% of respondents opined that their transfer was due to political interference. Gross interference is direct and indirect interference 89% and 93% respectively is a matter of concern. Similarly, the pendency for a search warrant 82.6%or sudden approval 39% for a search is significantly instrumental for the performance. Media, party sponsored, and IT of each party viral the ED actions in different colours.

Table-8. Political Interference.

Response	Transfer	Political Party Direct Intervention	Political Party Indirect Intervention	Sudden Approval Search Order	Search Approval Pendency	Party Media Critics
Agree	84.7 % 39/46	89% 41/46	93% 43/46	82.6% 38/46	84.7% 39/46	93% 43/46
Disagree	15% 7/46	10.6% 5/46	4% 2/46	17% 8/46	15% 7/46	6.5 3/46

Source: Field Data -Emerged from the short survey conducted in the field with forty-six respondents.

7.3.Overall Performance.

The below-given table discloses institutional competency in a fair trial, completing the charge sheet, argument, and producing relevant pieces of evidence in the special court. It is highly satisfactory after the 2014 ED

scored above 93%. Rule-based action against corrupt public servants was brought before them. Again, they scored above 95% in effectively applying the laws and rules to the given cases. Efficiency in handling strategy and applying institutional mechanisms as authorities they do justice to their profession. ED certainly stands to implement core provisions of the concerned legal instruments without any compromise. However, it faces numerous other challenges when it comes to seizure, recovery, search, and so on.

Table-9. Performance status of ED and Other Agencies

Scale Criteria	CVC		CBI		ED		ACB		Lokpal
Competency (Fair trial, Charge sheet, The argument in the special court)	After 2014	Before 2014	After 2014	Before 2014	**After 2014**	**Before 2014**	After 2014	Before 2014	2019 onwards
	85%	13%	83%	14%	**93%**	**8%**	77%	NA	67%
Efficacy Rule-based Action	89%	15%	84%	14%	**95%**	**11%**	81%	NA	85%
Efficiency Role-Based Action	88%	17%	86%		**94%**	**13%**	82%	NA	81%

Source: Field Data -Emerged from the short survey conducted in the field with forty-six respondents.

7.4.Political Parties Before and After 2014.

There are seven National level political parties and 11 major registered regional-level parties. Around 66 registered but unrecognized political parties align in electoral politics to form the government. These political parties secure considerable seats in Parliament and state legislatures.

Some of them were found corrupted, and recently ED allied agencies exposed them. The table below describes the status of political parties and their commitment to upholding the rule of law and good governance. It is evident that the same enforcement public authorities performed their enforcement obligations before and after 2014.

Table-10. ED Action Comparison of Cases among Political Parties.

2004 to 2014	2014 to 2022	2004 to 2014	2014 to 2022	
Congress 5	BJP Allies 6	BJD -NA	SP 5	AIADMK 1
TMC 7	Congress 24	RJD NA	TDP 5	SBSP 1
BJP 3	TMC 19	TDP NA	AAP 3	MNS 1
BSP 2	NCP11	CPI (M) NA	INLD 3	TRS 1
BJD 1	Shiv Sena 8	PDP NA	YSRCP 3	Others 1
YSRCP 1	DMK 6	AIADMK 1	CPI (M)2	
DMK 4	BJD 9	MNS NA	NC 2	
Independent 3	RJD 5	SBSP NA	PDP 2	
	BSP 5		Independent 2	

Source: Times of India, 12th July 2022, P.2

The public servants who are elected to serve the people were caught in political corruption. There is no research done to assess the adverse impact of governance in their respective constituencies. But so far, many were out of the radar of the ED and some of them were targeted purposely by the ED. Around 95% of cases were opened against opposition parties, which indicates ED is more active at the same time it invited criticism that it was acting as a tool to suppress the opposition. But when it comes to the cases before 2014, where was the ED? What was its success? The answer is visible.

7.5.ED Case against High-Profile Public Servant.

80% of around 200 politicians were detained, arrested, raided, interrogated during the last 18 years. This includes both ruling and opposing parties in national and regional political parties. Before 2014, hardly 2 to 3 Ex.CM and Cabinet Ministers were brought before trial. Only 3 personas were convicted. Whereas after 2014, 2 sitting CMs and 14 Ex. CMs were under trial. Significantly, 24 MPs and 7 Ex. MPM were brought before a special court for trial.. Similarly, during the same period, 32 high-profile politicians were charge-sheeted and 19 were arrested for trial.

Period	CM	Ex. CM	Cabinet Minsters	MPs	Ex. MPs	MLAs	Ex. MLAs	Charge Sheeted	Arrest/ Convicted
After 2014	**2**	**14**	**19**	**24**	**7**	**21**	**11**	**32**	**Arrested 19**
Before 2014	**0**	**2**	**3**	**3**	**0**	**0**	**0**	**9**	**Convicted 3**

Table-11. High-Profile Public Servant.
Source: Times of India, 12th July 2022, P.2

8. ED's Compliance with OECD

The Legal Instruments of the OECD, which India has adhered to, are now considered to be legally binding in India. A Declaration on the Efforts Being Made to Combat Foreign Bribery: Towards a New Era of Enforcement. Beginning in 2016 initiatives in India have been launched with the goal of combating corruption and bribery through improved openness. Some of these projects, such as the construction of online transaction platforms, are already underway. If international bribery can be properly combatted, India's growth in its foreign investment could be

boosted. India participates in meetings of the G20 Anti-Corruption Working Group, which is tasked with monitoring and enforcing compliance with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, in accordance with the Anti-Corruption Action Plan for 2017-2018 that was developed by the G20 (Anti-Bribery Convention).

Table-12. Extract from OECD Note on Putting an End to Corruption.

'Eighty percent of all foreign bribes are given to officials working for state-owned businesses, whereas just eleven percent are given to heads of state or ministers.	*"The mining industry, the construction industry, the transportation and storage industry, and the information and communication industry account for 66 percent of all cases of foreign bribery."*	*'10-30%* *of the investment in a publicly funded construction project may be lost due to mismanagement and corruption'*	*'Twenty-four of the OECD member countries that signed the anti-bribery pact have yet to complete an international enforcement action.*
'The OECD Anti-Bribery Convention has been ratified by 41 countries, making bribery a crime everywhere. *India is one among them'*	*A significant enforcement gap persists, with only 17 of the 41 Parties having successfully resolved a foreign bribery case to date.* *India is one among them'*	*'Investigations and prosecutions of bribery cases should be independent of considerations of national economic interest'*	*'Secrecy from law enforcement provides a fertile ground for financial crimes such as corruption and tax evasion'*
'99 jurisdictions have now signed up to implement the AEOI standard and begin the	*'18 countries have introduced or strengthened whistle-blower protection in response to OECD peer evaluations and*	*'Investigators and prosecutors must also have a reasonable amount of time to follow a bribery case and have access to the*	*'Criminalisation alone is not sufficient. Active enforcement is the only truly effective means*

first exchanges in 2017 and 2018'	*Recommendations'*	*tools they need to effectively investigate the often-complex cases of bribery of foreign and domestic public officials'*	*for deterring and ending bribery'*

Source: OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials, OECD Publishing, Paris.2014-2020.

India was also featured in the G20 Self-Assessment Report on Combating Foreign Public Official Bribery. Adherence to the Convention would assist India to strengthen its enforcement of transnational bribery and provide a level playing field for fair competition, aligning it with international standards. Indian authorities have attended meetings of the OECD Working Group on Bribery, which monitors the Anti-Bribery Convention's implementation. ED attempts to stand with OECD guidelines to deal with the corrupt with stringent provisions.

Table-13. Foreign Bribery Cases Occur to Obtain a Public Procurement Contract.

Public purchasing 57%	Travel Visa 1%	License and approval 6%	Other preferential treatment 7%
Unknown 7%	Information about sensitive sources 4%	12% customs clearance	6% preferential tax treatment

Source: OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials, OECD Publishing, Paris.2014-2020.

Global level observation on the share of party states to the foreign bribery status, for example, the above-given table, indicates favourable tax treatment has gone up to six percent, similarly, for public procurement is the highest at 57% when ED is particular in tapping them for tax evasion and money laundering.

9. CONCLUSION.

In India, corruption is eroding the political, democratic, and economic systems and harming the well-being of society. Both public spending and revenue are impacted by corruption. As a result, the government finds it more challenging to implement prudent economic measures, which raises budget deficits. Because corruption permits wealthy people to profit from government activity at the expense of the rest of society, income disparity is likely to widen as a result. Corruption distorts markets and resource distribution which hinders the government's capacity to put in place the necessary regulatory controls and inspections to address market failures. But the source of black money is corruption. Black money is to corruption, what air is to plants. According to a global study, international banks are receiving significantly more "dirty money."

It is possible to draw the conclusion that law enforcement agencies will be more watchful beginning in 2019 and going forward. The Enforcement Directorate has been very active over the past five years, making an effort to serve and enforce the intuitive powers and strategy to significantly control and prevent corruption. It is possible, but not certain, that they are primarily working on cases of corruption involving the other party. This is the most common criticism levelled against them. However, at least they are functionally engaged and performing effectively, whereas, for the past sixty years, they were ineffective.

Combating corruption is a necessary step toward achieving the overarching goal of making government operations more just, efficient, and fruitful. When public resources are used in a manner that lacks sufficient openness, accountability, and probity, it is difficult for the state to win citizens' confidence and establish its power. The legitimacy of democratic institutions is called into question, and corrupt practices at every level of government are detrimental to effective administration. There is a clear connection between corrupt behaviour and both a disregard for human rights and activities that are anti-democratic. This is also true the other way around. Over the course of the past two

decades, India has had a great deal of success in bringing the fight against corruption to the highest political levels possible on a global and national scale, as well as in improving the anti-corruption regulations and the implementation of those regulations.

In all phases of development, countries face a significant challenge when it comes to their ability to make long-term economic, political, and social progress due to the pervasive problem of corruption. Bribery costs businesses their ability to be innovative and competitive, while corrupt public officials waste money that could be used to improve the health of the general population. As a consequence of this, corruption has also been a contributor to the recent rapid increase in the disparity between income and wealth. The current refugee problem is made worse by corruption because it makes it simpler for organised criminals to smuggle people. Corruption also has an effect on efforts to mitigate the effects of climate change because it encourages illegal logging. In addition, one of the most significant obstacles to achieving Sustainable Development Goals by 2030 will be corruption. It is possible to draw the conclusion that in order to demonstrate its efficacy, the ED should also be actively involved in the cases of members of the ruling party; however, the fact that it is interested in applying legal provisions against the cases of opposition leaders indicates that there is favouritism. In cases involving prominent commercial corporations and multi-millionaires who have avoided paying taxes and converted illegal funds into legal ones while having a connection to politics, the ED does not take any action. This is evidence that the ED is solely active for political vendetta and mileage, as the punishment rate is extremely low, with barely 0.5% of the corrupt getting convicted; the sentence handed down. The corrosive effect that corruption has on faith in government In the not-too-distant future, the self-vigilance of all citizens will be necessary to ensure good governance and prevent corruption.

CIVIL SOCIETY ORGANISATIONS INVOLVEMENT IN PROMOTING ACCOUNTABILITY: STUDY OF SOCIAL AUDIT OF MGNREGA IN JHARKHAND

Dr. Rajesh Kumar Sinha[1]

Abstract

Civil Society Organisations are important stakeholders in promoting transparency and accountability in governance. Social audit as an effective tool to enforce accountability has not got institutionalised in the implementation of the Mahatma Gandhi National Rural Employment Guarantee Act which assures 100 days of employment to rural households who demand it. In Jharkhand, CSO representatives have been engaged in the social audit structure and process in various capacities such as members of governing board, members of jury which decides on actions to be taken on findings of social audit and members of action taken report review committees etc. On the basis of a primary survey, this paper captures and analyses perceptions of CSO representatives and also social audit resource persons on the nature, scope and efficacy of CSOs engagement in social audit in Jharkhand and their suggestions to improve this engagement further. The paper has found a positive contribution of CSOs in the social audit process in Jharkhand and has recommended to further strengthen CSOs engagement with the social audit unit and the social audit process so that effectiveness of MGNREGA can be improved.

Key Words: *CSO, Social Audit, MGNREGA, Jharkhand, Accountability*

1. INTRODUCTION

In India, Social Audit of Government programmes evolved from the efforts and advocacy of Civil Society Organisation (CSOs) and has now

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been institutionalised under the Mahatma Gandhi National Employment Guarantee Act (MGNREGA) as a part of the government but functioning independently. In Jharkhand, the Social Audit Unit which facilitates social audits of MGNREGA, have involved CSOs in the structure and process of social audit.

This paper is based on an empirical research study in which perceptions of CSO representatives and social audit resource persons on the involvement of CSOs in social audits of MGNREGA in Jharkhand and how this involvement is impacting social audit has been described and analysed. Data has been gathered from official records, interviews of key office bearers, and administering structured questionnaires to CSO representatives and social audit resource persons. Further, based on the findings of the research study, some policy and operational recommendations have been made to further strengthen CSOs engagement with social audits in promoting accountability in MGNREGA.

2. LEGAL FRAMEWoRK FOR SOCIAL AUDIT IN MGNREGA

Section 17, proviso 2 of the Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA), 2005 says that the Gram Sabha shall conduct regular social audits of all projects under the scheme taken up within the Gram Panchayat. Proviso 3 of this section further says that the Gram Panchayat shall make available all relevant documents including muster rolls, bills, vouchers, measurement books, copies of sanction orders, and other connected books of account and papers to the Gram Sabha for the purpose of conducting the social audit.[2] For operationalizing these provisions of the MGNREGA, the Ministry of Rural Development, in consultation with the Comptroller and Auditor General of India, notified the 'Mahatma Gandhi National Rural Employment (MGNRE) Audit of Scheme Rules' 2011. These Rules mandate the setting up of an independent Social Audit Unit (SAU) in every State to build the capacity

[2] The Mahatma Gandhi National National Rural Employment Guarantee Act, 2005, Ministry of Rural Development, Government of India. Available at https://nrega.nic.in/amendments_2005_2018.pdf. Last seen on 24.01.2023.

of Gram Sabha in conducting social audits.[3] As per the Rule 4 of MGNRE Audit of Schemes Rules, 2011 the Government of Jharkhand constituted a Social Audit Unit vide Notification No-10-3002/SA/2015/RD-(N) 79 dated 2nd May 2016. The Social Audit Unit is currently a cell within the Jharkhand State Livelihood Promotion Society (JSLPS). Further, the Ministry of Rural Development, Govt. of India, has issued Auditing Standards for Social Audit in the year 2016 with a purpose to improve the quality and validity of the social audit process.[4]

Although a legal framework has been created and social audit units have been set up in all States except Goa, it faces several challenges. Important among these challenges are as follows:

- All GPs are not being social audited. In the year 2022-23 36 percent of GPs have not been social audited even once in a year. The main reasons are inadequate number of social audit resource persons and inadequate financial resources with the social audit units which facilitates social audit.
- Follow up actions on findings of social audits are delayed and inadequate. Only 7.9 percent of issues identified during social audits have been closed by taking actions on those issues in 2022-23. Misappropriation of approximately Rs. 133 crore was identified by social audit teams during the year 2022-23 but only 7.15 percent of this misappropriated amount has been recovered.[5]

To improve coverage and also to ensure follow up action on the findings of social audits, a strong public opinion in favour of social audits needs

[3] MGNREGA Audit of Scheme Rules, 2011, MoRD Notification 30th June 2011. Available at http://mnregaweb4.nic.in/netnrega/SocialAudit/guidelines/document/MGNREGS%20Audit%20of%20Scheme%20 Rules,%202011.pdf. Last seen on 24.01.2023.

[4] The Auditing Standards for Social Audit, Ministry of Rural Development, Government of India. Available at https://nrega.nic.in/netnrega/writereaddata/Circulars/1948Social_Audit_.pdf. Last seen on 24.01.2023

[5] MIS Reports from Social Audit section on official website of MGNREGA https://mnregaweb4.nic.in/netnrega/MISreport4.aspx last seen on 05.04.2023

to be created, and CSOs can play an important role in this regard. Although many Directors of Social Audit Units in States have a CSO background, not much effort has been made to actively involve CSOs in the structure and process of social audits. Jharkhand is one State where CSOs are closely involved in the social audit process and decision making process at different levels.

3. METHODOLOGY OF THE EMPIRICAL RESEARCH STUDY

During the study, primary as well as secondary data have been collected. Secondary data was gathered from documents and records of the SAU of Jharkhand such as annual reports, minutes of Steering Committee meetings, etc. Primary data was gathered from CSO representatives, officials of SAUs, and district and block level social audit resource persons. Key informants such as the Director, Social Audit Units, and leaders of CSO networks in the State were interviewed with the help of a structured interview schedule. Primary data for social audit resource persons and representatives of CSOs have been collected with the help of two separate questionnaires, one for CSO representatives and another for social audit resource persons. 47 out of 72 CSO representatives were administered questionnaires. 07 of these CSO respondents represent State level CSOs, 09 are from Santhal Pargana division, 08 are from Kolhan division, 07 are from Palamu division, 09 are from North Chotanagpur division and 08 are from South Chotanagpur division. There are approximately 240 social audit resources persons (DRPs and BRPs) in the State. Out of these, 82 resource persons were administered questionnaires. Sampling was randomly done after listing resource persons from different divisions, gender and social category wise. After cleaning the data, tabulation and analysis of the data has been done with the help of MS Excel software.

4. FINDINGS AND DISCUSSION

4.1. Background of CSOs involvement in Social Audit of MGNREGA: In Jharkhand, social audit has been piloted and popularised by CSOs before the State Government adopted it to scale up as per the provisions of section 17 of the MGNREGA. In 1998, Public Distribution System (PDS) was social audited in Palamu district when Jharkhand was part of Bihar.

Later in Palamu, Swarn Jayanti Rojgar Yojana (SGRY) was also socially audited. At that time, muster rolls were physical and without unique numbers. It was observed during the social audit that printed muster rolls were available in the market and used by implementing agencies. Muster rolls were fudged and filled to accommodate maximum permissible expenditure. When social audit brought that to the notice, the practice of issuing printed muster rolls with unique numbers started. Later, when the Social Audit Unit (SAU) got formed, CSOs led social audits in Jharkhand became State Government SAU led social audits. However, CSOs remained closely associated with the SAU.

The steering Committee of the SAU of Jharkhand functions as the Governing Board. State Convenor, Jharkhand NREGA Watch (a network of CSOs) and Professor Ramesh Sharan (Ex Vice Chancellor and a leading academician-activist) are Members of the Steering Committee of the SAU as CSO representatives. In the second Steering Committee Meeting of the Social Audit Unit, held on 7th December 2016, detailed discussion on the need for engaging with CSOs and CBOs took place.[6] SAU of Jharkhand organises periodic State level consultation and meets with the representatives of CSOs in which CSOs from different districts and selected social audit resource persons are invited.

A separate independent ATR Review Committee has been set up at the State level consisting of Members from CSOs, Academics, PAG and Media, with a purpose to introduce a higher level of transparency.[7] In the first meeting of the Steering Committee of the Social Audit Unit of JSLPS held on 10th May 2016, the recruitment process of the State and District level positions including State Coordinator, Social Audit Specialist (Capacity

[6] JSLPS, Govt. of Jharkhand. *Minutes of the 1st Steering Committee of Social Audit Unit, JSLPS, 2016*. Retrieved from http://www.saujharkhand.org/wp-content/uploads/2017/08/1st-Meeting-MoM.pdf on 27.07.2021

[7] JSLPS, Govt. of Jharkhand. Minutes of the 4th Steering Committee of Social Audit Unit, JSLPS, 2018. Retrieved from http://www.saujharkhand.org/wp-content/uploads/2018/11/6th-Steering-committee-Minutes.pdf on 27.07.2021

Building), Social Audit Specialist (MIS), DRPs was approved. It was decided that CSO's representatives in the MGNREGA Ombudsman Selection Committee will also be a Member of the Notified Committee for Selection of these posts. Accordingly, Professor Ramesh Sharan was included in the Committee.[8] As facilitation of social audits require a commitment towards the rights of marginalised sections of society, SAU has given priority to candidates who have worked with rights based civil society organisations. The Human Resource Development Policy of SAU describes the approved eligibility criteria. For the post of Social Development Specialist prior experience of working with any reputed CSOs working in Jharkhand is one of the eligibility criteria.[9] Most CSO representatives are engaged with SAU and the social audit process in Jharkhand as members of the jury at GP, Block, District and State levels. This jury decides on actions to be taken on the findings of social audit and also reviews actions taken by implementing authorities. SAU has constituted a Grievance Redressal Committee (GRC) to deal with violations of code of conduct. The current committee has the CEO of the JSLPS and three CSO representatives.

4.2 Profile of CSO Representatives involved in Social Audit

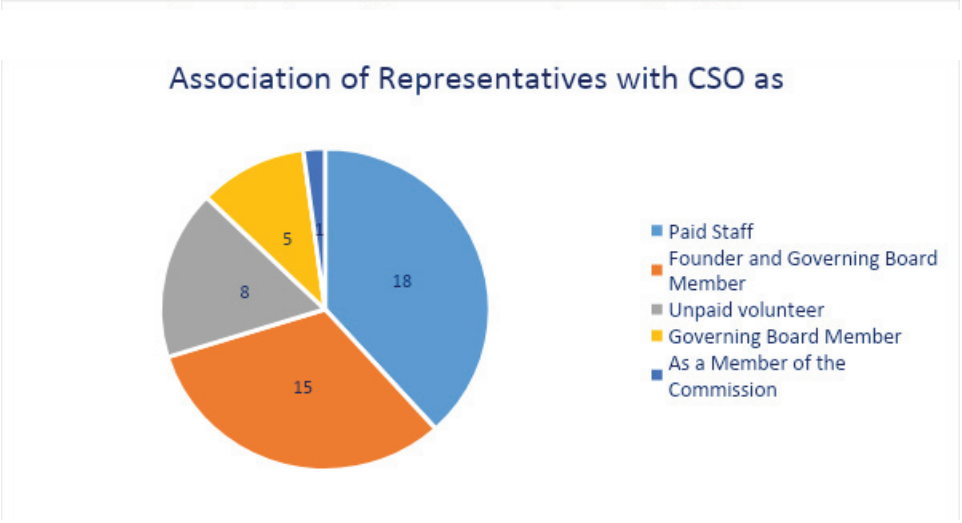
A total 47 CSO representatives have been interviewed to study perceptions of CSOs about their engagement with the social audit process in Jharkhand. Out of 47 representatives interviewed, there are 39 male respondents and 8 female respondents. A large majority (32) of respondents belonged to CSOs registered under the Societies Registration Act. Involvement of more registered CSOs in social audit leads to more responsible behaviour by non-State actors as these organisations are governed by certain bylaws and regulated by various rules and laws of the State and their governing board members are

[8] JSLPS, Govt. of Jharkhand. *Minutes of the 1st Steering Committee of Social Audit Unit, JSLPS, 2016*. Retrieved from http://www.saujharkhand.org/wp-content/uploads/2017/08/1st-Meeting-MoM.pdf on 27.07.2021

[9] JSLPS, Govt. of Jharkhand. *SAU-HR Policy, JSLPS, 2017*. Retrieved from http://www.saujharkhand.org on 27.07.2021

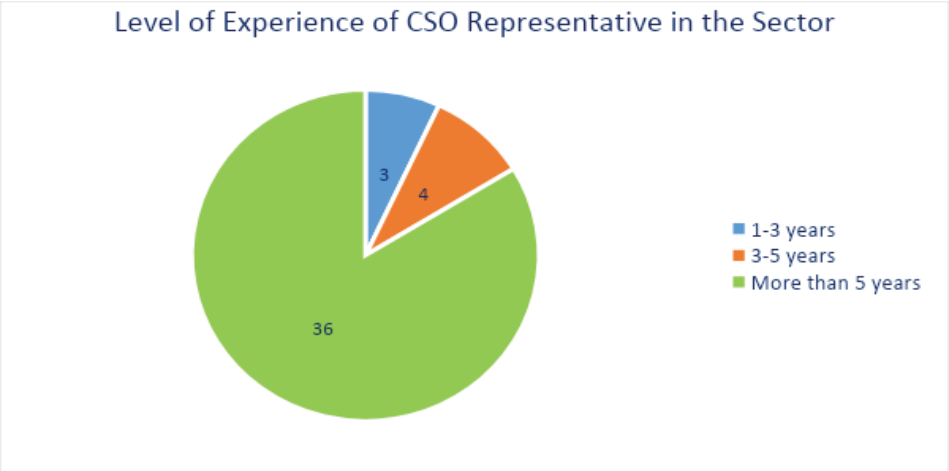
known. In turn, implementing authorities also feel more comfortable sharing information to and seeking advice from registered CSOs. Graph-1 shows that 18 of these CSO respondents are paid staff of these CSOs, fifteen of them are founders of these CSOs, eight of them are unpaid volunteers, and five of them are governing board members. Although involvement of paid staff brings professionalism, it also leads to instability. When paid staff leave these CSOs, another person from CSO starts representing the CSOs in social audits and previous experience sometimes gets lost.

Graph-1



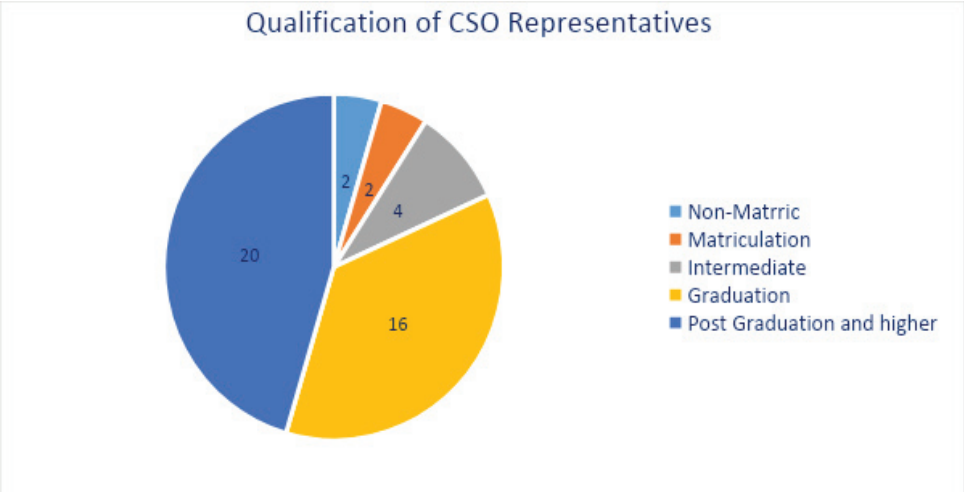
Most CSO representatives who are associated with SAUs and social audit processes in the State have substantial experience (Graph-2). More experienced CSO representatives are contributing significantly in various processes of social audit and also have better acceptance and recognition from MGNREGA implementing authorities.

Graph-2

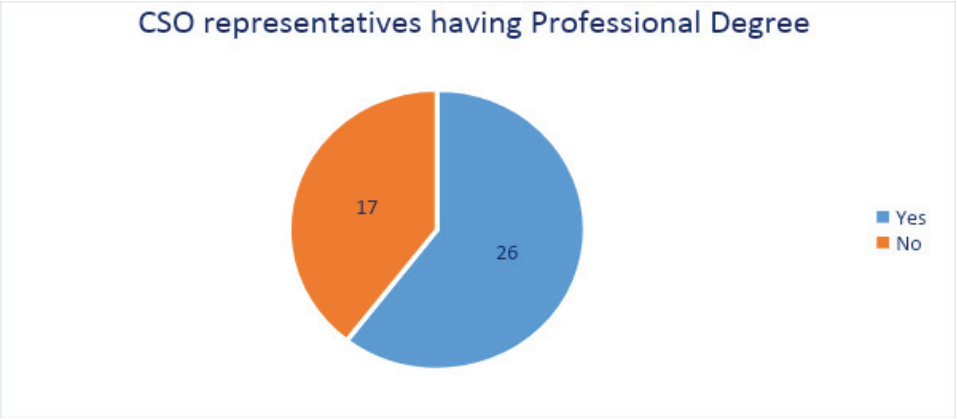


As can be seen in Graph-3, twenty of these CSO respondents have post-graduation or higher educational degrees and 16 of them are graduates. Further Graph-4 shows that a majority (60%) of CSO representatives associated with SAU have a professional degree. More educated CSOs representatives not only contribute in policy formulation, but also provide inputs on social audit formats, processes, and capacity building of resource persons. More educated CSO representatives also feel confident to function as members of a jury where they have to seek explanation from officials and make decisions.

Graph-3



Graph-4



4.3 Nature of CSOs Engagement with Social Audit

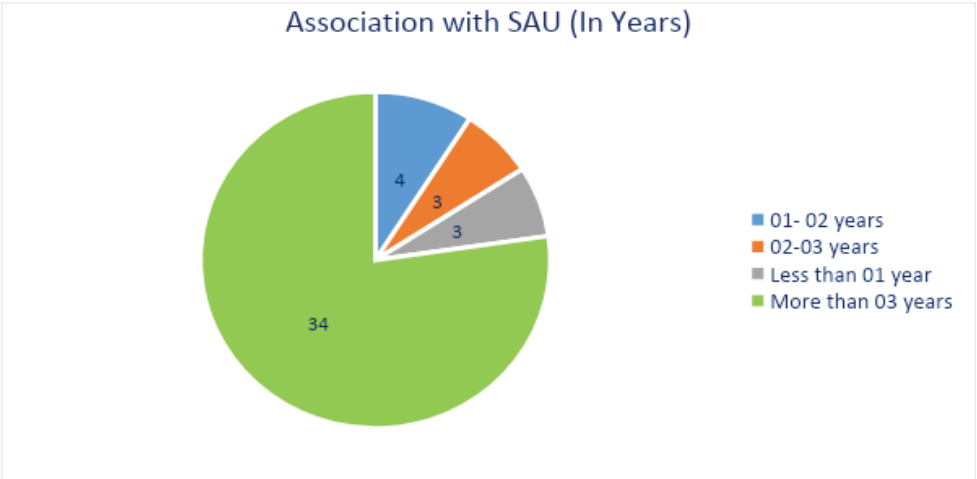
Graph-5 shows that 29 respondents are involved in social audit process as members of jury, 24 of them are involved in community mobilisation, 19 as monitors, 13 as members of ATR Review Committees, eight as members of special social audit teams, three as members of the Disciplinary Committee and two as Governing Board (Steering Committee) members. Some of these CSO representative respondents are involved in social audit processes in more than one capacity. Involvement of CSO representatives as Member of Jury helps protect interests of MGNREGA workers and those from marginalised sections of the rural community.

Graph-5

4.4 Duration of Engagement in Social Audit

Thirty four respondents have been engaged in social audit processes and with SAU for more than three years (Graph-6). Longer association not only enhances the expertise of CSO representatives but also develops better understanding and mutual trust between SAU and CSO representatives.

Graph-6



4.5 Motivation for Involvement in Social Audit

Respondents were asked about their motives for joining the social audit process and engaging with the SAU of Jharkhand. The following motives have been shared by them:

- Eighteen (18) CSO representatives said that social audits gave them the opportunity to work for the rights of the marginalized and poor by making them aware of their rights and entitlements.
- Ten (10) CSO representatives said they got involved in social audits to make MGNREGA more transparent and effective in utilising public resources to reduce poverty.
- Eight (08) CSOs said they got involved in social audits to empower communities and enhance their participation in monitoring of government programmes.

- Eight (08) CSOs said they got involved in social audits to reduce the leakages and corruption in the implementation of public programmes.
- Five (05) CSO representatives said that through social audits they ensure quality in public works and services.

It was also asked from the respondents, whether social audit is aligned with their organisational mission and objectives. Twenty (20) respondents said that objectives of their organisation include promotion of transparency, accountability and community monitoring. Alignment of organisational agenda with the objectives of social audit of MGNREGA and motivations such as improving governance of public programmes through enhanced transparency and accountability leads to better performance of tasks assigned to CSO representatives. Because they are self-motivated, they keep contributing to social audit exercises voluntarily and without any payment against adversities such as non-cooperation of implementing authorities.

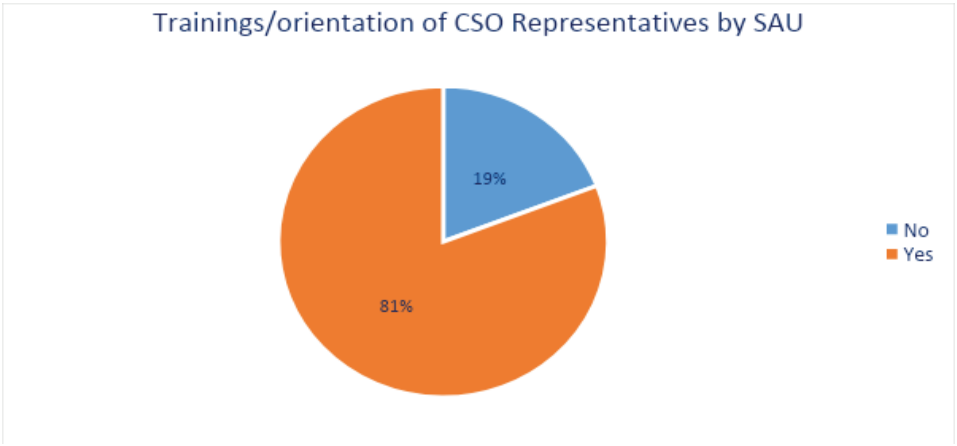
4.6 Orientation of CSO Representatives on Social Audit

CSO representatives are involved in social audits in different capacities and they require an orientation from SAU to effectively perform the role assigned to them. When asked what activities/ role they are expected to perform, following were the responses:

- Community mobilization and facilitating community participation in social audit Gram Sabha
- Awareness creation through wall paintings, workshops, nukkad natak/ street plays, group meetings etc. on Social Audit.
- Decision making as jury member in public hearings at GP, Block, District and State.
- Field level monitoring of social audit.
- Training social audit resource persons as subject experts.
- Review of the ATR as ATR review committee.
- To facilitate formation of the Village Monitoring Committee (VMC).
- Facilitate test social audit and special social audit
- Support the social audit team at ground level

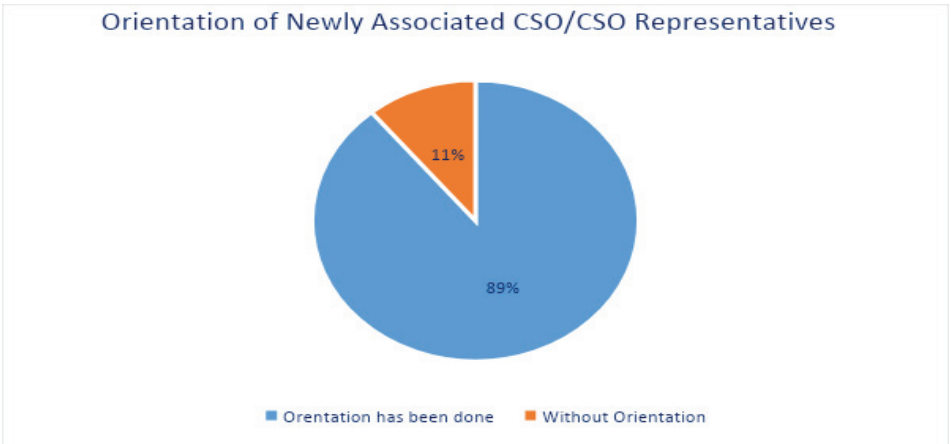
Graph-7 shows that 81% of respondents shared that they have received training or orientation by SAU on their roles and responsibilities. Such orientation helps these CSO representatives perform assigned tasks.

Graph-7



This has been corroborated by the response of social audit resource persons. 89 percent of social audit resource persons responded that they or their colleagues from SAU orient newly associated CSO representatives on their roles and responsibilities (Graph-8). Similar responses were received by CSO representatives also. Such orientation helps CSO representatives perform their assigned tasks effectively.

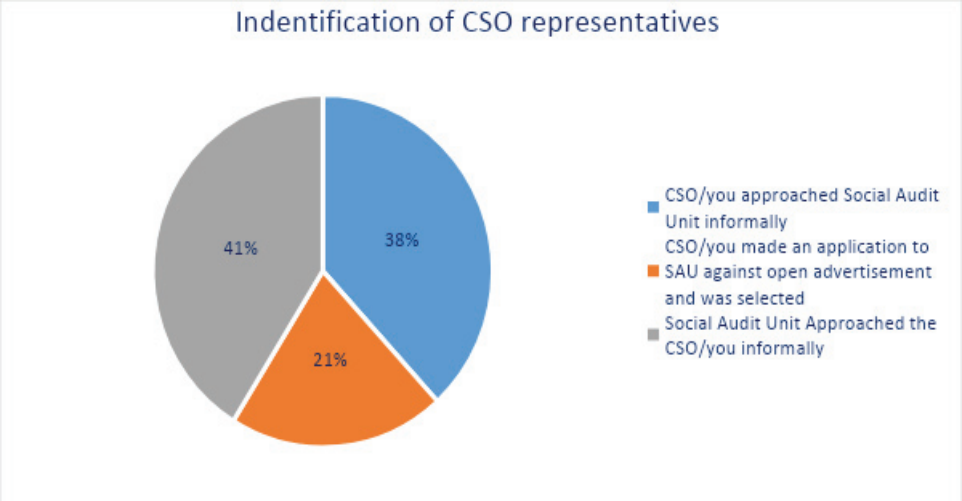
Graph-8



4.7 Identification of CSOs by SAU

CSO respondents have been asked how have CSOs or CSO representatives been identified/ selected by SAU to be associated with the social audit process in the State. As shown in Graph-9, 41% CSO representatives were approached by SAU informally to be associated with the social audit. Such a proactive approach of SAU has led to identification of CSOs with rights based approach and having prior experience of working towards improving governance of MGNREGA leading to more effective social audit exercise.

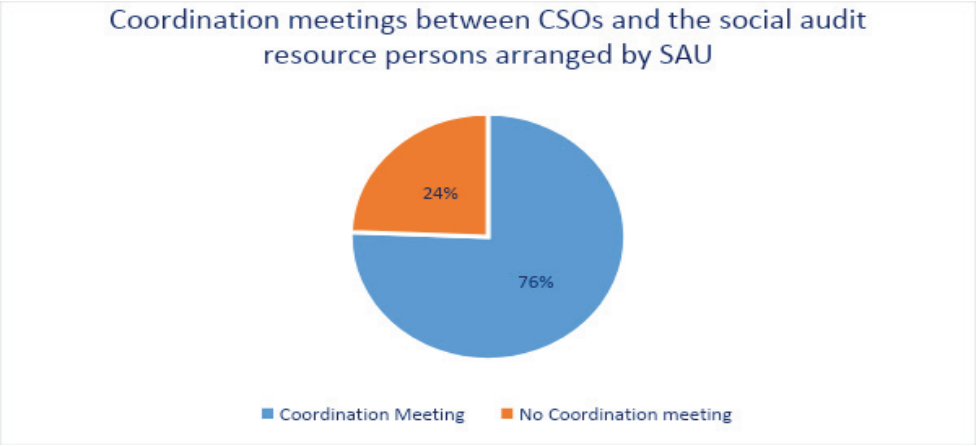
Graph-9



4.8 Coordination between Resource Persons and CSOs

For CSO representatives to perform their role in the social audit process and in support of SAU of Jharkhand, it is necessary to have good coordination between social audit resource persons and CSO representatives. Seventy six (76) percent of CSO representative respondents accepted that meetings between CSOs and social audit resource persons are organised for better coordination (Graph-10). This is because one the one hand CSOs are motivated to work for better governance of MGNREGA through enhanced transparency and accountability and on the other hand social audit resource persons have prior experience of working with CSOs and they see value in contributions of CSO representatives.

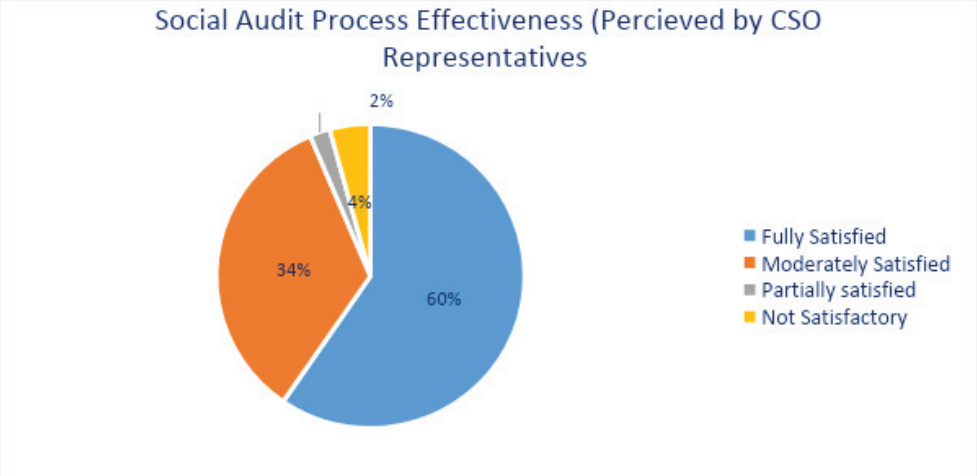
Graph-10



4.9 Satisfaction with Social Audit

Positive perception of CSOs about the efficacy of the social audit process in the State is essential for a sustained active involvement of CSOs in social audit and their collaboration with SAU in future. Graph-11 shows that 60% of CSO representative respondents are fully satisfied with the social audit process. This high level of satisfaction keeps them motivated to engage with social audit and contribute towards better implementation of MGNREGA in the State. High satisfaction also gets reflected in the majority of CSOs continuing involvement even after three years.

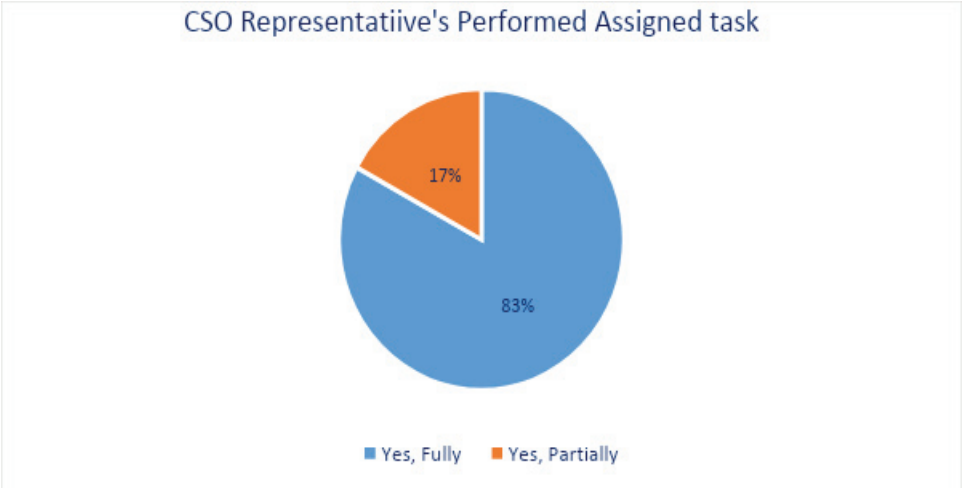
Graph-11



4.10 Performance of Assigned Tasks

As Graph-12 shows, 83% percent of CSO representatives felt that they have fully performed the tasks assigned to them while remaining 17% said they have partially performed their tasks.

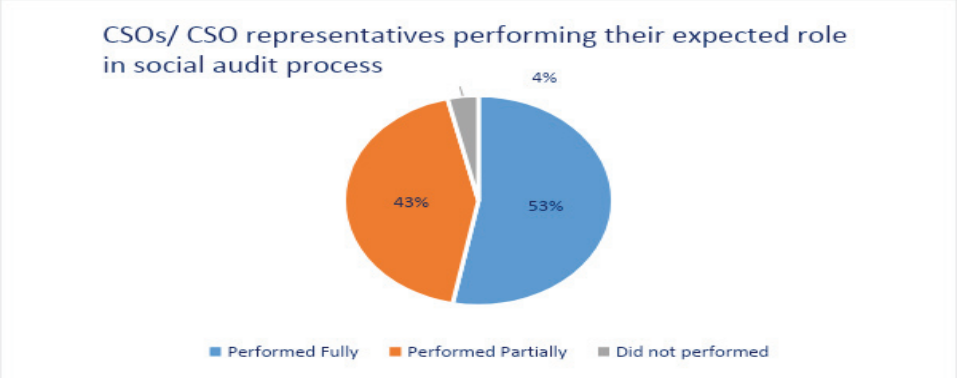
Graph-12



Among those who felt that they have not been able to fully perform their assigned tasks, they have shared that lack of cooperation from the department, lack of time and other organisational commitments are the major reasons for their partial performance.

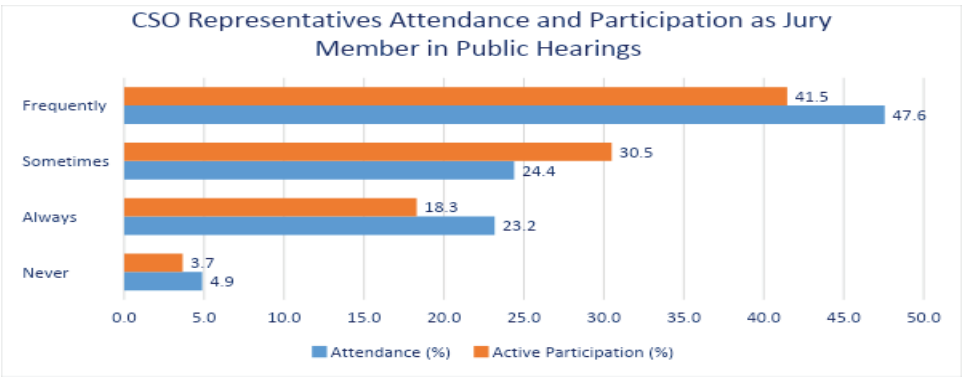
Perceptions of social audit resource persons were also captured on the performance of assigned tasks by CSO representatives. 53 percent (Graph-13) of social audit resource persons have responded that CSOs representatives are fully performing their expected role. A miniscule minority of resource persons also feels that CSO representatives do not perform. They explained the reasons for their opinion by sharing that CSO representatives often do not turn up for public hearings or similar work due to their prior engagements. This is because, involvement of CSOs in social audit is voluntary and unpaid work and when they have their own personal or official work many of CSO representatives give preference to these works than social audit.

Graph-13



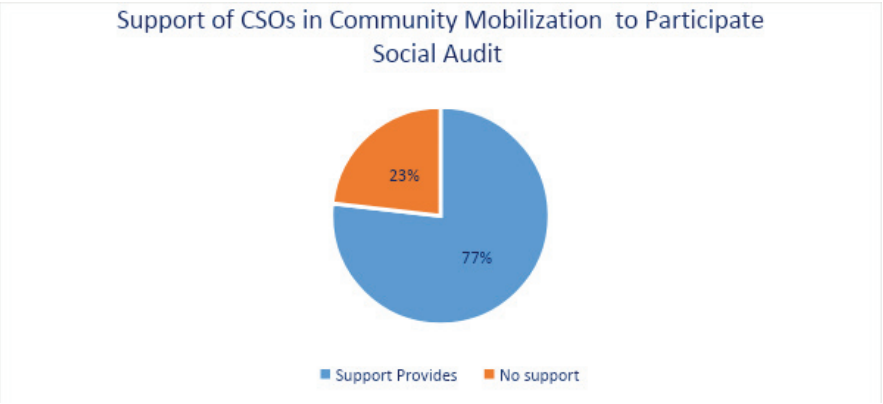
Most CSO representatives are associated in social audit processes as members of the jury panel. Attendance and active participation of jury members makes public hearing successful. As shown in the Graph-14, approximately 23% of social audit resource persons said that CSO representatives always attend the public hearing as jury members and 18.3% of them said that CSO representatives always actively participate in the public hearing. 47% of social audit resource persons said CSO representatives frequently attend, and 41% said that they actively participate in the public hearing. 24.4% of resource persons said that CSO representatives only sometimes attend and 30.5% said that CSO representatives only sometimes actively participate in public hearings. A small five percent of resource persons have shared that CSO representatives never attend public hearings and four percent of them have said that CSO representatives never actively participate in public hearings.

Graph-14



Social audits can be effective only when affected communities participate in the process. Assistance of CSOs is sought by SAU in mobilisation of the community during the social audit process. Perception of social audit resource persons was captured on whether they get support from CSO representatives in mobilising the affected community. Graph-15 depicts that 77 percent of social audit resource persons interviewed said that they get support from CSO representatives in mobilising community members for participation in social audit exercises.

Graph-15

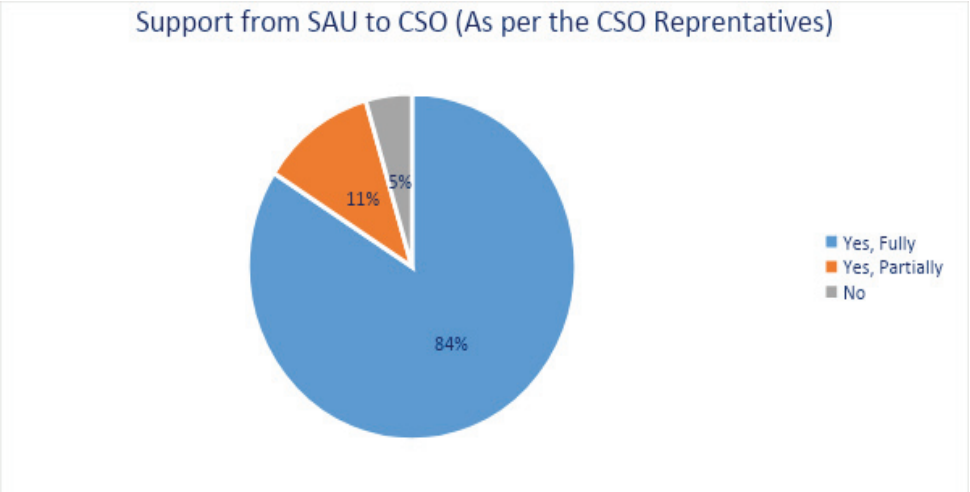


Further, resource persons explained that CSOs and their representatives support community mobilisation in many ways including spreading information about social audit in their own programmes, providing support during the field visit and to conduct the meetings, offering support in creating awareness about and conduct of social audit Gram Sabha helping Social Audit teams reach the most marginalized community served by them helping in sensitizing underprivileged and aggrieved people to participate in social audit process etc.

4.11 Support from SAU

As depicted in the Graph-16, 84% of CSO representatives shared that they get full support from SAU. Support from SAU enables them to fully perform their task, makes them satisfied with social audit, and increases chances of continuous engagement.

Graph-16



Those who said that they have got no support from SAU, expect that SAU should organise regular periodic trainings for CSO representatives, make provisions for honorarium and travel allowances to CSO representatives, ensure safety of CSO representatives who take part in social audit process, and SAU regularly organise coordination meeting in which CSOs collaborating with SAUs be invited.

4.12 Support/Cooperation from Implementing Agencies

As seen from Graph-17, the majority (61%) CSO representatives interviewed shared that they have received full support/cooperation from functionaries of implementing agencies in performing their assigned responsibilities, which is a good sign. Perhaps their association with registered CSOs, higher education, and professional degree and longer experience has contributed to better acceptance from implementing authorities leading to good cooperation.

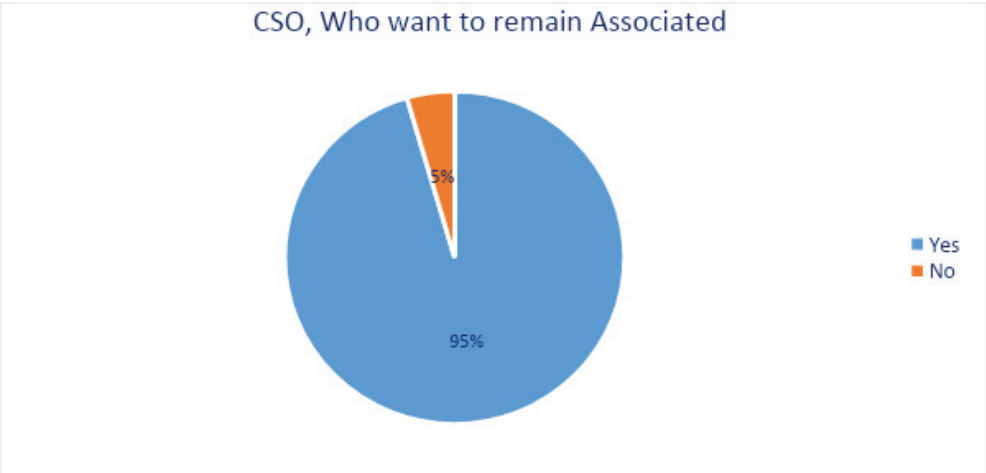
CSO representatives have shared that most implementing agency functionaries perceive CSOs engagement in social audit positively and sometimes they encourage the engagement of CSOs in social audit. However, there have been few negative experiences where implementing agency functionaries have seen CSOs as obstacles in their way.

Graph-17

4.13 Willingness of CSOs to Remain Associated with Social Audit

Graph-18 shows that 95% CSO representatives want to remain associated with the social audit process and SAU in the future too. This data shows that there is strong goodwill among CSOs about SAU and that they have found their association with SAU rewarding. Their higher satisfaction with social audit, support and cooperation from social audit units and implementing authorities contribute to their willingness to remain associated in futu

Graph-18



4.14 Benefits of CSOs Collaboration with SAU and Social Audit Process

Social Audit resource persons have shared following benefits of CSOs collaboration with SAU and social audit process in Jharkhand:

- With their continuous local presence and goodwill in the community, CSO representatives help mobilise the community to social audit exercises.
- CSOs engagement enhances the voice of the community in the social audit Gram Sabha and Public Hearings at GP level.
- CSOs presence in jury panels ensures proper decisions and effective actions on the issues identified under the social audit despite reluctance of the implementing authorities.
- Social audit resource persons learn from the grass root experiences of CSOs.
- Presence of CSO representatives puts an additional pressure on implementation officials to perform their job properly.
- CSOs engagement helps social audit teams to establish rapport with the community.
- CSOs support in arranging logistics for social audit teams during social audit processes, if required.

4.15 Enabling Factors for CSOs Engagements with SAU and Social Audit Process

Social audit resource persons have been asked to identify factors which enable CSOs engagement with the SAU and social audit process in Jharkhand. Following were responses of resource persons:

- CSOs who are working for ensuring rights and entitlements of the people in the State are keen to associate with social audit processes.
- As CSOs are strong in community mobilization in their operational areas, social audit teams collaborate with them to mobilize communities to actively participate in social audit processes.
- Most social audit resource persons have a background of working with CSOs and hence they see CSOs as their natural allies.

- Some SAU staff and resource persons are members of different CSOs enabling better coordination between CSOs and them.
- CSO's have more acceptability among stakeholders at ground level due to their involvement with them from a longer period and hence collaboration becomes beneficial.
- Organisational objectives of several CSOs are aligned with the SAU's objectives and this helps collaboration.
- CSOs have a better understanding of the micro level grass root issues related to the delivery of public services and programmes.
- Many CSOs are organising Mazdoor Manch (Labour Forums) and since the Social Audit Unit also engage with wage seekers, these common factors help to engage with CSOs.
- By design, CSO representatives are to be included in the public hearing, ATR review committee, special audit committee, which enables engagement with CSO.

4.16 Challenges in CSOs Engagement with Social Audit

Social audit resource persons have faced following difficulties/ challenges in engaging with CSOs:

- Sometimes, the implementing officials or elected representatives of Panchayats do not cooperate due to their prior experience with a particular CSO.
- Since, CSO representatives are engaging voluntarily in the process, they participate as per their time availability and their convenience. That is why sometimes, they don't turn up to public hearings as they have their personal and organisational commitments.
- There is no provision for reimbursement of travel expenses incurred by CSO representatives, so sometimes they find it difficult to travel to distant places and participate in the social audit process.
- Sometimes they affiliate with the social audit team for their personal vested interests such as having an influence with local elected representatives or officials.

- Sometimes, the CSO representatives are fearful of influential persons and take inappropriate decisions under pressure, as members of jury panels.

5. RECOMMENDATIONS AND CONCLUSION

Jharkhand is an underdeveloped State with a large tribal population. The State faces many challenges including land alienation, displacement, left-wing extremism, out-migration for employment, social evils such as alcoholism, witch-hunting, and lack of modern infrastructure. Due to these challenges, political instability, and poor governance, a large number of CSOs and social activists have been active in the State.

In Jharkhand, CSOs have been at the forefront in piloting and institutionalising social audit in MGNREGA and making efforts to expand it to other Government programmes. Recognising their experience in and commitment towards facilitating social audit, CSOs have been engaged by SAU at various levels and in various capacities in the State. Majority of SAU staff and social audit resource persons are from CSO background.

CSOs engagement with SAU and social audit process in Jharkhand has been mutually beneficial. The SAU has been able to access the expertise of CSOs in capacity building of resource persons, development of formats for data collection and report, and as members of the jury to deliberate upon and decide on issues involved in implementation of various schemes being audited. Most importantly SAU has got an ally in the form of CSOs whose support is needed to win over open resistance from vested interests in the administration and the community. On the other hand CSOs have got an opportunity and a platform through which they can represent the voice and issues of the poor and marginalised sections of society for which they have been working. They also get recognition and acceptance of administrative officials as well as the community as an important stakeholder in the development process.

To further strengthen CSOs engagement with SAU and social audit process in the State, certain actions on the part of State government and

SAU have been suggested both by CSO representatives as well as social audit resource persons. Important among them are as follows:

5.1 Legislation on Transparency, Accountability and Social Audit: To provide a strengthened legal framework for social audit in the State, passing a law of transparency, accountability and social audit by the State legislature is recommended. Such a law exists in Telangana and Meghalaya. Those legislations can be studied and adopted with necessary adaptation as per local context.

5.2 Situating Social Audit outside the Department of Rural Development: Currently, the social audit unit is situated in the Department of Rural Development, but it is expected from it to facilitate social audit of schemes not only of the Department of Rural Development but also other departments. Further, the Principal Secretary of the Department of Rural Development chairs the Steering Committee of the SAU, compromising its independence. It is recommended to make the SAU more independent and locate it in a department which does not implement any scheme/programme. Such a department could be the Department of Planning or the Department of Finance.

5.3 Timely and Adequate Follow up Actions on Findings of Social Audit: Several CSO representatives have expressed their dissatisfaction with the actions on the findings which not only demotivates them but also the community. It is highly recommended that timely and adequate follow up actions on findings of social audit and reporting back the action taken report to CSOs and community.

5.4 Regular Coordination between SAU and CSOs: Currently, interactions between SAU and CSOs are few and far between, other than those during the social audit exercise. It is recommended that regular coordination meetings between SAU and CSOs at different levels are facilitated by SAU. Such interaction will not only strengthen mutual trust and support but will also provide SAU with much needed feedback on the

process and quality of social audit from CSOs leading to improved practices.

5.5 Enhanced Capacity Building on Social Audit: It is recommended that orientation and capacity building of CSO representatives in general and members of juries in particular on various rules and procedures of social audit must be done in regular intervals. Further, orientation and sensitization of government officials and elected representatives on the role and contributions of CSOs is also needed so that CSOs are not seen as adversaries and they receive the needed cooperation from implementing agencies and elected representatives of Gram Panchayats.

5.6 Honorarium and Travel Reimbursement to CSOs: Currently, CSOs are involved in the social audit process on a voluntary basis. Since not all CSOs are financially sound or have regular funding support, it is recommended that a provision for paying honorarium, reimbursement of travel and accommodation costs, and other logistics support to participating CSO representatives may be made by the SAU.

Jharkhand is the pioneering State in CSOs engagement with SAU and social audit process. Need for such engagement has been appreciated by Operational Guidelines of MGNREGA, Auditing Standards for Social Audit and Annual Master Circular. Few academic studies have also recommended a partnership betweenCSOs and SAUs. The Jharkhand model may be studied by other States and adopted with necessary adaptation as per local contexts. However, for such adoption, it is important that the supportive and crucial role of CSOs are recognised and CSOs are involved in the social audit process without any predilection or bias. CSOs and SAU collaboration in some States do not develop and become vibrant as only pro-government CSOs are partnered with, who do not give free, frank and fair opinions to the SAU.

To facilitate such engagement of CSOs with SAU and social audit processes in other States, guidelines for CSOs collaboration with SAU or CSOs policy for social audit may be developed by the Government of India

and circulated. In the meanwhile, successful models such as ATR Review Committee, Jury System etc. of Jharkhand may be adopted by State governments by issuing Government Orders (GO). The Government of India may promote test audits to be conducted by a group of CSOs from other States. This will not only help independent evaluation of social audit processes but will also serve as an exposure to CSOs from other States.

A CRITICAL EXAMINATION OF PLAGIARISM CONTROL SYSTEM & CORRUPTION IN THE PUBLICATION OF HIGHER EDUCATION

Dr. Amit Agarwal and Dr. Abhishek Kumar Singh[1]

ABSTRACT

India is the second place in the world population, but it is far behind in the work of international research and development. Keeping in mind the standards and ethics of high-quality research work in higher education institutions, the University Grants Commission, New Delhi (Promotion of Academic Integrity and Prevention of Plagiarism in Higher Educational Institutions) Regulations, 2018, Dated 23 July 2018[2]. Corruption is being done in various forms by plagiarism. The activities of plagiarism block the mental growth of the researchers. Plagiarism is an unethical activity. Due to lack of original or fundamental research, the research and development activities in the country reach a low level. The 21st century is the century of information and technology. The Internet revolution has made all the information available through the Internet. Plagiarism has reached its peak with the easy access of information through search engines. Now the use of Digital Detection Mechanism is also becoming a ray of hope to prevent plagiarism. Plagiarism and corruption can be controlled with the help of digital detection mechanism and computer software. Publishers, researchers and faculty get economic and social benefits through corruption from plagiarism. The need for digital checking mechanism and regulation to control plagiarism and corruption in the publication of HEIs has been analyzed in detail through this research paper.

KEY WORDS: Corruption free plagiarism-detection Mechanism/software; digital repository.

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[2] Newspost. (2017). Saahityik choree par rok ko yoojeesee ka kanoon, September 4, 2017. (http://www.newspost.live/ugc-comes-out-with-stringent-rules-to-curb-theft-of-intellectual-property/

1. INTRODUCTION

The API method has been adopted for the recruitment of teachers in universities or for promotion in higher educational institutions, due to which the quality of research has declined, due to the compulsion of publishing research papers against interest or desire. Lakhs of magazines/journals are edited every year in India. In the name of UGC CARE, at present some magazines and journals are charging Rs.2000 to 5000 from researchers. Research papers prepared by plagiarism are often published in research journals by paying money. Most of the journals do not even have a plagiarism check. This work is done more in online magazines and journals. Only cut-paste is being done in the name of research. Some publishers publish articles in the back issues of research papers by taking money. This business is running very fast these days. Some publishers sitting at home are doing corruption by acting unethically and earning lakhs of rupees every year as corruption. Plagiarized conclusions or findings which are more or less intact, they take valuable publications that can be used for original research. They skewed the research record to show more evidence of previously published results, which distorted the meta-analysis. India has not been spared from research and other Plagiarism[3] and related issues. Over the past 6 decades (1956-2019), the Ministry of Education / Government of India and UGC have developed and sophisticated / refined / defined their policies and programs in research institutes/HEIs, examples of allegations and reactions to established approaches to plagiarism. They will apply to students, faculty /teachers, researchers and employees/staff of all higher education institutions in the country.

1.1. APPROACH AND SCHEME OF THE RESEARCH ARTICLE

In the context of The UGC (Promotion of Academic Integrity and Prevention of Plagiarism in HEIs) Regulations, 2018, responses were collected through a questionnaire from Post Graduate students (50), Research Scholars (100), and faculty members (50) in the context of UGC regulation regarding plagiarism. A mixed research approach has been

[3] https://www.collinsdictionary.com/dictionary/english/accusations-of-plagiarism

used for the research for empirical research on various issues and analyzed through the research article. The data obtained from quantitative research has been presented in the form of tables and diagrams. The design for research is predetermined. The impact of plagiarism on the quality of literature, the main causes of plagiarism and corruption in publication, etc., were studied through a questionnaire. Data was analyzed through Microsoft Office.

1.2 Background of research quality in India

According to UNESCO[4], the creative work done in a planned manner to increase the stock of knowledge is called research i.e., research and development i.e., development. Knowledge-science, research and education play an important role in every aspect of life. Research was arranged in higher education so that through it new ideas, new research can be brought to the fore, which will give direction to the society and industrial revolution. The Times Higher Education World University Rankings 2023[5] include 1,799 universities across 104 countries and regions, making them the largest and most diverse university rankings to date. Indian institute of science which has come on 186 ranks under World University Ranking 2023 India. According to the Indian Science and Research and Development Industry Report 2019, India is among the top-ranking countries in the field of basic research. Recently, India was ranked 40th position out of 132 in the Global Innovation Index (GII) 2022 rankings released by World Intellectual Property Organisation (WIPO)[6]. To promote innovation in the country, the Central Government has allocated 50 thousand crore rupees for the National Research Foundation[7] for the next five years in the general budget year 2021-22. New Education Policy 2020 in India and the initiative to form a

[4] https://www.unesco.org/en/brief
[5] World University Rankings. (2023). https://www.timeshighereducation.com/world-university-rankings/2023/world-ranking
[6] WIPO.(2022). Global Innovation Index - 2022. https://www.wipo.int/global_innovation_index/en/2022/
[7] MoE. (2019). National Research Foundation - Detailed Project Report December, 2019 : PM-STIAC. https://www.psa.gov.in/psa-prod/2020-11/English%20NRF.pdf

commission for reforming higher education and drafts like STIP 2020[8] can prove to be a milestone for research and innovation.

1.3 Emphasizing the importance of promoting quality research by the UGC (Promotion of Academic Integrity and Prevention of Plagiarism in HEIs) Regulations, 2018:[9] The quality mandate of UGC emphasizes on promotion of quality research and creation of new knowledge by the faculty. UGC, as the apex regulatory body responsible for maintaining standards in higher education institutions, has taken stringent steps to improve the quality of research and protect publication ethics. The growing incidence of quality-compromised publication ethics and deteriorating academic integrity is a growing problem plaguing all areas of research. Publication Ethics Committee Guidelines, The UGC has set up the 'Consortium for Academic and Research Ethics (CARE)[10]' to prepare and maintain a 'Reference List of Quality Journals'. The objectives of the UGC Regulations 2018 are:

* Promotion of academic integrity.
* Plagiarism prevention in academic writing.
* To create awareness about responsible conduct of academic research and writing.
* Education and training for the prevention of plagiarism. Train academics to use plagiarism detection tools.
* Installing software systems for plagiarism detection.
* To establish a prevention mechanism under the Departmental Academic Integrity Panel (DAIP) and Institutional Academic Integrity Panel (IAIP), the official bodies for detection of plagiarism.

[8] Ministry of Science and Technology. (2021). Draft 5th National Science, Technology, and Innovation Policy for public consultation, January 31, 2021. https://dst.gov.in/draft-5th-national-science-technology-and-innovation-policy-public-consultation

[9] University Grants Commission. (2018). UGC (Promotion of Academic Integrity and Prevention of Plagiarism in Higher Educational Institutions) Regulations, July 23, 2018. https://www.ugc.ac.in/pdfnews/7771545_academic-integrity-Regulation2018.pdf

[10] UGC. (2019). Consortium for Academic and Research Ethics CARE, November, 2019. https://www.ugc.ac.in/e-book/CARE%20ENGLISH.pdf

* To detect plagiarism these two bodies, DAIP and IAIP, will deal with detection in two different areas, one departmental and the other institutional.
* Prescribing punishment for those who violate responsible conduct.
* To promote quality research by faculty members and generate credible research. To create and maintain a 'CARE Reference List of Quality Journals'[11] for various academic evaluations. Guidance from Committee on Publication Ethics (COPE)[12], San Francisco Declaration on Research Assessment (DORA)[13] and the Leiden Manifesto may be also referred for this purpose.
*

2. Analysis of primary data on anti-plagiarism policies:

Plagiarism regulation and application of anti-plagiarism software have been approved by the UGC to eliminate corruption in publication. Plagiarism is an unethical act in academia, to prevent a regulation which was implemented by the UGC in 2018 for higher educational institutions. Its relevance to controlling plagiarism and corruption in academia has been studied. Responses were collected through a questionnaire from Post Graduate students (50), Research Scholars (100), faculty members (50) in the context of UGC regulation regarding plagiarism, based on which the main findings and results are presented, which are the following are:

2.1 Impact of plagiarism on research quality Question:

Research has been taken as a mental activity done for a specific purpose, but plagiarism destroys innovative thinking.[14] Research and development activities give birth to new products, new technology, new services and processes.[15] During Covid-19, we can see that what was the

[11] UGC. (2019). Consortium for Academic and Research Ethics CARE, November, 2019. https://www.ugc.ac.in/e-book/CARE%20HINDI.pdf
[12] Elsevier's Committee on Publication Ethics (COPE). https://www.elsevier.com/editors/perk/about-cope
[13] San Francisco Declaration on Research Assessment (DORA) https://sfdora.org/
[14] https://irafpa.org/en/methods/investigating-cases-of-plagiarism/the-ten-consequences-of-plagiarism/
[15] https://study.com/academy/lesson/what-is-research-and-development-definition-methods-examples.html

difficulty related to research to get the patent of vaccine[16] and other medicines at the global level. Perception, credibility, validity, scientific approach, measurement of level of significance, objective research methodology, research problem and hypothesis, optimization, precision, analysis of interrelationships between variables and dependent events, knowledge obtained from research is purely organized for quality in research. and be systematic, originality, verifiability and predictive ability etc. should be essential qualities.[17]

Impact of plagiarism on the quality of research[18]

Table No. – 01 (Consent of the respondents %*)

S.N	Impact on quality of research[19]	F.M.	R.S.	P.G.	Total % *
1	Loss of originality of research.[20]	100	100	100	100
2	The research paper does not have the qualities of a qualitative research paper.[21]	90	89	94	91
3	Lack of innovation or startup thinking.[22]	86	93	82	88

[16] https://www.nature.com/articles/d41586-021-01242-1

[17] UOU. (2023). Researching for Hospitality and Tourism Management: Study Material, UOU Haldwani, Uttarakhand. https://www.uou.ac.in/sites/default/files/slm/BHM-503T.pdf

[18] Helgesson, G and Eriksson, S. (2014). Medicine Health Care and Philosophy, July. 2014. https://www.researchgate.net/publication/263743965_Plagiarism_in_research DOI: 10.1007/s11019-014-9583-8

[19] George, T. (2021). Consequences of Mild, Moderate & Severe Plagiarism: Scribbr, October 18, 2021. https://www.scribbr.com/plagiarism/consequences-of-plagiarism/

[20] Pubrica Academy. (2021). How to avoid Plagiarism while ensuring the originality of their manuscript: Pubrica Academy, September 8, 2021 https://pubrica.com/academy/research-writing/how-to-avoid-plagiarism-while-ensuring-the-originality-of-their-manuscript/

[21] Copyleaks (2021). How Does Plagiarism Affect Qualitative Research in Education? February 25, 2021. https://copyleaks.com/blog/how-does-plagiarism-affect-qualitative-research-in-education

[22] Shinawi, Jamil. (2020). Plagiarism and flattery VS. Innovation and copycats in startups, December 21, 2020. https://www.linkedin.com/pulse/plagiarism-flattery-vs-innovation-copycats-startups-jamil-shinawi?trk=public_profile_article_view

4	Impairment in the goodwill of the stakeholders.[23]	76	65	78	71
5	Research process, discussion, results and recommendations get contaminated.	54	46	46	48
6	Lack of brainstorming[24] among researchers.	56	58	72	62
7	Lack of creativity.[25]	78	73	84	77
8	Failure to register a quality patent or copyright[26].	88	87	94	89
9	Increase in unethical value from academic weakness.[27]	90	93	93	93
10	Loss of talented researchers due to non-identification of ineligible stakeholders.	42	51	64	47

Sources: Self Survey F.M. = Faculty Member, R.S. = Research Scholar, P.G. = Post Graduate

Analyzing Table No. 1, it is found that the quality of plagiarism detection is affected by the consent of the respondents. Whose first major effect is the loss of originality of research, with which 100% researchers agree. If the research is not original then it will be unable to serve its purpose. In the absence of originality, the conclusions and suggestions will not be rational, due to which the entire research will become futile. 93% of respondents consider an increase in unethical vulnerability in research as the second main effect of plagiarism. 91% of the respondents believe that plagiarism does not lead to quality research.

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[23] Penmypaper. (2023). Consequences of Plagiarism and How to Avoid Them, March 21, 2023. https://penmypaper.com/blog/consequences-of-plagiarism-and-how-to-avoid-them/

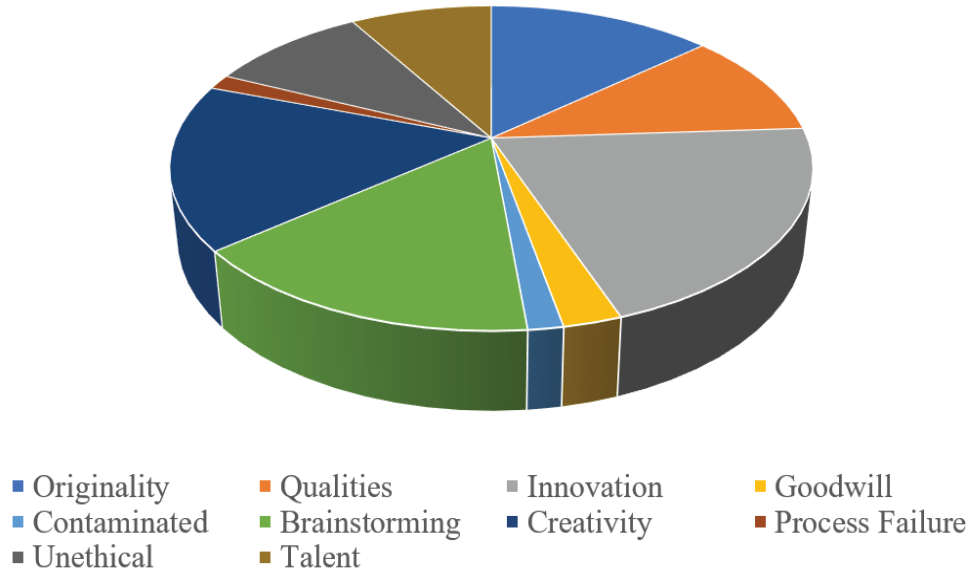
[24] TWI. (2023). What is Brainstorming? : TWI Ltd Cambridge, CB21 6AL, UK https://www.twi-global.com/technical-knowledge/faqs/faq-what-is-brainstorming

[25] Home Work Help Global. (2016). The effect of plagiarism on inspiration and creativity, January 26, 2016 https://www.homeworkhelpglobal.com/us/blog/effects-of-plagiarism-on-inspiration-and-creativity/

[26] Dean O, Spoor & Fisher, Claremont. (2018). Is plagiarism unlawful? : WIPO Magazine, Special issue 10/2018 https://www.wipo.int/wipo_magazine/en/2018/si/article_0008.html

[27] UNSW .(2022). What is Plagiarism? : UNSW Sydney NSW 2052 Australia, June 17, 2022. https://www.student.unsw.edu.au/what-plagiarism

Fragmentation of literary creation by plagiarism
Diagram/Graph Number – 01



Sources: Self Survey

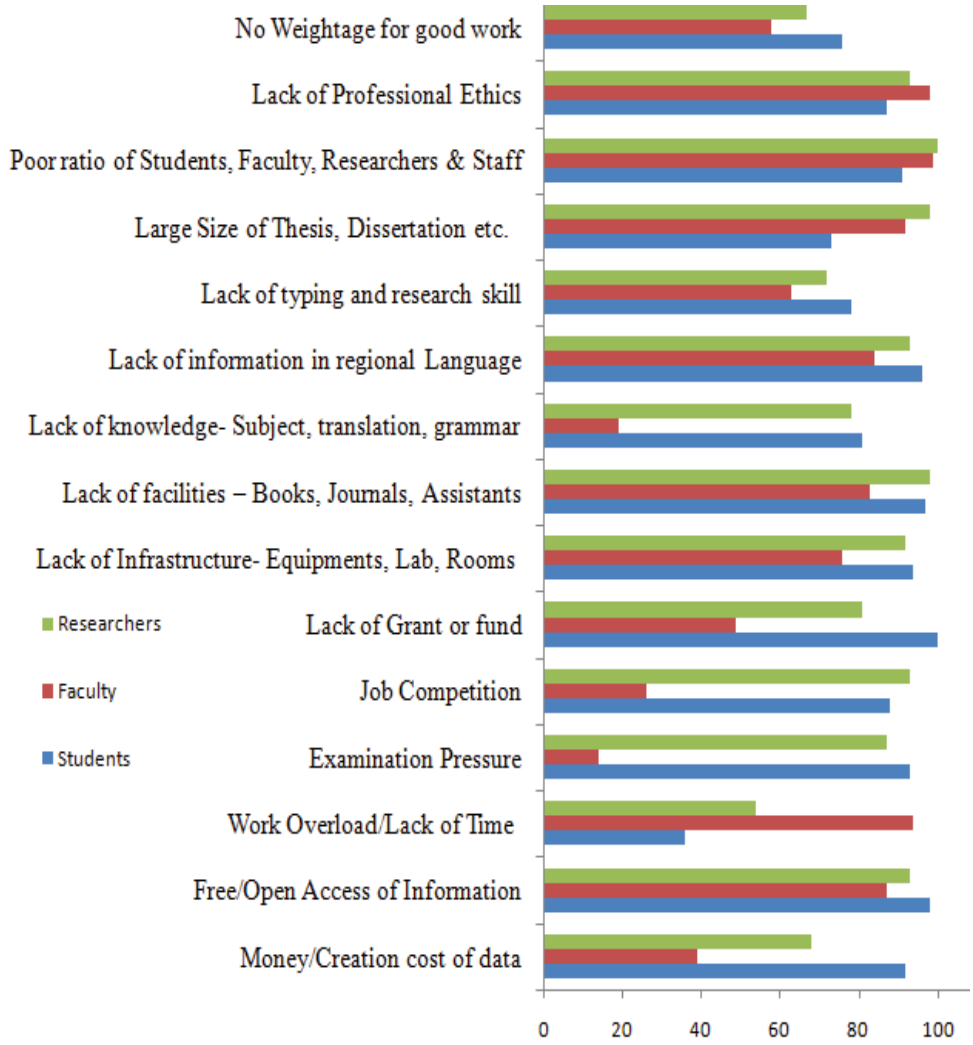
How plagiarism corrupts the creation of literature. This has been analyzed in Diagram/Graph Number – 01. Based on the answers of the respondents, the effect of plagiarism has been shown in descending order – Innovation (41), Creativity (33), Brainstorming (31), Originality (27), Qualities (21), Unethical (19), Talent (17), Goodwill (05), Contaminated (03) and Process (03). The cycle of these activities stops due to plagiarism, due to which India's research and development work goes to the lower level at the global level. Innovation is the first step to success to compete globally. If there is no innovation, then the process of entrepreneurship development will be blocked. India's low ranking in the global innovation index is an indication that high standards of quality are not being adopted in literature creation in India. From the analysis of Table No. 1 and Chart No. 1, it became clear that plagiarism is affecting literary activities in various ways. Regulation 2018 of the University Grants Commission to block Plagiarism was brought with the same objective so that higher educational institutions of India can prepare themselves to compete at the global level.

2.2. The Main Causes for Of Plagiarism in the Higher Educational Institutions in India:

Plagiarism in all educational institutions and research centers has become a basic problem. Individuals working in higher education/research institutions have started moving towards plagiarism under the pressure of timely publication.

The Main Causes for Of Plagiarism in the Higher Educational Institutions in India

Diagram/Graph No.- 02 (Consent of the respondents %)



Sources: Self Survey

Diagram/Graph No.- 02, the data of responded (researchers, faculty and students) acceptance for the 15 main causes[28] for plagiarism in percentage is analyzed. Academic or plagiarism is also increasing rapidly in India. Lack of clear policies to deal with scientific misconduct among academics has led to the rise of research misconduct which can seriously impact the development of India's higher education. Even in other areas of life, the issue of Plagiarism in the entertainment sector and in music is also increasing rapidly. Problems evaluating Internet sources; Lack of search skills; Illusion between plagiarism and paradoxes, vocabulary and quoted sources; Take careless notes; Compete for scholarships and jobs; Pressure from the family; Knowledge and education; Student ethics and affiliation with university are due to plagiarism. The editor of 'Current Science' in India conducted a survey from the year 2006 to 2008 and found that 80% of the plagiarized authors lacked language skills due to which they plagiarized.

2.3. Corruption is done by unethical activities in the publication of research papers:

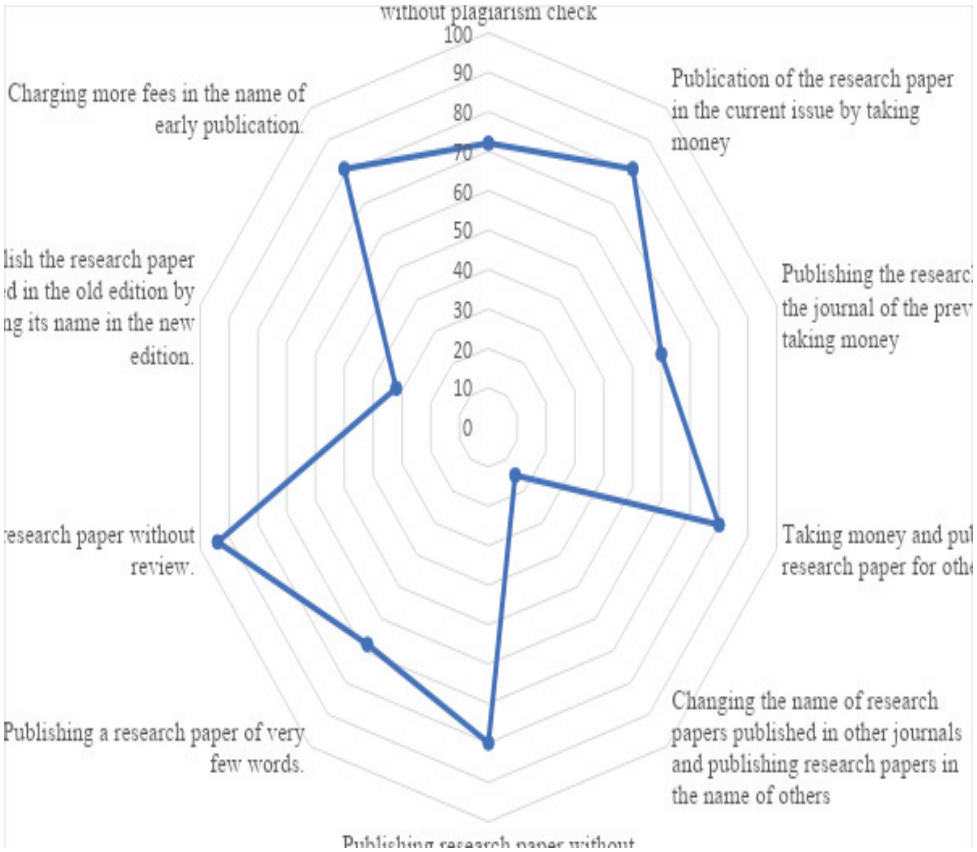
On research, it was found that corruption is done by unethical activities[29] in the publication of research papers in the following ways:

[28] Kumar, Dr. Mukesh. (2020). Shodh kaaryon mein saahityik choree : kaaran aur nivaaran, Shodhadarsh, Najibabad U.P; March 13, 2020. https://www.shodhadarsh.page/2020/03/shodh-kaaryon-mein-saahityik-c-LA-C9o.html

[29] Lindgreen, A. (2004). Corruption and Unethical Behavior: Report on a Set of Danish Guidelines: Journal of Business Ethics, Springer, pp 31–39 April 04. https://springer.com/article/10.1023/B:BUSI.0000032388.68389.60

Corruption is done by unethical activities in the publication of research papers

Diagram/Graph No. - 03 (Consent of the respondents %)



Sources: Self Survey F.M. = Faculty Member R.S. = Research Scholar

Analyzing Diagram/Graph No. - 03, it is known that at present plagiarism has taken the form of a widespread problem in India. Plagiarism involves researchers, faculty members, publishers and other stakeholders. Confidential research found that 72% of research papers were published without review. 80% of the researchers and faculty members believed that their research paper was published without any prescribed format. If the research paper is published early, 60% researchers and faculty members have to pay a higher publication fee. In this way plagiarism and corruption are clearly visible in various factors which is an indicator of unethical and widespread corruption. Post graduate students are not required to publish, so this data has not been collected from them regarding corruption.

2.4. Plagiarism detection software is effective in preventing plagiarism:

Use of plagiarism detection software[30] which is accessible online has a strong role because people are more open to the web, numerous online counterfeit checking software's are accessible online to detect the appropriate content. Plagiarism detection software[31] can be classified into four main categories - online or remotely located search tools and services, stand-alone desktop software, web search engines and other web resources, and subscription databases. Such plagiarism has become common on the Internet. The spirits of many thieves are so high that they even get their own book printed by manipulating a few words in people's works. Based on the consent and non-consent of the respondents, a hypothesis was made that plagiarism detection software is not effective in preventing plagiarism. The results of the research in this context are as follows:

Table No. - 2

Hypothesis	Consent	Non-consent	Total
Where plagiarism detection software is not used. (fo1)	68	32	100
Where Plagiarism Detection Software Used. (fo2)	15	85	100
Total (fo1+ fo2)	83	117	200
Fe	41.5	58.5	
(fo-fe)	26.5	26.5	
$(fo-fe)^2$	702.25	702.25	
$(fo-fe)^2/fe$	16.92	12.00	28.92

Source: Self Survey

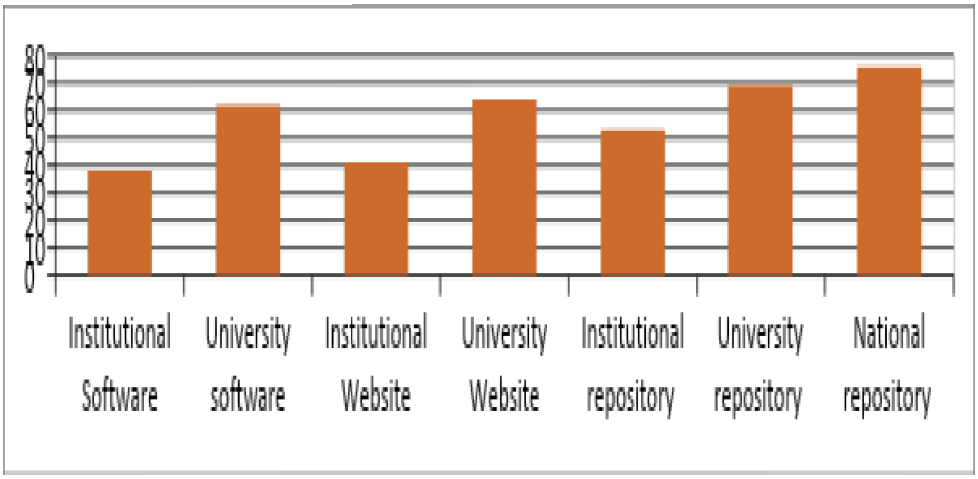
[30] Isenburg, Oermann and Howard. (2019). Plagiarism Detection Software and Its Appropriate Use, Wiley Research DE&I Publishing, March 01. 2019. https://onlinelibrary.wiley.com/doi/10.1111/j.1750-4910.2019.tb00034.x

[31] Plagiarism detection: Elsevier. https://www.elsevier.com/editors/perk/plagiarism-complaints/plagiarism-detection

Here the sum of the chi-square test (X^2) of the Where plagiarism detection software is not used. and Where Plagiarism Detection Software Used is 28.92+28.92 = 57.84. Here d.f. (2-1) (2-1) = 1 is 1 d.f. but the value of X for significance at 5% confidence level = 3.841 and at 1% confidence level = 6.635. The value of X^2 obtained in the study is more than the above two values, so it is meaningful on both levels. Here the null hypothesis cannot be true. Based on the analysis (Table-2), it can be said that Plagiarism detection software is effective in preventing plagiarism in the academic world if there is no human intervention in it.

2.5. Dimensions of digital identity systems/software tools would be more effective for plagiarism control in HEIs

Diagram/Graph No.- 04 (Responded acceptance in %)



Sources: Self Survey (Response collected from 200 respondents by online questionnaire)

Analyzing Diagram-4, it is known that there is a need for coordination at the institute, university and national level to prevent plagiarism. For this it is necessary that institute, university and national level plagiarism detection software should be made available. The research work should be made available on the website of the institute and the website of the university. Apart from this, a digital depository[32] of research works

[32] Shodhganga.(2022). https://shodhganga.inflibnet.ac.in/

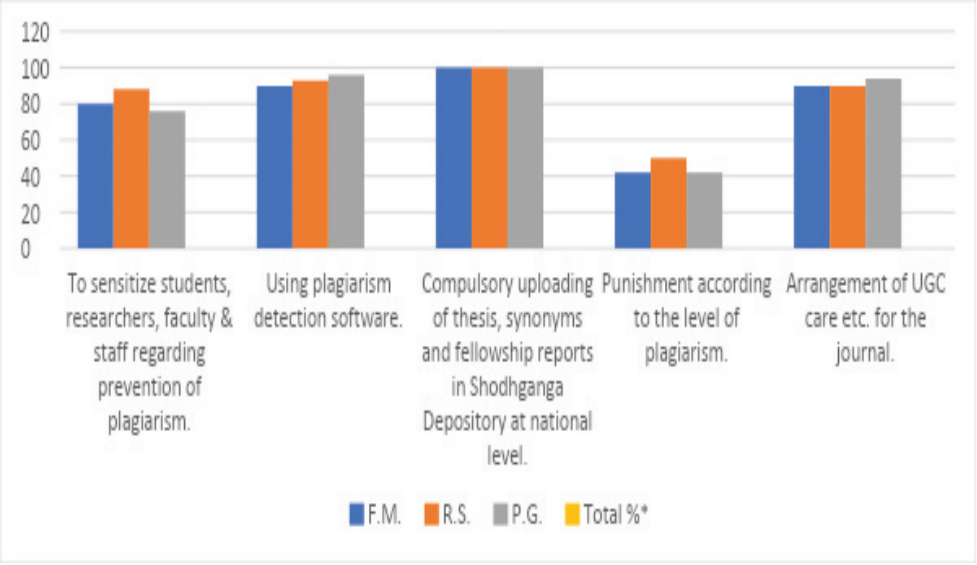
should be prepared at the national level as well as at the university and institute level so that plagiarism in research work can be stopped completely or it should be made extremely difficult.

2.6 UGC Regulations 2018 Effective in Preventing Plagiarism:

Various definitions have been given under point 2 in this regulation such as - academic integrity, curriculum, plagiarism, information manuscript researcher etc. Objectives of its regulation in point 3, Responsibilities of higher education institutions in point 4, Training in awareness program in point 5, Strategy for prevention of plagiarism in point 6, Measurement of level of plagiarism in point 8, Information about detection and work to be done in relation to it in point 9, departmental academic integrity list in point 10, institutional academic integrity panel in point 11 and punishment in point 12, are mentioned in the regulation.

Five points of an effective strategy to prevent plagiarism

Diagram/Graph No. - 5 (Consent of the respondents %)



Sources: Self Survey F.M. = Faculty Member, R.S. = Research Scholar, P.G. = Post Graduate

Three Days Advanced Training Programme on Shodhganga and Plagiarism Issues: Information and Library Network Centre Gandhinagar, Gujarat, 02 - 04 November, 2022. https://hrd.inflibnet.ac.in/docs/Adv_Trg_Shodhganga_02_04Nov_2022.pdf

Analyzing diagram number 5, it is known that 100% faculty members, research scholars and postgraduates agree with the statement of Compulsory uploading of thesis, synonyms and fellowship reports in Shodhganga Depository at national level. 93% of the respondents express their agreement with the statement of Using plagiarism detection software. In respect of faculty members, researchers and postgraduate students, this percentage is 90, 93 and 96 respectively.

3. Conclusion

High quality research work is done without the establishment of universities and institutes with world class facilities. The need to build a knowledgeable, good society in order to prevent plagiarism should be in the priorities of this country. Regarding research and development regulations, more budget allocation is required. India has earned a global reputation in the fields of space and nuclear energy, due to its efforts and achievements in science and technology. UGC's regulatory efforts to prevent plagiarism are bold and friendly. In order to prevent plagiarism, the compulsory implementation of all the higher education institutes has been followed by the UGC, whereas the higher education institute is now in the infancy stage for the establishment of the composition-mechanism/ Institutional mechanism and methods for the prevention of plagiarism. Churning[33] on the causes of plagiarism requires their dismantling[34]. Consumption of economic benefits from taking a casual advantage by plagiarism has become a serious problem. As members of the research community, they must be alerted before writing, if possible, holding it before publication and writing it. By doing this, they help protect the integrity of the research system. Certainly, there is a lack of continuity in the entire higher education sector. Some institutions have an active anti- plagiarism policy, some reactive policy and some are still claims, but it cannot prove that none of their students' cheats. Regulation

[33] Lamkin Bill.(2023). Plagiarism: Preaching: The Importance of 'Churning Your Own Butter' : "To take the thoughts or ideas of another and claim them as one's own, INTO THY WORD "
http://www.intothyword.org/apps/articles/?articleid=31543&columnid=
[34] Copyleaks. (2023). How to Avoid Plagiarism: Copyleaks, Stamford, CT 06902 USA.
https://copyleaks.com/hi/plagiarism-checker/how-to-prevent-and-avoid-plagiarism

of University Grants Commission (Prevention of literary integrity and plagiarism in higher educational institutions), Regulation 2018[35] is a milestone for controlling plagiarism in HEI and giving possible methods to avoid plagiarism in HEIs. Plagiarism and corruption can be eliminated and reduced by the plagiarism control matrix.

4. RECOMMENDATIONS BY UGC FOR CURBING PLAGIARISM

4.1. Check mechanism and software for plagiarism in HEIs: Establish the facility equipped with modern techniques to detect plagiarism. HEIs will create a mechanism to ensure that they are checked by HEI's paper publication / thesis / dissertation, students, faculty, researchers or staff for plagiarism at the time of forwarding /submission. The venture will include the fact that the document has been duly investigated through a plagiarizing device approved by HEI.

4.2. HEI website with the repository: HEI will develop a policy on plagiarism and it will be approved by its respective statutory bodies / authorities. The approved policy will be placed on the homepage of the HEI website. HEIs will create an institutional repository on the Institute's website, which will include dissertation/thesis/papers/publications and other in-house publications.

4.3. The digital repository (e-store) under the ShodhGanga and other e-repository: Under HEI "ShodhGanga e-repository", after the award of a degree for hosting in the digital repository, all masters, the research program's dissertation and the soft copy of the thesis will be presented to INFLIB_NET. The digital repository of Indian electronic thesis called Shodhganga, and Dissertation called Shodhgangotri accessible to all institutions and Universities. E-Shodhsindhu provides access to e-resources to Universities, Colleges and Centrally Funded Technical Institutions in India.

[35] Hindi Sarang.(2018). UGC kee saahityik choree neeti 2018 kya hai? https://hindisarang.com/ugc-guidelines-for-plagiarism-2018/

4.4. Awareness Programs and Trainings: HEI shall instruct students, faculty, researcher and staff about proper attribution, seeking permission of the author wherever necessary, acknowledgement of source compatible with the needs and specificities of disciplines and in accordance with rules, international conventions and regulations governing the source.

4.5. Compulsory awareness Programs & Trainings course work/module on plagiarism in HEIs : HEI shall instruct students, faculty, researcher and staff about proper attribution, seeking permission of the author wherever necessary, acknowledgement of source compatible with the needs and specificities of disciplines and in accordance with rules, international conventions and regulations governing the source. HEI will conduct a semester / awareness program on students responsible for promoting research, thesis, dissertation, educational integrity and ethics in education for faculty, researchers and employees. Encourage students, faculty, researchers and employees to register on the International Researcher Registry System. Include elements of responsible conduct of research and publication ethics as mandatory course work / modules for Masters and Research Scholars.

4.6. Control Authority for plagiarism in HEI: If there is any complaint of plagiarism against HEI Chief, then a suitable action will be taken by the Controlling Authority of HEI according to these regulations /rules.
4.7. Complaints Mechanism for plagiarism in HEIs: If there is any complaint of plagiarism against the head of the department/authorities at the institutional level, a suitable action will be recommended by the IAIP and approved by the competent authority according to these regulations.

4.8. Ethics for controlling authority: Each HEI should establish the mechanism set out in these regulations/rules, to increase awareness of responsible conduct of research and academic activities, promote academic integrity and prevent plagiarism. If any member of the DAIP or IAIP has any complaint of plagiarism, then such members will be

excluded from the meeting where their case is being discussed / examined/ investigated.

4.9. Basic original work and indication of being free from any plagiarism: Each student presents a thesis, dissertation, or any other such document to HEIs, which indicates that the document has been prepared by it and that the document is: It's original work and free from any plagiarism. Each supervisor will present a certificate that indicates that the work done by the researcher under his is free of plagiarism.

4.10. Complaint/Reporting of Plagiarism/Handling of Reporting & Detection of Plagiarism: If any member of the academic community suspects that there is a case of plagiarism in a document, it will report to the Departmental Academic Integrity Panel (DAIP) with due proof. DAIP will investigate this matter if the complaint is received or charged, and submit its recommendations to the Institutional Academic Integration Panel (IAIP) of HEI.

The authorities of HEI can also take Suo Motu notice of an act of plagiarism and initiate proceedings under these regulations. Similarly, proceedings can also be initiated by the HEI on the basis of findings of an examiner. All such cases will be investigated by the IAIP

COMBATTING CORRUPTION IN FOREIGN INVESTMENT THROUGH WTO'S INVESTMENT FACILITATION AGREEMENT

Eluckiaa and Kapil Sharma Research Scholar,
National Law University Odisha

ABSTRACT

This article explores the need to combat corruption in the international investment regime through the World Trade Organisation (WTO). Firstly, this article explains the anti-corruption measures in the current investment regime by analysing the anti-corruption provisions in the International Investment Agreements (IIAs) and the investment disputes involving the allegations of corruption. Then, the article traces the negotiating history of the anti-corruption provision in the proposed Investment Facilitation Agreement of the WTO. The article finally explores the scope and necessity of the anti-corruption provisions in the Investment Facilitation Agreement.

Keywords: *Anti-corruption, Investment Facilitation for Development, Investment Facilitation Agreement, Sustainable Investment, World Trade Organisation.*

I. INTRODUCTION

Corruption plagues every aspect of the governance of a state. The pervasiveness of corruption has a corrosive effect on the economic progress of a state. Corruption affects international trade and foreign direct investment. For many economies, especially developing and least developed economies, international trade and foreign investment are crucial for their economic development. A country where corruption is prevalent may not be an attractive destination for foreign investment.

Addressing corruption has become an important task both at the national and international levels. Many international instruments were adopted to address corruption. The Organisation for Economic Cooperation and Development (OECD) adopted a Convention on Combating Bribery of Foreign Public Officials in International Business

Transactions in 1997. The United Nations also adopted a Convention Against Corruption (UNCAC) in 2003. Currently, UNCAC is the most significant anti-corruption treaty, with a comprehensive coverage of combating corruption at public and private sectors and at national and international levels.

Given the importance of combating corruption in the investment regime, many international investment agreements also contain anti-corruption provisions. The World Trade Organisation is currently negotiating a plurilateral investment facilitation agreement, including an anti-corruption provision. This agreement aims to develop the elements that would improve the transparency and predictability of investment measures, streamlining and speeding up administrative procedures, enhancing international cooperation, information sharing, and exchange of best practices.[1] However, the proposed Investment Facilitation Agreement (IFA) excludes issues related to market access, investor-state dispute settlement system, and investment protections. Had these provisions been included, it may have generated many debates, and the negotiation of the IFA may not have progressed any further. The agreed scope of the IFA, which focuses merely on facilitation measures, does not just focus on economic development but sustainable development. Thus, IFA contains many provisions on the transfer of technology, environment, human rights, responsible business conduct *etc*. IFA also contains an anti-corruption provision. This research paper explores the necessity and scope of this anti-corruption provision in the proposed IFA of the WTO.

Before examining the anti-corruption provision of the IFA, it is pertinent to understand contemporary anti-corruption provisions in international investment agreements. Therefore, the first section of this article will explore how International Investment Agreements (IIAs), particularly the Bilateral Investment Treaties (BITs) and Treaty with Investment

[1] WTO, Joint Ministerial Statement on Investment Facilitation for Development, WTO document WT/MIN(17)/59, (13 December 2017) available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN17/59.pdf&Open=True, last seen on 24/11/2022.

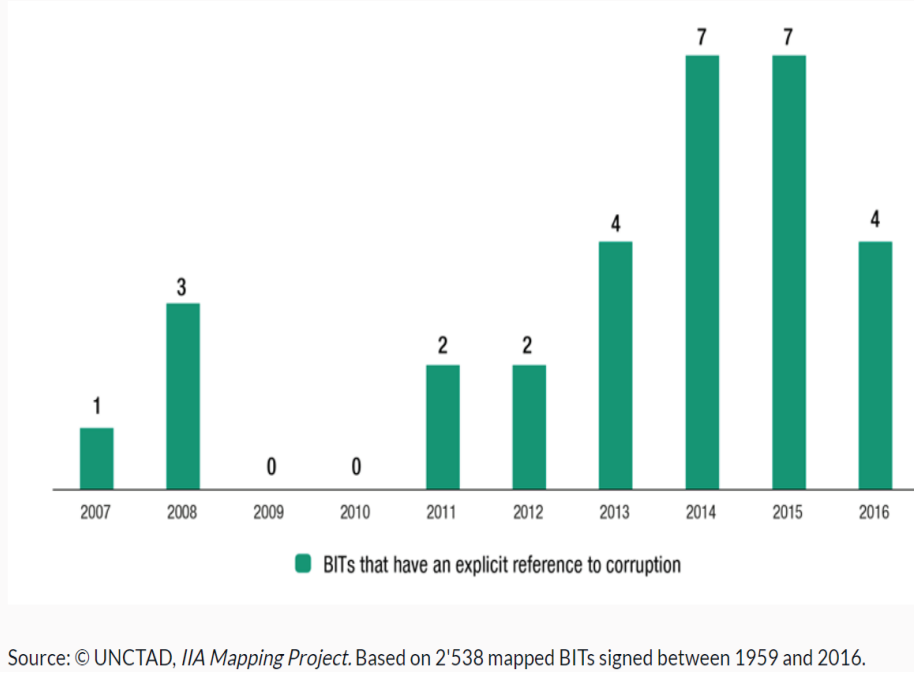
Provisions (TIPs), combat corruption in the investment regime. This section also examines those cases where the arbitral tribunals dealt with the questions of corruption. A broad concept of corruption is examined here, which involves various modalities like bribery, money laundering, trading influence *etc*. Then this article examines various proposals submitted by WTO Members for drafting the anti-corruption provision in the IFA and the provision that is temporarily agreed upon in the current draft version of the IFA. Finally, the article examines the necessity and scope of the anti-corruption provision in the IFA.

II. ANTI-CORRUPTION PROVISIONS IN INTERNATIONAL INVESTMENT AGREEMENTS

Many IIAs contain anti-corruption provisions. In earlier BITs, such provisions were not found and this may be because BITs are not the primary instrument to address corruption. Earlier, corruption was mostly addressed only through national policies. But in recent BITs, anti-corruption provisions can be found. Such anti-corruption provisions can be found in the preamble[2] or as a substantive provision[3]. Sometimes a whole chapter in an IIA is dedicated to combating corruption in recent instruments. For instance, there is a separate chapter on Transparency and Anti-Corruption in the recently concluded Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

[2] For instance, the US – Singapore FTA (2003) states in its preamble that "… Desiring to promote transparency and to eliminate bribery and corruption in business transactions".

[3] Article 10 of the Agreement Between Japan and the Kingdom of Cambodia for the Liberalization, Promotion and Protection of Investment.



Source: © UNCTAD, *IIA Mapping Project*. Based on 2'538 mapped BITs signed between 1959 and 2016.

Figure 1: Number of BITs that have an explicit reference to corruption, signed between 2007 and 2016

This practice of including an anti-corruption provision in the BIT is very recent. The UNCTAD undertook a mapping project whereby it mapped the contents of IIAs. Accordingly, it can be seen that 45 out of 2584 mapped treaties (both 46 TIPs and 2538 BITs) contain a substantive provision on corruption.[4] The very first substantive anti-corruption provision for the first time featured in the US – Singapore FTA in 2003.[5] Japan was the first country to include this anti-corruption provision in a

[4] The UNCTAD Project merely quantitatively analysed the contents of IIAs. See UNCTAD IIA Mapping Project, UNCTAD, available at https://investmentpolicy.unctad.org/uploaded-files/document/Mapping%20Project%20Description%20and%20Methodology.pdf, last seen on 21/4/2023.

[5] Subsequently, the US incorporated anti-corruption provisions in the US – Morocco FTA in 2004, US – Korea FTA in 2006, US – Oman FTA in 2006, and US – Peru Trade Promotion Agreement in 2006.

BIT.[6] The very first such mapped BIT to contain this provision was a treaty between Japan and Cambodia.[7]

1. Diverse Anti-Corruption Provisions in IIAs

While qualitatively examining the mapped treaties containing anti-corruption provisions in this research paper, it can be found to be very diverse.

(a) Mere commitment to combat corruption as the Anti-Corruption Provision

Some IIAs in their anti-corruption provision merely affirm the state's commitment to combat corruption.[8] Some IIA refers to international instruments on anti-corruption and requires the contracting parties to abide by them.[9] The US – Singapore FTA goes one step further where it does not only refer to the international instrument on anti-corruption but rather reaffirms the commitment to adopting, maintaining and enforcing anti-corruption measures.[10] Even CPTPP requires the

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[6] Japan – Lao People's Democratic Republic BIT (2008), Japan – Uzbekistan BIT (2008), Japan – Peru BIT (2008), India – Japan EPA (2011), Japan – Papua New Guinea BIT (2011), Colombia – Japan BIT (2011), Japan – Kuwait EPA (2012), Iraq – Japan BIT (2012). Until 2012, anti-corruption provision was found only in Japan's IIA.

[7] Article 10 of Japan – Cambodia BIT which came into force on 31 July 2008 states that "[e]ach Contracting Party shall ensure that measures and efforts are undertaken to prevent and combat corruption regarding matters covered by this Agreement in accordance with its laws and regulations." See note 4.

[8] Supra 7.

[9] For example, in the EU - Iraq Cooperation Agreement, Article 106 titled as "Combating Organised Crime and Corruption" states that:

> "The Parties agree to cooperate on and contribute to the fight against organised, economic and financial crime and corruption, counterfeiting and illegal transactions, through full compliance with their existing mutual international obligations in this area including on effective cooperation in the recovery of assets or funds derived from acts of corruption. The Parties will promote the implementation of the UN Convention on Transnational Organised Crime and its supplementing Protocols and the UN Convention against Corruption."

It can be seen that the EU mostly in its IIA gives reference to the United Nations Convention Against Corruption.

[10] Article 21.5 titled as "ANTI-CORRUPTION" stated that:

> "1. Each Party reaffirms its firm existing commitment to the adoption, maintenance, and enforcement of effective measures, including deterrent

countries to have domestic legislation to criminalise corruption when it is committed intentionally and when it affects trade or investment. The Chapter on Anti-Corruption in CPTPP requires countries to consider adopting whistle-blower protection laws as well.

(b) Anti-Corruption Provision Imposing Obligations on the Investor

Some IIAs contain anti-corruption provisions that impose an obligation on the investor. Most such provisions are found in the clause relating to corporate social responsibility.[11] Some IIAs restrict the access to Investor-State Dispute Settlement (ISDS) if the investor has engaged in corrupt activities. The Indian Model BIT 2016 follows this approach. Indian Model BIT has two provisions relating to corruption. Article 11 imposes an obligation on the investor that they shall not offer, promise or give any undue pecuniary advantage, gratification or gift to any government official both directly or indirectly either before or after the establishment of investment. Such comprehensive obligation on investors was further strengthened by stating that the investors shall

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> penalties, against bribery and corruption in international business transactions. The Parties further commit to undertaking best efforts to associate themselves with appropriate international anti-corruption instruments and to encourage and support appropriate anti-corruption initiatives and activities in relevant international fora.
>
> 2. The Parties shall cooperate to strive to eliminate bribery and corruption and to promote transparency in international trade. They will look for avenues in relevant international fora to address these issues and build upon the potential anti-corruption efforts in these fora."

[11] For instance, see Article 16 of the Agreement Between Canada and the Federal Republic of Senegal for the Promotion and Protection of Investments stated that:

> "Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. Such enterprises are encouraged to make investments whose impacts contribute to the resolution of social problems and preserve the environment."

not even be complicit in inciting, abetting or conspiring to commit corrupt activities.[12]

Subsequently, in Article 13.4, the Indian Model BIT provides that an investor cannot take recourse to ISDS "if the investment has been made through fraudulent misrepresentation, concealment, corruption, money laundering or conduct amounting to an abuse of process or similar illegal mechanisms." Many scholars have criticised such anti-corruption provisions which refuse access to ISDS for investors by questioning if such anti-corruption provisions address the asymmetric balance between the host state and the investor.[13] It can be seen that the arbitral tribunals have refused access to ISDS on the ground of corruption even in the absence of such provision.[14]

At the outset, this provision in the Indian Model BIT is in line with the domestic legislation, the Prevention of Corruption Act, 1988 and also with India's obligations under the UNCAC. But the Law Commission of India, while commenting on the draft version of the Model India BIT, remarked that "[a]n obligation against corruption is toothless without complementary obligations upon the Host State, such as the requirement of transparency and competition in public procurement and decision-making".[15]

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[12] Article 11 of Model Text for the Indian Bilateral Investment Treaty. See Model Text for the Indian Bilateral Investment Treaty, UNCTAD, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download, last seen on 20/4/2023.

[13] See Yueming Yan, Anti-Corruption Provisions in International Investment Agreements: Investor Obligations, Sustainability Considerations, and Symmetric Balance, 23, Journal of International Economic Law, 989, 993 and 994 (2020).

[14] World Duty Free Company v Republic of Kenya, ICSID Case No. Arb./00/7, Award, 4 October2006, available at: https://www.italaw.com/sites/default/files/case-documents/italaw15005.pdf and Metal-Tech Ltd v Republic of Uzbekistan, ICSID Case No. ARB/10/3, Award, 4 October 2013, available at https://www.italaw.com/sites/default/files/case-documents/italaw3012.pdf.

[15] Law Commission of India Report 260: Analysis of the 2015 Draft Model Indian Bilateral Investment Treaty, Law Commission of India, available at https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081624.pdf, last seen on 30 /11/2022. It should be noted that the anti-corruption provision in the draft Indian Model BIT is different from that of the final

At this juncture, it should be noted that CPTPP in its Chapter on Anti-Corruption also lays down that countries should promote integrity, honesty, and responsibility among their public officials and that training should be given to public officials who are vulnerable to corruption. It also states that transparency should be promoted amongst public officials while exercising their public functions and that public officials should make public declarations of their outside investments, assets and gifts received. Moreover, CPTPP requires countries to maintain books and records, financial statement disclosures, auditing and accounting standards to guard against corruption. Another interesting provision in this Anti-Corruption Chapter of CPTPP is that it encourages the countries to support the active participation of individuals and groups or organisations in fighting corruption in trade and investment. In fact, CPTPP made most of the provisions of this Chapter to be subject to the dispute settlement system.

Indian Model BIT. In the draft version, Article 9 titled as "Obligation against Corruption" provided that:

> "9.1 Investors and their Investments in the Host State shall not, either prior to or after the establishment of an Investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of the Host State as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage.
>
> 9.2 Except as otherwise allowed under the Law of the Host State, Investors and their Investments shall not engage any individual or firm to intercede, facilitate or in any way recommend to any public servant or official of the Host State, whether officially or unofficially, the award of a contract or a particular right under the Law of the Host State to such Investors and their Investments by mechanisms such as payment of any amount or promise of payment of any amount to any such individual or firm in respect of any such intercession, facilitation or recommendation.
>
> 9.3 Investors and their Investments shall not make illegal contributions to candidates for public office or to political parties or to other political organisations. Any political contributions and disclosures of those contributions must fully comply with the Host State's Law.
>
> 9.4 Investors and their Investments shall not be complicit in any act described in this Article, including inciting, aiding, abetting, conspiring to commit, or authorizing such acts."

2. Approaches of Tribunals in Cases involving Corruption in ISDS

There is an increasing number of cases in Investor-State Dispute Settlement (ISDS) with allegations of corruption.[16] In most of these cases, the relevant IIAs did not contain an anti-corruption provision.[17] Thus, there was no guidance on how the tribunal should decide this issue. However, even in the absence of an express provision on anti-corruption, it did not bar the arbitral tribunal from referring to international instruments on corruption. The legal basis for this is derived from Article 31(3)(c) of the Vienna Convention on Law of Treaties. Further, the ILC's Report on Fragmentation of International Law explained the principle of systemic integration and concluded that other sources of international law will be applicable.[18] Thus, when the IIA is silent on combating corruption, the OECD's Anti-Bribery Convention or the UNCAC can guide the arbitral tribunals.

Article 42(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (popularly known as ICSID Convention as it establishes the International Centre for Settlement of Investment Disputes) also states that the tribunals can decide the dispute in accordance with the rules as agreed by the parties and in the absence of such agreement, the tribunal may apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

Thus, theoretically, the arbitral tribunals even in the absence of any anti-corruption provision in the IIA can deal with corruption issues. Yet, there are some practical difficulties. Most international instruments on

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[16] Littop Enterprises Ltd. v. Ukr., Case No. V 2015/092, Final Award, 1 363 (Stockholm Chamber Com. 2021). See generally Niko Res. (Bangl.) Ltd. v. Bangl. Petroleum Expl. & Prod. Co. Ltd. ("Bapex"), ICSID Case No. ARB/10/11 & No. ARB/10/18, Decision on the Corruption Claim (Feb. 25, 2019); Spentex Neth., B.V. v. Republic of Uzb., ICSID Case No. ARB/13/26, Award (Dec. 27, 2016). See also Glencore Int'l A.G. v. Republic of Colom., ICSID Case No. ARB/16/6, Award, 1 593 (Aug. 27, 2019).

[17] Yueming Yan, The Inclusion of Anti-Corruption Clauses in International Investment Agreements and Its Possible Systemic Implications, 17(1), Asian Journal of WTO & International Health Law and Policy, 141, 145 (2022).

[18] Martti Koskenniemi, Fragmentation of International Law: Difficulties Arising From The Diversification And Expansion of International Law, United Nation, available at https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf, last seen on 2/12/2022.

corruption are drafted in such a way that it imposes certain obligations on the states aimed at preventing and eliminating corruption. These instruments have defined corruption and laid down procedures to determine if certain acts should be considered as corrupt acts. This definition may be useful to an arbitral tribunal but at the same time, most of the provisions of these instruments are directed at domestic legislation and require enforcement from national authorities. These instruments require imposing sanctions on public officials involved in corruption but an arbitral tribunal hearing an investment dispute does not have the power to do so.

Moreover, even these international instruments establish diverse practices for combating corruption. For instance, the UNCAC and OECD Anti-Bribery Convention have different provisions with respect to demanding bribes.[19] It is addressed in UNCAC but not in OECD Anti-Bribery Convention. Similarly, different instruments have different evidentiary standards as well. This difficulty can be understood from investment arbitration as well. Some arbitral tribunals have accepted circumstantial evidence[20] while some tribunals require irrefutable evidence[21]. The Tribunal in *Karkey v Pakistan* established a higher threshold for proof whereas the Tribunal in *Union Fesona Gas v Egypt* had a lower threshold of proof.[22] Thus, the arbitral tribunals invoked many grounds in the absence of relevant anti-corruption provisions in the applicable IIA to deal with corruption claims in investment arbitration.

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[19] Supra 17, at 147.

[20] Metel-Tech, Supra 14 and Vladislav Kim and others v Republic of Uzbekistan, ICSID Case No. ARB/13/6, Award, 8 March 2017 available at https://www.italaw.com/sites/default/files/case-documents/italaw8549.pdf.

[21] African Holding Company of America, Inc. and Société Africaine de Construction au Congo S.A.R.L. v Democratic Republic of the Congo, ICSID Case No. ARB/05/21, Award, 14 July 2008.

[22] Karkey Karadeniz Elektrik Uretim A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/13/1, Award, 22 August 2017 available at https://www.italaw.com/sites/default/files/case-documents/italaw9767.pdf and Unión Fenosa Gas, S.A. v. Arab Republic of Egypt, ICSID Case No. ARB/14/4, Award, 31 August 2018 available at https://www.italaw.com/sites/default/files/case-documents/italaw10061.pdf.

(a) Ground of International Public Policy

In *World Duty Free v Kenya*, the Tribunal held that no claim can arise from an agreement which was procured through corrupt means.[23] For this, the Tribunal relied on international public policy and held that Kenya was entitled to void the contract.[24] This broad reference to international public policy by the Tribunal was criticised by some scholars.[25] Since the concept of international public policy itself suffers from certain uncertainties with regard to its definition, legal functioning and its boundaries, its reliance by the Tribunal in the *World Duty Free* case was questioned.[26]

(b) Ground of Host State's Laws

In *Metal-Tech v Uzbekistan*, the Tribunal relied on the definition of investment in the BIT which contained the phrase "in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made".[27] Accordingly, the Tribunal stated that it does not have jurisdiction in this case as the contract was secured by bribery.

It should be noted that this phrase requiring the investor to comply with the laws and regulations of the host state is a common provision in many BITs. In fact, even in the very famous *Salini v Morocco* case, Morocco contended that there was no investment relying on the phrase "in accordance with the laws and regulations of the aforementioned party" but the Tribunal ruled that this phrase related to the validity of the investment and not the definition.[28] There are many cases where the host state argued to dismiss the claims based on this phrase and the

[23] World Duty Free, Supra at 14, para 137.
[24] Ibid, at para 138.
[25] Supra 17, at 146.
[26] Meyer Olaf, The Formation of a Transnational Ordre Public against Corruption, 229, 231 in Anti-Corruption Policy: Can International Actors Play a Constructive Role? (Susan Rose-Ackerman and Paul D. Carrington, eds., 2013).
[27] Metel-Tech, Supra 14, at 130.
[28] Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Award, 23 July 2001, available at https://www.italaw.com/sites/default/files/case-documents/ita0042.pdf at para 46.

tribunals have seldom accepted it.[29] In *L.E.S.I.-DIPENTA v Algeria*, the Tribunal stated that such mention of compliance with laws and regulations was meant to exclude investments made in violation of the fundamental principles.[30]

The Tribunal, in *Fraport v The Philippines*, held that "in accordance with" should be applied only to the establishment of the investment and that any violation of domestic law during the operation of the investment can merely be claimed as a defence to substantive violations of the BIT but it cannot bar the jurisdiction of the Tribunal.[31] But the dissenting opinion of Mr. Bernardo M Cremades stated that a finding of corruption based on domestic law could preclude the tribunal from hearing the case.[32]

Thus, in line with this reasoning by tribunals for the phrase "in accordance with the domestic laws and regulations", the decision in *Metal-Tech* case may be justified as the *Metal-Tech* Tribunal stated that corruption at the time of the establishment of the investment should result in the dismissal of the jurisdiction. But it is interesting to note that the *Metal-Tech* Tribunal undertook an *ex officio* investigation as to whether the establishment of investment was flawed by corruption. For this purpose, the Tribunal followed the "red flags" list approach where the Tribunal looked at a set of indicators that acted as tools to detect instances of corruption.

In this approach also, at the maximum, the investor who engaged in corrupt practices may merely lose access to ISDS. Moreover, the reference to domestic laws in the IIA may not always aid the arbitral tribunal in corruption allegations as the domestic anti-corruption laws

[29] See Fraport AG Frankfurt Airport Services Worldwide v The Republic of the Philippines, ICSID Case No. ARB/03/25, Award, 16 August 2007 available at https://www.italaw.com/sites/default/files/case-documents/ita0340.pdf.
[30] Consortium Groupement L.E.S.I.- DIPENTA v Algeria, ICSID Case No ARB/03/08, Award, 10 January 2005, available at https://www.italaw.com/sites/default/files/case-documents/italaw4321.pdf, para 24(iii).
[31] Supra 28 at para 345.
[32] Ibid, at Para 29, dissenting opinion of Mr. Bernardo M Cremades.

may vary from country to country. Therefore, there is uncertainty with regard to the legality of domestic anti-corruption laws for the arbitral tribunal to completely rely on it.

(c) Ground of Doctrine of Unclean Hands

Sometimes, the arbitral tribunals have relied on the doctrine of unclean hands, that is, *ex malo non oritus action* to deal with corruption allegations.[33] The Tribunal in *Al-Warraq v Indonesia* applied this doctrine of unclean hands to declare the inadmissibility of investors' claims.[34] Also, in *Spentex v Uzbekistan*, the Tribunal stated that corruption was a violation of good faith and that the investor did not initiate the arbitral proceedings with clean hands and thus, should not be heard.[35] It should be noted that in most cases, the investor contests the application of this doctrine as the same is not a general principle of international law.[36] In one case, *Yukos v Russia*, the Tribunal itself declared that it was not persuaded that the doctrine of unclean hands was a general principle of law recognised by civilised nations.[37] Thus, the application of this doctrine of unclean hands for corruption claims is also controversial.

In *Siemens v Argentina*, even when the allegation of corruption was not discussed during the arbitral proceedings, a joint investigation of the US and Germany revealed that Siemens secured investment in Argentina

[33] Ex dolo malo non oritus action means that a right of action cannot be raised out of fraud.
[34] Hesham Talaat M. Al-Warraq v. The Republic of Indonesia, UNCITRAL, Final Award, 15 December 2014, available at https://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf
[35]Spentex Netherlands, B.V. v. Republic of Uzbekistan, ICSID Case No. ARB/13/26, Award, 27 December 2016.
[36] For example, see Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, Award, 8 July 2016 available at https://www.italaw.com/sites/default/files/case-documents/italaw7417.pdf at para 350.
[37] Yukos Universal Limited (Isle of Man) v Russian Federation Award, PCA Case No AA 227, ICGJ 481 (PCA 2014), 18 July 2014 at para 1358.

through bribes.[38] Thus, the implementation of the award in favour of the investor was affected by this fact of corrupt practices coming to light. Argentina proceeded to annul the award but meanwhile, the matter was settled when Siemens admitted to the bribery allegation and abandoned its effort for the implementation of the award.

(d) Uncertainty in ISDS to deal with Corruption Claims

As it can be seen above, the approaches of the tribunals in dealing with corruption allegations have been very diverse. There are many uncertainties in the way that tribunals deal with such issues. Firstly, corruption has become a jurisdictional barrier and the tribunals have dismissed claims if the investor has been involved in corrupt practices. This gives rise to a question if corruption claims should be a question to be determined at the jurisdictional stage of the arbitration or as a substantive issue? More importantly, the consequence of accepting the defence of the host state that its officials engaged in corruption seems to be asymmetrical. As it can be seen in the *World Duty Free* case, the investor's expropriation claim was not entertained by the Tribunal and at the same time, Kenya had not initiated any proceedings against the former President who is said to have received a suitcase full of cash to provide concessions to the investor.[39]

It can also be seen that the Tribunal in *Wena v Egypt* required the host state to submit evidence to disprove the investor's contention that the agreement was a legitimate one but no such affirmative evidence was offered by Egypt.[40] One witness testified that the Egyptian government was aware of the agreement that Mr. Kandil "offered his help and assistance officially above board with their knowledge."[41] The Wena

[38] Siemens A.G. v. The Argentine Republic, ICSID Case No. ARB/02/8, Award, 6 February 2007 available at https://www.italaw.com/sites/default/files/case-documents/ita0790.pdf.
[39] World Duty Free, Supra at 14
[40] Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award, 8 December 2000,
available athttps://www.italaw.com/sites/default/files/case-documents/ita0902.pdf., para 117.
[41] Ibid, at para 115.

Tribunal stated that it was reluctant to immunise Egypt in this from its liability under the arbitration as Mr. Kandil was never prosecuted in Egypt in connection with this agreement but Egypt was contending that the agreement with Mr. Kandil was illegal under Egyptian law.[42] This approach of the Wena Tribunal gives rise to another question of whether the defence of corruption can be taken by a host state only if the corrupt officials are prosecuted.

Given the huge financial burden to the host state when it loses a case in ISDS, this approach of the tribunals requiring the host state to initiate action against its officials may discourage host states from adopting stricter anti-corruption laws.[43] On the other hand, even if the investor has genuine claims against the host state, the corruption claims by the host state can act as a defence and shield against its liability under the BIT.

It was actually the Metal-Tech Tribunal that exacerbated the uncertainties in corruption cases in ISDS. During the examination of the investor's witness in this case, certain facts about payment of a substantial amount were revealed and that Consultants were engaged in lobbying activities.[44] Then the Metal-Tech Tribunal invoked its powers under Article 43 of the ICSID Convention[45] as it considered that it was its duty to inquire about the reasons for such payment.[46] Therefore, it called for additional testimony and evidence in this regard.[47] This Tribunal put the burden of proof on the investor as the evidence of payments came from them to establish the nature and purpose of

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[42]Supra 40, at para 74.

[43]Jason Webb Yackee, Investment Treaties and Investor Corruption: An Emerging Defense for Host States, 52, Virginia Journal of International Law, 723 (2012).

[44] Metel-Tech, Supra 14, at paras 240 and 241.

[45] Article 43- Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the
proceedings,

(a) call upon the parties to produce documents or other evidence, and

(b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem
appropriate.

[46] Supra 14, at para 241.

[47] Ibid.

payments.[48] The Metal-Tech Tribunal arrived at this conclusion regarding the burden of proof as corruption is generally difficult to establish and the same may be shown through circumstantial evidence as well.[49] Since the investor did not submit evidence of the legitimate services for which the exorbitant funds were made, the Tribunal rejected the investor's explanation that it was not able to get the testimony of witnesses as they "are very concerned about their well-being and going and suing the Government of Uzbekistan".[50]

The approach of the Tribunal to examine the allegations of corruption on its own which emerged during the course of arbitration remains a concern. The asymmetrical burden can be seen here in the *Metal-Tech* case. Firstly, the burden of proof was on the investor where they had to provide evidence disproving corruption when it was not even the original issue of the arbitration and secondly, the Uzbeki officials are not made responsible for their acts. The investor raised an issue of the timing of the corruption allegations by the host state but the Tribunal rejected it as the same came to light only during the course of the arbitral proceedings.[51]

With so much uncertainty in the current ISDS regime, a new opportunity to combat corruption in the investment regime was presented in the negotiation of the Investment Facilitation Agreement under the auspices of the WTO. Since the negotiation of this agreement is underway, it becomes pertinent to have a strong and robust anti-corruption provision in the Investment Facilitation Agreement. The next section traces the negotiation of the anti-corruption provision in the investment facilitation agreement.

[48] Ibid, at para 243.
[49]Ibid.
[50] Ibid, at para 246.
[51] Ibid.

III. COMBATING CORRUPTION THROUGH INVESTMENT FACILITATION AGREEMENT

Having an agreement on investment in the WTO has been debated for long, especially given the fact that the Havana Charter had provisions on investment. When the Trade Facilitation Agreement was adopted in 2015, it reduced significant trade costs even when it did not address market access problems but merely standardised custom procedures, documentation requirements *etc*.[52] Along similar lines, Brazil proposed the idea of having an instrument for investment facilitation.[53] Even before Brazil's proposal to the WTO in 2014, other international organisations explored the need for a multilateral framework on investment facilitation.[54] Investment facilitation is a concept that is difficult to define but UNCTAD defined investment facilitation as "the set of policies and actions aimed at making it easier for investors to establish and expand their investments, as well as to conduct their day-to-day business in host countries."[55]

1. Structured Discussion on Investment Facilitation Agreement

In the 11th Ministerial Conference, 70 WTO Members endorsed a "Joint Ministerial Statement on Investment Facilitation for Development" at Buenos Aires where they wanted to initiate a structured discussion for

[52] Agreement on Trade Facilitation, Ministerial Decisions, WTO Doc. WT/MIN(13)36, 7 December 2013.

[53] It should be noted that India has introduced a proposal in the WTO for services facilitation.

[54] The International Centre for Trade and Sustainable Development (ICSTD) and the World Economic Forum (WEF) established an E15 Initiative to work on Investment Policy among other things., Karl Sauvant, The Evolving International Investment Law and Policy Regime: Ways Forward, E15 Task Force on Investment Policy Options Paper (2016); UNCTAD published a Global Action Menu for Investment Facilitation, find citation; G20's Trade and Investment Working Group (TIWG) provided for Guiding Principles for Global Investment Policymaking, find citation; Ana Novik and Alexandre de Crombrugghe, Towards an International Framework For Investment Facilitation, available at https://www.oecd.org/investment/Towards-an-international-framework-for-investment-facilitation.pdf, last seen 24/11/2022.

[55] Annual Report 2016, UNCTAD, available at https://tft.unctad.org/wp-content/uploads/2019/07/unctad_anual_repport_2016_en.pdf, last seen on 24/11/2022.

developing a multilateral agreement on investment facilitation.[56] A structured discussion at the WTO, thus, began in early 2018. During this discussion, the WTO Members recognised the need to address corruption that hinders foreign investment.

On 4 March 2019, there was an open-ended meeting of the Structured Discussions on Investment Facilitation for Development to discuss elements aimed at improving the transparency and predictability of investment measures.[57] For this purpose, the Participating Members prepared a compendium of examples based on the text-based examples submitted for this purpose. A total of fourteen written submissions of text examples of possible elements for improving transparency and predictability of measures were submitted by 45 WTO Members.[58] These examples were tabled without any prejudice to the submitting Member's position or views. A total of six elements were identified in order to proceed on element-by-element basis discussions in the

[56] Para 4 of Joint Ministerial Statement on Investment Facilitation for Development provides that:
"We call for beginning structured discussions with the aim of developing a multilateral framework on investment facilitation. These discussions shall seek to identify and develop the elements of a framework for facilitating foreign direct investments that would: improve the transparency and predictability of investment measures; streamline and speed up administrative procedures and requirements; and enhance international cooperation, information sharing, the exchange of best practices, and relations with relevant stakeholders, including dispute prevention. These discussions shall also seek to clarify the framework's relationship and interaction with existing WTO provisions, with current investment commitments among Members, and with the investment facilitation work of other international organizations. These discussions shall not address market access, investment protection, and Investor-State Dispute Settlement." WTO, Joint Ministerial Statement on Investment Facilitation for Development, WTO document WT/MIN(17)/59, (13 December 2017) available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN17/59.pdf&Open=True, last seen on 24/11/2022.

[57] WTO, WTO Structured Discussions on Investment Facilitation for Development, Negotiating meeting held on 4 March 2019, WTO document INF/IFD/R/1, (4 April 2019) available at
https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/R1.pdf&Open=True, last seen on 30/11/2022.

[58] Australia; Brazil; Canada; China; Costa Rica; the European Union (29); Guatemala; Hong Kong, China; Republic of Korea; Mauritius; Pacific Alliance (Chile, Colombia, Mexico and Peru); Panama; Switzerland; and Uruguay.

meetings scheduled between January 2019 to July 2019. These elements are-

1. Publication and availability of measures and information
2. Notification to the WTO
3. Enquiry points
4. Specific exceptions applicable to transparency requirements
5. Other transparency-related issues
6. Any other investment facilitation-related issues

Under the element 'Other investment facilitation-related issues', an example was tabled regarding the role of the investment facilitation framework in preventing and combating corruption.[59] Subsequently, meetings were scheduled on 24 and 25 June 2019 to discuss further the role of the investment facilitation framework in combating corruption among other things.[60] Accordingly, the discussion on including an anti-corruption provision was scheduled for the meeting on 25 June 2019.[61]

2. Issue 79 and Combating Corruption Through IFA

Drawing from the experience of negotiation of the Trade Facilitation Agreement, the participating Members preferred a "bottom-up" approach, that is, a provision-based approach to negotiate on the different investment facilitation elements.[62] Accordingly, many issues were identified in a document called "Checklist of Issues raised by

[59] Supra 57, at 4.
[60] WTO, WTO Structured Discussions on Investment Facilitation for Development , Schedule of Meetings January – July 2019, WTO document INF/IFD/W/3/Rev.1, (22 May 2019) available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/W3R1.pdf&Open=True, last seen on 30/11/2022.
[61] See the Agenda of the Meeting on 25 June 2019, WTO, WTO Structured Discussions on Investment Facilitation for Development, Meeting of 25 June 2019, Annotated Agenda by the Coordinator, WTO document INF/IFD/W/5, (5 June 2019) available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/W5.pdf &Open=True, last seen on 30/11/2022.
[62] WTO, WTO Structured Discussions on Investment Facilitation for Development, Meeting of 25 June 2019, 9 Other Cross-Cutting Issues, WTO document INF/IFD/R/4, 3, (15 July 2019) available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/R4.pdf &Open=True, last seen on 30/11/2022.

Members".[63] Issue 79 was on the role of the investment facilitation framework in combating corruption. In the meeting held on 25 June 2019, this issue 79 was discussed along with two other issues, the role of the investment facilitation framework in promoting corporate social responsibility and promoting women empowerment (issues 80 and 81 respectively). The summary document of this meeting highlighted the discussion on anti-corruption.[64] This document stated that the WTO Members were willing to include provisions on CSR and anti-corruption and that the international standards in this regard could be the basis of such provisions.[65] This document also stated that the discussion on these issues highlighted the relationship between elements of investment facilitation and the fight against corruption.[66] With the convergence of the opinion of many Members on including an anti-corruption provision, a provision on the same was included in Section VI of the Working Document.[67] The discussion on the anti-corruption provision continued in the meetings scheduled in November 2019.[68] In the meeting held on 25 November 2019, the participating Members agreed on the value of including an anti-corruption provision in the investment facilitation framework but they expressed a view that the anti-corruption provision should not impose any obligation on investors as the investment facilitation framework can only provide

[63] Ibid.
[64] Ibid at 4.
[65] Ibid.
[66] Ibid.
[67] WTO, WTO Structured Discussions on Investment Facilitation for Development, Working document, WTO document INF/IFD/RD/39, 25-28, (24/07/2019), available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?DataSource=Cat&query=@Symbol=%22INF/IFD/RD/39%22&Context=ScriptedSearches&languageUIChanged=true, last seen on 30/11/2022.
[68] WTO, WTO Structured Discussions on Investment Facilitation for Development, Meeting of 25-26 November 2019, Annotated Agenda By The Coordinator, WTO document INF/IFD/W/11, (14 November 2019) available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/W11.pdf&Open=True, last seen on 30/11/2022.

obligation on WTO Members.[69] Finally, they agreed to use flexible language or a voluntary provision in the anti-corruption provision.[70]

3. Three Proposals by WTO Members for the Anti-Corruption Provision in the Investment Facilitation Agreement

The discussion on the anti-corruption provision was further scheduled in the meetings held on 12 and 13 March 2020[71] and meetings scheduled on 5 June 2020[72], 24 June 2020[73], 10 July 2020[74], and 24 July 2020[75]. Before the meeting on 24 and 25 September 2020, three WTO Members

[69] WTO, WTO Structured Discussions on Investment Facilitation for Development, Meeting of 25 November 2019, WTO document INF/IFD/R/9, 2, (11 December 2019), available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/R9.pdf&Open=True, last seen on 30/11/2022.

[70] Ibid.

[71] WTO, WTO Structured Discussions on Investment Facilitation for Development, Meeting of 12-13 March 2020, Annotated Agenda By The Coordinator, WTO document INF/IFD/W/17, (4 March 2020) available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/W17.pdf&Open=True, last seen on 30/11/2022.

[72] WTO, WTO Structured Discussions on Investment Facilitation for Development, Meeting 5 June 2020, Annotated Agenda By The Coordinator, WTO document INF/IFD/W/19, (25 May 2020) available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/W19.pdf&Open=True, last seen on 30/11/2022.

[73] WTO, WTO Structured Discussions on Investment Facilitation for Development, Meeting 24 June 2020, Annotated Agenda By The Coordinator, WTO document INF/IFD/W/21, (19 June 2020) available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/W21.pdf&Open=True, last seen on 30/11/2022.

[74] WTO, WTO Structured Discussions on Investment Facilitation for Development, Meeting 10 July 2020, Annotated Agenda By The Coordinator, WTO document INF/IFD/W/22, (7 July 2020) available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/W22.pdf&Open=True, last seen on 30/11/2022.

[75] WTO, WTO Structured Discussions on Investment Facilitation for Development, Meeting 24 July 2020, Annotated Agenda By The Coordinator, WTO document INF/IFD/W/23, (20 July 2020) available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/W23.pdf&Open=True, last seen on 30/11/2022.

submitted proposals on Element 27 titled as "Measures against corruption".[76]

The *first proposal* was aimed at preventing and combating corruption by creating a transparent, efficient and predictable environment for facilitating cross-border investment.[77] This proposal required Members to adopt or maintain measures to combat corruption. This proposal suggested incorporating a very robust provision on anti-corruption and this proposal was more or less based on the anti-corruption Chapter of CPTPP and other regional trade agreements. The provisions of Chapter 26 of the CPTPP have been discussed above in detail. The CPTPP provisions were based on UNCAC provisions that were relevant to international trade. This proposal also stated that the definition of offences to be covered under the anti-corruption measures should be confined to each Member's law.[78] This proposal also encourages Members to promote integrity among public officials, to increase public awareness, and to recognise the role of the private sector and society in combating corruption affecting international investment.[79]

The necessity of such a comprehensive provision on corruption was questioned by some Members including the selective reference to some articles of the UNCAC.[80] The proponent of this proposal explained that

[76] WTO, WTO Structured Discussions on Investment Facilitation for Development, Meeting of 24-25 September 2020, WTO document INF/IFD/R/16, 5, (7 October 2020) available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/R16.pdf&Open=True, last seen on 30/11/2022.

[77] Although the summary document of the September meetings did not specify which Member had submitted the proposals, the authors think that this proposal was submitted by Canada. This inference was made by the authors by looking at the Easter Text draft (Revision 1) of 23 July 2021. This Easter Text Draft (Revision 1) was also not released by the WTO but was done by bilaterals.org which is an initiative of the Asia-Pacific Research Network, GATT Watchdog, Global Justice Ecology Project, GRAIN, IBON Foundation and XminusY. WTO, WTO Structured Discussions on Investment Facilitation for Development, Consolidated Document by the Coordinator, "Easter Text", WTO document INF/IFD/RD/74,Rev.1, (23 July 2021) available at https://www.bilaterals.org/IMG/pdf/wto_plurilateral_investment_facilitation_draft_consolidated_revised_easter_text-2.pdf, last seen on 30/11/2022.

[78] Ibid, at 41.

[79] Ibid, at 42-43.

[80] Supra 76, at 6.

his government does not consider corruption to be a tangential issue but a pertinent issue of investment facilitation.[81] He further clarified that there was no repetition of UNCAC provisions but that it has been adapted to this context in order to ensure that such obligations will be mandatory and enforceable in the WTO.[82]

The *second proposal* was a general proposal which clarified the measures that a Member was expected to take to combat corruption and required the adoption of measures in conformity with the obligations of the UNCAC.[83] The *third proposal* was an interesting proposal where the proponent wanted each Member to take measures against "corruption, money laundering, terrorism financing, tax fraud and tax evasion" in accordance with domestic laws and international instruments applicable to that Member like the UNCAC, OECD Guidelines for Multinational Enterprises as well as the current standards in the field of international taxation.[84]

With these proposals, the discussion on anti-corruption provisions continued in the meetings of 9 and 10 November 2020.[85] In this meeting on 9 November 2020, it was decided to continue an inter-sessional meeting on 23 November 2020 to have a conceptual discussion in informal mode on measures against corruption provided in Section VI of the informal consolidated text.[86] But the content of this informal meeting is not available to the public.

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[81] Ibid.
[82] Ibid.
[83] Ibid. The authors infer from the draft Easter Text that the proponent of this second proposal is Japan.
[84] Ibid. The authors infer from the draft Easter Text that the proponent of this third proposal is either the European Union or Switzerland.
[85] WTO, WTO Structured Discussions on Investment Facilitation for Development, Meeting 9-10 November 2020, Annotated Agenda By The Coordinator, WTO document INF/IFD/W/27, (3 November 2020) available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/W27.pdf&Open=True, last seen on 30/11/2022.
[86] WTO, WTO Structured Discussions on Investment Facilitation for Development, Meeting of 9-10 November 2020, WTO document INF/IFD/R/18, 4, (9 December 2020) available at

4. Revisions to the Proposals of WTO Members

Further meetings were held on 25 and 26 January 2021[87] and 8 and 9 March 2021[88]. In the March meetings (8-9 March 2021), the participating Members discussed element 27 titled as 'Measures against corruption'. One proponent, Morocco revised its proposal[89] on the grounds that other Members found it "too perspective".[90] Therefore, this proponent removed some of the elements.

Japan also proposed a provision where it stated that WTO Members should reaffirm the importance of transparency and should avoid corrupt practices in accordance with applicable international instruments.[91] For this purpose, Japan gave a reference to the United Nations Convention Against Corruption and drafted the provision in such a way that WTO Members should commit to adopting and maintaining anti-corruption measures in accordance with the UNCAC and its own domestic laws and regulations.[92] Japan's proposal also provided for consequences of corrupt activities as it stated that WTO

https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/R18.pdf&Open=True
, last seen on 30/11/2022.

[87] WTO, WTO Structured Discussions on Investment Facilitation for Development, Meeting of 26 and 27 January 2022, WTO document INF/IFD/R/30, (21 March 2022) available at
https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/R30.pdf&Open=True, last seen on 30/11/2022.

[88] WTO, WTO Structured Discussions on Investment Facilitation for Development, Meeting of 8-9 March 2021, WTO document INF/IFD/R/21 (31 March 2021) available at
https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/R21.pdf&Open=True, last seen on 30/11/2022.

[89] WTO, WTO Structured Discussions on Investment Facilitation for Development, Revised proposal by Morocco, WTO document INF/IFD/RD/71 (8 March 2021) available at
https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Language=English&SourcePage=FE_B_009&Context=Script&DataSource=Cat&Query=%40Symbol%3dINF%2fIFD%2f*&languageUIChanged=true, last seen on 30/11/2022.

[90] Supra 88, at 2.

[91] Supra 77, at 41.

[92] Ibid.

Members should provide effective and proportionate civil, administrative or criminal penalties.[93]

Chinese Taipei[94] proposed to add a footnote to Japan's proposal for clarifying the phrase "matters covered by this Agreement". Therefore, it suggested that a footnote may be added stating that measures which are exempted from the anti-corruption provision are merely some obligations of the investment facilitation framework and that they may still be covered by other provisions of the investment facilitation framework.[95]

This proposal of adding the footnote was discussed in the March meetings. Also, in these meetings, the Members resolved to include provisions to prevent and fight corruption in the Investment Facilitation Agreement.[96] The Members strongly supported referring to international anti-corruption instruments and standards so that the Investment Facilitation Agreement will be updated even if the standards evolve over time.[97] One suggestion that came up during the March meetings was that a balance between the approach to anti-corruption and the approach to responsible business conduct should be stressed in order to reflect the equal importance that Members attach to both issues.[98]

Cambodia made a proposal on element 27 to include a provision that WTO Members should ensure that it shall undertake measures in accordance with its laws and regulations to prevent and combat corruption on matters covered by the investment facilitation

[93] Ibid.
[94] Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.
[95] Supra 88, at 41.
[96] Kindly note that since the Investment Facilitation Agreement is still in the negotiation stage, it is referred to by many names like Investment Facilitation for Development Agreement or Investment Facilitation Agreement or Investment Facilitation Framework. The authors prefer to refer to this proposed agreement as Investment Facilitation Agreement in line with WTO's earlier Trade Facilitation Agreement.
[97] Supra 88, at 41.
[98] Ibid, at 2.

agreement.[99] In this proposal, Cambodia made a note to exclude this provision from the scope of dispute settlement. But Chinese Taipei wanted a limited application of dispute settlement for anti-corruption. Thus, two proposals were inserted in the provision dealing with dispute settlement for further negotiation.[100]

In the March meetings, the Members finally agreed that "the WTO dispute settlement procedures shall not apply to matters arising from the application and enforcement of anti-corruption laws of Members."[101] This exclusion of anti-corruption provision from the scope of dispute settlement seems to be the latest position as made evident from the draft Easter Text (Revision 6) dated 9 February 2022.[102] The latest position in the draft Easter Text (Revision 6) reads that "Members shall not have recourse to dispute settlement under this Article for matters arising under Article 30 on "Responsible business conduct" and Article 31 on "Measures against corruption"."[103]

Therefore, in the March meetings, since there were many proposals for Article 31 titled as "Measures against corruption", they were included in the 'text box' to be discussed later. The discussion on the text box of Article 31 in Section VI titled as Sustainable Investment of Easter Text was scheduled on 12 and 13 July 2021.[104]

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[99] WTO, WTO Structured Discussions on Investment Facilitation for Development, Communication from Canada, WTO document INF/IFD/RD/67 (25 January 2021) available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Language=English&SourcePage=FE_B_009&Context=Script&DataSource=Cat&Query=%40Symbol%3dINF%2fIFD%2f*&languageUIChanged=true, last seen on 30/11/2022.

[100] Cambodia added "Note: Exclude Article 31 (Measures against corruption) from dispute settlement" and Chinese Taipei added "27.3 Article 35 (Dispute Settlement) shall apply to [Article 31 – measures against corruption], except for matters arising from the application and enforcement of anti-corruption laws of Members".

[101] Supra 85, at 2-3.

[102] WTO, WTO Structured Discussions on Investment Facilitation for Development, Consolidated document by the Coordinator, Easter text, WTO document INF/IFD/RD/74/Rev.6, 26, (9 February 2022) available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Language=English&SourcePage=FE_B_009&Context=Script&DataSource=Cat&Query=%40Symbol%3dINF%2fIFD%2f*&languageUIChanged=true, last seen on 30/11/2022.

[103] Ibid.

[104] WTO, WTO Structured Discussions on Investment Facilitation for Development, Meeting 12-13 July 2021, Annotated Agenda By The Coordinator, WTO document INF/IFD/W/35, (8 July 2021) available at

This meeting on 12 and 13 July 2021 was an open-ended negotiating meeting of the Structured Discussions on Investment Facilitation for Development and was coordinated by Ambassador Mathias Francke (Chile). In this meeting, the European Union and Switzerland introduced

joint proposal[105] for provision 31 titled as "Measures Against Corruption" replacing their earlier respective proposals.[106]

This EU and Switzerland proposal was drafted with a similar approach to the Responsible Business Conduct provision by referring to existing

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https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/W35.pdf&Open=True, last seen on 30/11/2022.

[105] WTO, WTO Structured Discussions on Investment Facilitation for Development, Communication from the European Union and Switzerland, WTO document INF/IFD/RD/78, (15 July 2021) available athttps://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Language=English&SourcePage=FE_B_009&Context=Script&DataSource=Cat&Query=%40Symbol%3dINF%2fIFD%2f*&languageUIChanged=true, last seen on 30/11/2022. The joint proposal provided the following to be included in the Investment Facilitation Agreement:

> "1. In accordance with its legal system and in conformity with its obligations under internationally agreed standards and commitments that a Member has adhered to or are supported by that Member [footnote: Internationally agreed standards and commitments may include the United Nations Conventions against Corruption, done at New York on 31 October 2003, the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, with its Annex, done at Paris on 21 November 1997, or the Inter- American Convention Against Corruption, done at Caracas on 29 March 1996], each Member shall ensure that legislative and other measures are taken to prevent and fight corruption and money laundering with regard to matters covered by this agreement.
>
> 2. Each Member recognises the importance of principles such as accountability, transparency and integrity with regard to the development of its anti-corruption policies, of taking measures affecting investment in a transparent manner and of avoiding conflicts of interest and corrupt practices.
>
> 3. Members agree to exchange information and best practices on issues covered by paragraphs 1 and 2, including with a view to identifying measures or areas of cooperation to prevent and fight corruption in matters affecting investment, in the Committee on Investment Facilitation."

[106] The revised proposal by the EU and Switzerland (INF/IFD/RD/78) replaced the previous proposals submitted by the EU in INF/IFD/RD/46 and by Switzerland in INF/IFD/RD/72.

relevant international obligations. The new joint proposal only focused on the scope of anti-corruption as they removed references to terrorism financing *etc*: but included money laundering. They argued that money laundering, that is, the flowing of illicit money could constitute a motive for outward FDI flows in certain cases.[107] It can be seen that this joint proposal was welcomed by some Members and yet a few participating Members preferred other proposals in the text box than the EU's and Switzerland's joint proposal. It can also be seen that one other Member stated in this meeting that it would also submit a text proposal.[108] This delegate said that it will be a simple provision as the anti-corruption issue has been addressed at length in other international instruments, especially the UNCAC.[109]

5. Anti-Corruption Provision in the Consolidated Draft of Investment Facilitation Agreement

With this a consolidated draft agreement was prepared and the deadline to prepare the same was given till Easter, thus getting its name "Easter Text". The draft Easter Text that was made available to the public was the first Revision version by bilaterals.org and not by the WTO.[110] This Revision 1 of the Easter Text contained Measures against corruption in Provision 31. There were many text boxes containing many proposals- (i) Cambodia's proposal (ii) joint proposal of the European Union and Switzerland; (iii) Japan's proposal including Chinese Taipei's proposal of adding a footnote to Japan's proposal; (iv) Canada's proposal.

Of all these proposals, Canada's proposal was the most exhaustive one resembling the chapter of CPTPP.[111] This proposal first defined the

[107] WTO, WTO Structured Discussions on Investment Facilitation for Development, Meeting of 12-13 July 2021, WTO document INF/IFD/R/25, 3, (15 October 2021), available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/R25.pdf&Open=True, last seen on 30/11/2022.
[108] Ibid.
[109] Ibid.
[110] Supra, at 77.
[111] WTO, WTO Structured Discussions on Investment Facilitation for Development, Consolidated document by the Coordinator, Easter text, WTO document INF/IFD/RD/74/Rev.1, 41-43, (23 July 2021) available at

scope of this provision and proceeded to elaborate on the obligations of the WTO Members to adopt or maintain legislative or other measures for combating corruption.[112] Then the proposal elaborated on promoting integrity among public officials, on the participation of the private sector and society, and the application and enforcement of Anti Corruption laws.[113]

Pursuant to the Easter Text (Revision 2)[114], many meetings were conducted to finalise the text boxes with regard to many provisions including provision 31 on "Measures against corruption". Meetings were convened on 2 and 3 November 2021 and the first objective of these meetings as mentioned in the annotated agenda by the coordinator was to "[d]iscuss provision 31 on 'Measures Against Corruption' based on 'Draft Text' prepared by the Coordinator".[115] Accordingly, the Coordinator prepared a draft text for this provision 31 taking a general approach by merging and streamlining participants' text proposals.[116]

The summary document of the meeting held on 2 and 3 November states that the proponent, following a detailed approach for provision 31 on "Measures Against Corruption", withdrew the proposal to allow the discussion to move forward.[117] The authors think that it was Canada that

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https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Language=English&SourcePage=FE_B_009&Context=Script&DataSource=Cat&Query=%40Symbol%3dINF%2fIFD%2f*&languageUIChanged=true, last seen on 30/11/2022.

[112] Ibid, at 41.

[113] Ibid, at 43.

[114] The text of this version of Easter Text is not available to the public.

[115] WTO, WTO Structured Discussions on Investment Facilitation for Development, Meeting of 2-3 November 2021, WTO document INF/IFD/W/39, 1, (29 October 2021) available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/W39.pdf&Open=True, last seen on 30/11/2022.

[116] WTO, 'Draft Text' by the Coordinator, restricted document without symbol, sent to all WTO Members on 27 October 2021, available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/W39.pdf&Open=True, last seen on 30/11/2022.

[117]WTO, WTO Structured Discussions on Investment Facilitation for Development, Meeting of 2-3 November 2021, WTO document INF/IFD/R/28 (10 December 2021), available at

withdrew the proposal. While withdrawing the proposal, the delegate stated that he expected similar flexibility from other delegations on issues without much support.[118] Thus, this conveys that the anti-corruption provision may have been used as a bargaining chip.

In this meeting, after the Coordinator introduced the draft text, many Members questioned the value of this provision as the same cannot be enforced under the DSU.[119] Some Members even questioned the inclusion of money laundering while some Members supported it as they considered that money laundering was particularly linked to anti-corruption.[120] Finally, in the meeting held on 26 and 27 January 2022, the participating Members stated that the provision on measures against corruption will require further discussions.[121]

On 9 February 2022, Revision 6 of the Easter Text was prepared and this was made available to the public by Taiwan WTO & RTA Center of Chung Hua Institution for Economic Research.[122] This version of Easter Text (Revision 6) contains the following:

> "31 Measures Against Corruption
>
> 31.1. In accordance with its legal system and internationally agreed standards and commitments that it has adhered to or that it supports [footnote: Internationally agreed standards and commitments may include the United Nations Convention against Corruption done at New York on 31 October 2003, the Convention on Combating Bribery of

https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/INF/IFD/R28.pdf&Open=True, last seen on 30/11/2022.

[118] Ibid.

[119] Ibid.

[120] Ibid.

[121] Supra 87, at 2.

[122]WTO Structured Discussions On Investment Facilitation For Development Consolidated Document By The Coordinator "Easter Text" Revision, WTO Center, available at https://web.wtocenter.org.tw/downFiles/18079/367074/00NHeOp90KC4BIHS8qiXGoqCBdPi8oeXaFwlHqCI33WtWsIJ0VEDcba7UPFeupFLMPWfeig1EKV5g1DdU11111XRpnsw==, last seen on 30/11/2022.

> Foreign Public Officials in International Business Transactions, with its Annex, done at Paris on 21 November 1997, or the Inter-American Convention Against Corruption, done at Caracas on 29 March 1996], each Member shall ensure that measures are taken to prevent and fight corruption [and money laundering] with respect to matters falling within the scope of this Agreement.
>
> 31.2. Each Member recognises the importance of principles such as accountability, transparency and integrity with regard to the development of its anti-corruption policies, and of taking measures affecting investment in a transparent manner and avoiding conflicts of interest and corrupt practices.
>
> 31.3. Members agree to exchange information and best practices on issues covered by paragraphs 31.1 and 31.2, including with a view to identifying measures or areas of cooperation to prevent and fight corruption in matters affecting investment, in the Committee on Investment Facilitation."

Except for the phrase "and money laundering", the other provisions seem to have been finalised. Even when the provisions are not exhaustive, it still refers to the international standards which give scope for including evolving standards. But it is disappointing to note that after a rigorous discussion on the content of the anti-corruption provision, the sixth revision of the Easter Text has excluded many elements. Thus, there is a need to improve this anti-corruption provision and the same is explained further in the next section of the article.

IV. NEED FOR STRENGTHENING THE ANTI-CORRUPTION PROVISION IN THE INVESTMENT FACILITATION AGREEMENT

There is no doubt that international cooperation is needed to combat corruption. With liberalisation, privatisation and globalisation, corrupt activities also have become global. Bribing government officials, politicians or other employees of private enterprises at the time of

making investment has come to light in the ISDS cases. A clean slate has been provided now with the negotiation of an agreement which focuses on simplifying administrative procedures at the time of investment. This is the stage where corrupt activities may be prevalent. Thus, a robust anti-corruption provision is required. While comparing the proposals submitted by WTO Members, by far Canada's proposal was the strongest but since the WTO Members had divergent views on the same, Canada withdrew its proposal as a compromise. It can be noted that Canada's Delegate even commented that he expected similar flexibility on other provisions.

Thus, the current version in Easter Text (Revision 6) has left out many important provisions and has diluted the severity of the provisions in order to reach a compromise. While looking back at what has been left out in the Revision 6 version, it can be seen that Canada's proposal contained many elements which would have made the anti-corruption provision a robust one. For instance, Canada's proposal imposed an obligation on WTO Members to adopt or maintain measures to establish corruption as a criminal offence under its law with regard to matters that may affect international investment.[123] This provision would have addressed a major problem encountered in the ISDS regime that different legal systems do not have the same notion of criminality of corrupt activities. Even when some countries have signed many international instruments or regional instruments to combat corruption, there is no uniformity in the approach taken by these countries. Thus, by imposing this obligation under the Investment Facilitation Agreement, this problem could have been addressed.

Another element of Canada's proposal that went missing from the Revision 6 is that Canada proposed that WTO Members should adopt or maintain measures consistent with its legal principles in order to establish the liability of legal persons who had engaged in corrupt activities.[124] Canada further required that such legal persons should be subject to "effective, proportionate and dissuasive criminal or non-

[123] Supra 88, at 41-42.
[124] Ibid.

criminal sanctions" including monetary sanctions.[125] Further, Canada's proposal which is modelled on CPTPP also imposed obligations on the WTO Members to maintain laws and regulations for the maintenance of books, records, financial statement disclosures, accounting and auditing standards *etc*.[126] Canada's proposals included a provision which urged the WTO Members to endeavour to adopt or maintain standards of conduct for the performance of public functions.[127] Moreover, a detailed provision on the requirement of procedures for dealing with public officials accused of corruption was also proposed by Canada.[128] It can be seen in many ISDS cases that many investors had claimed that the host state cannot claim the defence of corruption when it had not initiated any action against the corrupt officials. Thus, this suggestion from Canada could have addressed this uncertainty.

The other element that was dropped from Canada's proposal was with regard to the enforcement of anti-corruption provisions. This proposed provision imposed an obligation on the WTO Members to not fail to effectively enforce its laws or other measures relating to combating corruption. Even in the *World Duty Free* case, the investor argued that Kenya had not taken any action against the former President who received a bribe and therefore, cannot claim the defence of corruption. Even in other cases as well, the Tribunal did not mandate the host state to take action against the wrong-doer. Thus, such a provision in the Investment Facilitation Agreement mandating the WTO Members to enforce the anti-corruption laws seems to be necessary. There are many international and regional instruments and many domestic laws as well to combat corruption and it is in the enforcement of these provisions where countries seem to be lacking.[129] Thus, the current version

[125] Ibid, at 42.
[126] Ibid.
[127] Ibid.
[128] Ibid, at 43.
[129] For instance, the statistics from OECD Anti-Bribery Convention has stated that for the period between 15 February 1999 to 31 December 2021, merely 25 Parties have collectively convicted or sanctioned at least 687 natural and 264 legal persons for foreign bribery through criminal proceedings. It can also be seen that 7 Parties have collectively sanctioned at least 88 natural and 121 legal persons for foreign bribery through administrative or civil proceedings. See Data on enforcement of the

available to the public, Easter Text (Revision 6) needs to be strengthened and the strengthening could be done from the proposals already tabled at the WTO. A robust anti-corruption provision from a WTO instrument may be effective in combating corruption at the international level.

V. CONCLUSION

The negotiations on the Investment Facilitation Agreement had a rocky start and finally, as a plurilateral agreement, the negotiation has been moving forward. Given the success of the Trade Facilitation Agreement and the importance of foreign investment particularly for developing Members and LDC Members, it is imperative that the proposed Investment Facilitation Agreement focuses on sustainable development and not just economic development.[130] To answer the question, if there is any necessity for the negotiators to include anti-corruption provisions in the Investment Facilitation Agreement, there is an absolute necessity to do so.

The objective of this proposed Investment Facilitation Agreement is to achieve sustainable development and the preamble of the Easter Text (Revision 6) states that "[a]ffirming the importance of responsible business conduct and combating corruption for promoting sustainable investment".[131] Therefore, it is imperative that the proposed Investment Facilitation Agreement includes an anti-corruption provision. Even though there is some resistance to the Investment Facilitation Agreement itself by some WTO Members, it should be noted that the

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Anti-Bribery Convention, OECD, available at https://www.oecd.org/corruption/data-on-enforcement-of-the-anti-bribery-convention.htm#:~:text=Concluded%20cases,foreign%20bribery%20through%20criminal%20proceedings, last seen on 30/11/2022 .

[130] Eluckiaa A. and Kapil Sharma, Investment Facilitation under WTO: Is it Necessary?, 234, 255 in Trade Facilitation and the WTO (Sheela Rai and Jane Winn, eds., 2019).

[131] WTO, WTO Structured Discussions on Investment Facilitation for Development, Consolidated document by the Coordinator, Easter text, WTO document INF/IFD/RD/74/Rev.6, 4, (9 February 2022) available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Language=English&SourcePage=FE_B_009&Context=Script&DataSource=Cat&Query=%40Symbol%3dINF%2fIFD%2f*&languageUIChanged=true, last seen on 30/11/2022.

current version of the anti-corruption provision is excluded from the applicability of the DSU, thus, giving incentive to the sceptics to readily agree to the inclusion of the anti-corruption provision in the proposed Investment Facilitation Agreement. In the end, the fight against corruption is going to benefit everyone and this fight against corruption in the investment regime will benefit the investors and the host state as well.

As it can be seen in the existing international investment regime, where the arbitral tribunals have dealt with the issue of corruption, either they have referred to the broad concept of international public policy or the reference to the requirement of complying with domestic laws. In order to strengthen the predictability of legal procedures, having an explicit provision in the proposed Investment Facilitation Agreement can form the legal basis for any anti-corruption measure. There is also a possibility that this provision may be referred to by future arbitral tribunals while deciding investment disputes when the relevant IIA does not contain anti-corruption provisions.

The World Trade Organisation has been combating corruption through its efforts of making trade rules transparent and predictable which has reduced the scope for corrupt practices.[132] The very first explicit provision on combatting corruption in a WTO Agreement can be found in a plurilateral agreement, Government Procurement Agreement (GPA) concluded in 2012. There is a reference to UNCAC in the preamble of this Government Procurement Agreement and Article IV.4 of the GPA also mandates the procuring entity to act to prevent corruption.[133] The WTO focuses on good governance which addresses the issue of corruption. The GPA emphasises using electronic processes which reduces the

[132] Luciana Dutra de Oliveira Silveira, Can the WTO Bring More Teeth to the Global Anti Corruption Agenda?, 53 (1) Journal of World Trade, 129 (2019).

[133] Article IV.4 of the Government Procurement Agreement- A procuring entity shall conduct covered procurement in a transparent and impartial manner that:

a. is consistent with this Agreement, using methods such as open tendering, selective tendering and limited tendering;
b. avoids conflicts of interest; and
c. prevents corrupt practices.

opportunities for corruption. Even the Trade Facilitation Agreement, by virtue of its transparency provisions, and by cutting the 'red tape' at the border has reduced the scope for corrupt activities.

Recognising the WTO as a great platform to combat corruption in business transactions, some scholars have argued that WTO should come out with a comprehensive WTO Ministerial Declaration or a Decision against corruption or at least the WTO should create a specific committee to debate on the impacts of corruption on international trade.[134] Given the influential status of the WTO, its efforts in combating corruption will go a long way in addressing the issue of corruption. Thus, there is a need for a robust anti-corruption provision in the proposed Investment Facilitation Agreement and it is hoped that the final agreement contains one.

[134] Supra 132.

FROM 'HONEY-TRAPPING' TO 'PRIVACY': DECONSTRUCTING THE DILEMMA OF PUBLIC SERVANTS IN INDIA

Abhishek Negi[1] & Utkarsh K. Mishra[2]

ABSTRACT

'Honey-traps' have been employed to extract information from people in important public positions through blackmail. Public servants, like teachers, bureaucrats, and others holding public offices have been the victims of such traps and have been put behind bars for corrupt practices. So it becomes pertinent to not only understand the liability of public servants in honey-trapping cases, but also ponder the extent to which public officers can be surveilled. The "Right to Privacy" for public servants has become a pressing concern, especially in light of honey trapping incidents. This paper examines this issue within the Indian context, drawing on case studies involving teachers, political leaders, and bureaucrats, as well as settled judicial decisions and relevant legislative frameworks. The research approach in this paper is primarily critical, utilising a doctrinal research methodology. After analysing the aforementioned issues within the current legal framework, the authors conclude that certain legal areas urgently require the attention and intervention of both the Indian legislature and judiciary for improvements.

Key Words: *Public Servant; Honey-Trapping; Prevention of Corruption; Privacy; Liability etc.*

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1. INTRODUCTION

The Collins dictionary defines 'Honey-Trap' as a "*situation in which someone is tricked into immoral or illegal sexual behaviour so that their behaviour can be publicly exposed*".[3] This is not a recent phenomenon. In the world of intelligence, information is the fundamental currency. Sex, or the assurance of it, has always been bewildering discourse. used. For years, spies across the world have used sex to gain access to valuable information.[4] One instance of this historical global phenomenon can be witnessed in a 14-page document distributed to hundreds of British banks, businesses, and financial institutions, titled "*The Threat from Chinese Espionage*," where the British security service described a wide-ranging Chinese effort to blackmail Western business people using sexual relationships.[5] So, honey-traps have always been exploited as a tool to extract fundamental information by pressuring people in important public positions through blackmail. This happens in India too. Some recent controversies have come to the light which have not only caught the attention of policy makers, but also members of the bar, the bench, and the academics.

TheLucknow University question paper leak case raises poignant questions. Two teachers were suspended after six audio clips went viral in which two male voices could allegedly be heard leaking questions to a student. The exam was also cancelled.[6] An FIR was filed against the student under the Uttar Pradesh Public Examinations (Prevention of

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[3] *Honeytrap*, Collins Advanced English Dictionary, available at https://www.collinsdictionary.com/dictionary/english/honeytrap, last seen on 25/10/2022.

[4] Vinayak Dalmia, *Escaping the Honey Trap*, The Hindu (23/10/2019), available at https://www.thehindu.com/opinion/op-ed/escaping-the-honey-trap/article29771225.ece, last seen on 25/10/2022.

[5] Philip Knightly, *The History of Honey Trap*, Foreign Policy (12/03/2010), available at https://foreignpolicy.com/2010/03/12/the-history-of-the-honey-trap/, last seen on 10/11/2022.

[6] See *Lucknow University paper leak: Accused woman's voice in tape, says STF*, The Times of India (03/01/2020), available at https://timesofindia.indiatimes.com/city/lucknow/lucknow-university-paper-leak-accused-womans-voice-in-tapes-says-stf/articleshow/73079749.cms, last seen on 10/11/2022.

Unfair Means) Act, 1998.[7] The second one is the recent and startling Madhya Pradesh Honey Trap Case in which numerous top level politicians and bureaucrats were purportedly trapped by a gang of one man and five women. The same gang also allegedly recorded a similar video clip of an Additional Chief Secretary of the State Government and had published it on social platforms. when they failed to extract the anticipated huge sum of money from him.[8] Media has reported that the "honey-trap gang" also obstructed the process of tenders, contracts and transfers by blackmailing politicians and bureaucrats.[9] The two incidents mentioned above seem to involve different questions of legal importance.[10]

The paper has tried to critically analyse through these cases, the liability of public servants like teachers in the first case and political leaders and bureaucrats in the second case under the Prevention of Corruption Act, 1988.[11] The former case does not give an indication that there was any gratification received by the alleged teachers for leaking the paper. But still, allegedly there is a violation of public office. The situation would become tricky if the gratification demanded or received is not explicit, but is in the form of tacit undertones. In addition to this, what if the act

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[7] See *LU paper leak: Varsity cancels four exams on internal committee's recommendation,* Hindustan Times (05/01/2020), available at https://www.hindustantimes.com/lucknow/lu-paper-leak-varsity-cancels-four-exams-on-internal-committee-s-recommendation/story OvOVCCEOWukrpBer7QBwBJ.html, last seen on 11/11/2022.

[8] Hemender Sharma, *MP honeytrap case: Major setback to Congress govt, High Court to monitor investigations*, Indian Today (21/10/2019), available at https://www.indiatoday.in/india/story/mp-honeytrap-case-congress-bjp-1611574-2019-10-21, last seen on 11/11/2022.

[9] Aman Sharma, *MP Honey-trap case: 15 days later no names revealed yet , SIT chiefs changed twice*, Economic Times (03/10/2022), available at https://economictimes.indiatimes.com/news/politics-and-nation/mp-honey-trap-case-15-days-later-no-names-revealed-yet-sit-chiefs-changed-twice/articleshow/71416857.cms?from=mdr, last seen on 11/11/2022.

[10] The authors have analysed the two cases on the basis of the facts reported by the electronic media and newspapers. As the investigation in both the cases is currently going on, the idea is not to prejudice the investigation, but to critically venture into the legal intricacies that may come up in examining such and similar situations.

[11] By referring to the 1988 Act, the latest amendment to the act which came into force in 2018 is also included.

or omission is non-contemporaneous to the act of gratification? This topic needs further exploration. The second case is a clear case of gratification received. But a pertinent question is, whether act or omission done under threat or compulsion would constitute receiving of gratification or whether it would absolve the liability of the public servant.

On top of this, amidst these critical discussions, lies the controversy of the right to privacy of public servants. To what extent can surveillance be put on public servants? What is the nature of the right to privacy of public servants as an individual and as an officer performing a public duty? There is a need to throw light on this underlying issue so that liability of the Public servants can be fixed on the basis of definite principles and rules.

The paper essentially is a discussion and deliberation upon the fundamental questions raised above. The paper is divided into five segments. The second segment encapsulates the legal framework concerning the liability of Public servants and also analyses the possible loopholes in the existing law. The third segment of the paper is a critical reflection on the questions raised above and a discussion on the final analysis in ascertaining the criminal liability of the Public servants. The fourth segment is a critical reflection on the questions raised in relation to privacy of public servants. The last segment of the paper gives the concluding remarks with suggestions and recommendations on the basis of the analysis done.

2. The Legal Framework: Analysis Of Existing Rules On The Liability Of Public Servants

The Prevention of Corruption Act, 1988[12] is intended to "*consolidate and amend the law relating to the prevention of corruption and for matters connected therewith*"[13]. It envisions widening the scope of definition of offences under Sections 161 to 165A of the Indian Penal Code,

[12] It is hereinafter referred to as the "Act".
[13] See Preamble, The Prevention of Corruption Act, 1988. (As Amended by 2018 Act)

enhancement of penalties provides for these offences and incorporation of a provision that the order of the trial Court upholding the grant of sanction for prosecution would be final if it has not already been challenged and the trial has commenced. The provisions of Sections 161 to 165A of the Indian Penal Code were repealed and were incorporated into the Act with enhanced punishment. [14] Chapter III of the 1988 Act specifies various offences and penalty therefore and it starts from Section 7 and ends at Section 16. For offence under Section 7, previous sanction is a must. [15] Certain major amendments were made in the parent Act in 2018. The relevant provision for the purpose of discussion in this paper is Section 7. Following is a detailed breakdown of Section 7 under the Act:

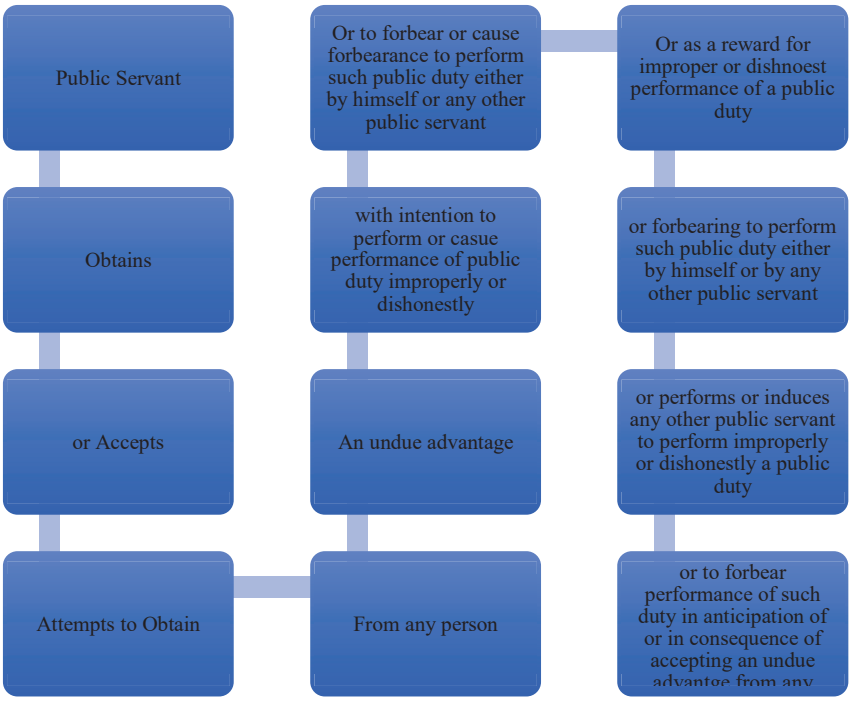

Figure 1: Structural Breakdown of Section 7, Prevention of Corruption Act, 1988[16]

[14] Venkateswarlu v. Union of India, (2002) Cr. L.J. 4009, 4015.
[15] P.L. Tatwal v. State of Madhya Pradesh (Criminal Appeal No. 456 of 2014).
[16] As per the Prevention of Corruption (Amendment) Act, 2018.

First, it is pertinent to note that every acceptance of illegal gratification, whether preceded by a demand or not, would be covered by Section 7 of the Act. But if the acceptance of an illegal gratification is in pursuance of a demand by the public servant, then it would also fall under Section 13(1)(d) of the Act.[17] The important words occurring in Section 7 of the Act are- "*Accepts*", "*Obtains*", "*Agrees to accept*" and "*Attempts to obtain*" which qualify and solidify the liability of a Public servant. All these words signify an active conduct on the part of the person in accepting or obtaining a thing. The word "obtain" as per Oxford English Dictionary, Vol. VII, would mean (*a) "to come into possession or enjoyment of (something) by one's own effort, or by request; (b) to procure or gain, as the result of purpose and effort, hence, generally, to acquire, get*"[18]. Similarly, the Black's Law Dictionary defines the word "obtain" as "*1. To bring into one's own possession, to procure especially through effort; 2. To succeed either in accomplishing something or in having it to be accomplished; to attain by effort...*" [19]In Sections 7 and 13(1) (a) and (b) of the Act, the legislature has specifically used the word "accepts" or "obtains". However, there is departure in the language used in sub-section (1)(d) of Section 13 and it has omitted the word "accepts" and has emphasised the word "obtains". Supreme Court interpreted similar provisions under the Prevention of Corruption Act, 1947 in Ram Krishna v. State of Delhi[20] and observed that:

> "*In one sense, this is no doubt true but it does not follow that there is no overlapping of offences. We have primarily to look at the language employed and give effect to it. One class of cases might arise when corrupt or illegal means*

[17] Section 13 of the Act lays down situations covering the Criminal Misconduct of a Public Servant. Section 13 (1)(d) reads as- "(d) *if he (i) by corrupt or illegal means. obtains for himself or for any other person any valuable thing or pecuniary advantage; or (ii) by abusing his position as a public servant, obtains for himself or for any other person any valuable thing or pecuniary advantage; or (iii) while holding office as a public servant, obtains for any person any valuable thing or pecuniary advantage without any public interest; or*"

[18] *Obtain*, Oxford English Dictionary (2nd ed. 1989).

[19] *Obtain*, Black's Law Dictionary (11th ed. 2009).

[20] See, Ram Krishna v. State of Delhi, A.I.R.1956 SC 476.

> *are adopted or-pursued by the public servant to gain for himself a pecuniary advantage. The word "obtains" on which much stress was laid* ***does not eliminate the idea of acceptance*** *of what is given or offered to be given, though* ***it connotes also an element of effort on the part of the receiver****. One may accept money that is offered, or solicit payment of a bribe, or extort the bribe by threat or coercion; in each case, he obtains a pecuniary advantage by abusing his position as a public servant*."

Secondly, a peculiar point to be noted here is that, after the 2018 amendment, the expression "official act" has been removed from Section 7 of the parent Act, and only the expression "public duty" has been retained. In this light, it can be argued that an act does not cease to become an official act, even if it does not come within the scope of the functions of office. In fact, a similar observation was made in the case of *Dr. V. Sebastian v. State*[21] as follows:

> *"A public servant may have power to do certain official acts by virtue of the rank he holds as a public servant. He may get other powers by virtue of the office which he holds. When he exercises either of the powers, his act is official. No line of distinction need be made as between the acts in exercise of a particular office and acts in exercise of his position as a public servant. If the act is done in his official capacity as distinguished from his purely private capacity, it amounts to official act. Even if it does not come within the scope of the functions of his office, the act does not cease to become official act*." [22]

Thirdly, instead of the word "Gratification" in Section 7 of the principal Act, the new amendment has replaced it with "Undue advantage", which has enlarged the ambit of the provision. Similarly, in section 11 of the

[21] Dr. V. Sebastian V. State (1988) Cri LJ 1150.
[22] Ibid, at para 8.

principal Act, the expression "valuable thing" has been replaced by "undue advantage" which has also enlarged the ambit of Section 11. However, Section 13 (1)(d) retains the word "valuable thing". This signifies that for charging an offence of Criminal Misconduct under Section 13 (1)(d), obtaining of a valuable thing by the Public Servant is necessary. Hence, if what the public servant has obtained is not a valuable thing, the offence will not be that of Criminal Misconduct but may attract other provisions like Section 11 or Section 7.

In the light of above discussions made, it is pertinent to examine the questions which have been raised in the introductory part of this paper in the light of the two case studies. The next segment of this paper is devoted to the same critical discussion.

3. Understanding Critical Legal Issues concerning 'Gratification' under the POC Act, 1988

"*Actus reus non facit reum nisi mens sit rea*", is an established principle of criminal law that act itself is not sufficient to constitute an offence unless coupled with a malice intention.[23] The public servant doing an act or omission prohibited by the Prevention of Corruption Act, 1988 can be punished only when such act or omission is coupled with a malice intention. The intention of the accused can be ascertained by the act committed by him combined with the instigation derived from the gratification offered or demanded by him. Thus gratification is a sine qua non to the offences under the Act.[24] The issue of honey trap i.e. intimidating or threatening a public servant to leak certain information having capacity to humiliate, disgust or annoy him with the intention of him doing an act or omission prohibited under the Act, has raised certain questions which are discussed hereinafter.

[23] *Actus reus non facit reum nisi mens sit rea*, P. Ramanathan Aiyar's Concise law dictionary (5th ed. 2017).
[24] See Section 7, The Prevention of Corruption Act, 1988.

3.1. Whether The Term Gratification Includes Threat or Intimidation?

The term gratification has not been adequately defined under Section 7 the Act, the definition provided under the Act has rendered the scope of gratification so wide that it may include any reward offered or demanded by the public servant and it is not limited to pecuniary benefits, but whether it includes duress i.e. threat or intimidation is a matter of discussion. The term gratification in common parlance means pleasure or satisfaction, or something which provides this.[25] The Courts have also attempted to define the term gratification as 'the word gratification cannot be confined only to payment of money. It means anything received other than legal remuneration.'[26] In another case the Apex court has interpreted the term as, 'the word gratification used in Section 4(1) to denote acceptance of something to the pleasure or satisfaction of the recipient.'[27] Interestingly the Prevention of Corruption (Amendment) Act, 2018[28] has added the term 'undue advantage' and has been defined as any gratification other than the legal remuneration, thus the amendment act has added one more qualification to the offences under the act. In simple terms the word, for the purpose of the act, may be defined as any gain whether monetary, social, emotional or even sexual favours demanded or accepted by a public servant.

The analysis of the above discussion *prima facie* establishes gratification to be a gain of any kind but whether it includes losses as well can be analysed with the help of an illustration. 'A' isa professor in a university and had friendly relations with his female student, who subsequently threatened to leak their chat messages if he refused to appoint her as a research associate at his research centre. In order to escape the humiliation and public disgust he appointed her as a research associate.

[25] *Gratification*, Cambridge Dictionary (Cambridge University Press) available at https://dictionary.cambridge.org/dictionary/english/gratification, last seen on 13/11/2022.
[26] C.I. Emden v. State of Uttar Pradesh, (1960) SCR (2) 592.
[27] State of A.P. v. V. Vasudeva Rao, (2004) 9 SCC 319, 329.
[28] W. e. f. 26th July, 2018.

Now, whether, the professor, as a public servant[29] under the Act, has committed the offence under section 7 or not, is the point of discussion. The view taken by the Supreme Court of India and various High Courts is that in order to constitute an offence under Section 7 of the Act, there needs to be a specific demand and acceptance of the same[30] and if the prosecution fails to prove demand or acceptance of the same, then the convictions cannot be based on mere illegal gratification. The Guwahati High Court has also expressed the same view stating that 'to constitute an offence under Section 7 of the PC Act, two essential ingredients are required to be established by the prosecution. The first is demand of gratification in consideration of doing some favour, and secondly, acceptance of gratification by the person, who demanded.'[31]

The judicial trend as discussed above is tilted towards the demand and acceptance but the judiciary has inadvertently ignored to analyse, if a person does any act prohibited by the PC Act without any illegal gratification, but under compulsion, can be made liable under the said provisions. It is also an established principle of law that any act done by a person against his will is not the act of that person i.e. '*actus ne invito factus est nisi actus.*'[32] In India compulsion can only be pleaded as a general exception when the requirements of Section 94 of the Indian Penal Code has been fulfilled and any compulsion which does not have the capacity to pose threat of imminent death will not qualify for the defence under Section 94[33]. In the Bourne[34] case, the appellate court acquitted the accused on the grounds that she committed bestiality under duress posed by her husband. Now, if the same principle applied

[29] Section 2 (c) (xi) "*any person who is a Vice-Chancellor or member of any governing body, professor, reader, lecturer or any other teacher or employee, by whatever designation called, of any University and any person whose services have been availed of by a University or any other public authority in connection with holding or conducting examinations*;"
[30] Mukhtiar Singh v. State of Punjab, (2017) 1 SCC (Cri) 317.
[31] Puspa Nath v. CBI (2018) SCC OnLine Gau 38.
[32] *Actus ne invito factus est nisi actus*, P Ramanathan Aiyar's Concise law dictionary, (5th ed., 2017).
[33] The Indian Penal Code, 1860.
[34] R. v. Bourne, (1972) 86 Cr App R 255.

to the illustration mentioned above the public servant should not be made liable for the offence mentioned above and therefore the term illegal gratification cannot include threat, intimidation compelling to do any act or omission prohibited by the PC Act.

The Prevention of Corruption Amendment Act, 2018[35] has widened the scope of Section 7[36] by adding the word undue advantage but the requirement of demand and acceptance has not been done away with, if we apply the amended provisions to the recent incidents which have occurred at Bhopal and Lucknow, the public servant thereby could not be made liable under the said provisions of the Act as there is absence of undue advantage, also any advantage if taken was not it relation to the deficiency of the duty, therefore, the incidents seem to be outside the purview of the Prevention of Corruption Act, 1988.

3.2. Whether The Act of Obtaining or Accepting or Attempting to Obtain an Undue Advantage by Public Servant in order to Improperly or Dishonestly Perform Public duty, requires Contemporaneity?

On reading the bare language of Section 7 of the 1988 Act as amended by the 2018 Act, there is a prima facie indication that the act of obtaining/accepting/attempting to obtain undue advantage requires contemporaneity. This essentially means that the said act and the act of improperly or dishonestly performing public duty should be contemporaneous. But this interpretation would cause huge problems in deciphering the liability of Public Servants in cases where the former act

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[35] W. e. f. 26th July, 2018.

[36] Section 7 reads as: "*Any public servant who, (a) obtains or accepts or attempts to obtain from any person, an undue advantage, with the intention to perform or cause performance of public duty improperly or dishonestly or to forbear or cause forbearance to perform such duty either by himself or by another public servant; or (b) obtains or accepts or attempts to obtain, an undue advantage from any person as a reward for the improper or dishonest performance of a public duty or for forbearing to perform such duty either by himself or another public servant; or (c) performs or induces another public servant to perform improperly or dishonestly a public duty or to forbear performance of such duty in anticipation of or in consequence of accepting an undue advantage from any person, shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine*."

is done later while the latter is done first. This may include cases where the Public servant dishonestly performs a public duty on the request of a person and later on accepts/obtains/attempts to obtain an undue advantage. Also, for instance, in cases like that of Lucknow University exam paper scam, where the audio clips allegedly only indicate the dishonest performance of a public duty with no indication of even any attempt to obtain an undue advantage. However, it is a clear possibility that the public servant in such cases obtains or accepts or attempts to obtain undue advantage later. There may be cases where the act of obtaining or accepting or attempting to obtain an undue advantage may be hidden or in latent form. In this context, it is pertinent to question whether the court should be concerned about one 'give and take' transaction of or should the chain of transactions be cumulatively taken into consideration so as to constitute the offence under Section 7. So, the question is whether this language should be interpreted to include all situations, immaterial of the fact the later act precedes the first. This needs to be answered by the judicial interpretation.

4. Assessing the impact of the POC Act, 1988 on The conduct of Public Servants: Possible Limitations and Challenges

The critical discussions made in this segment of this paper clear the road towards a few certain observations. The role of statutory instruments in the form of legislation/amendments etc have a direct bearing on the conduct of public servants in relation to corruption. Having examined the scope and ambit of the concerned legislation in the last sections of this paper, it would be appropriate to state that some provisions together with their judicial interpretations have the potential to curb corrupt activities being done by public servants. However, some of them have created further loopholes which need immediate legislation or judicial attention.

For instance, after the 2018 amendment in the Prevention of Corruption Act, 1988, the expression "official act" was removed and only the expression "public duty" was retained. This enlarges the ambit of the liability of public servants in relation to corruption which is definitely an

improvement from the earlier position. Restricting the conduct of public servants to just "official acts" would have jeopardised the ambit of ascertaining the liability of public servants in cases like the ones discussed in this paper. It would not be an exaggeration to say that both legislature and the judiciary in India have accepted this understanding. Similarly, the amendment also enlarges the ambit of Section 7 and 11 of the POC Act by replacing the words "gratification" and "valuable thing" by undue advantage. Moreover, the amended Section 7 of the Act also states that, *"...the obtaining, accepting, or the attempting to obtain an undue advantage shall itself constitute an offence even if the performance of a public duty by public servant, is not or has not been improper*".[37]

However, despite such positive changes in the legislative provisions, there are some loopholes which need to be addressed either by the legislation or by the judiciary. For instance, despite replacing 'gratification' with 'undue advantage' in Section 7, the requirement of demand and acceptance is still present in order to invoke Section 7 liability. Secondly, the issue of contemporaneity has still not been addressed as its implications on the conduct of public servants do not seem to have been understood by either legislature or the judiciary. Thirdly, on one hand, Section 7 (a) of the amended POC Act, 1988 states that there needs to be an intention on the part of the public servant "*to perform or cause performance of public duty improperly or dishonestly or to forbear or cause forbearance to perform such duty*", however, as pointed out in the last paragraph, the explanation 1 to Section 7 clarifies that proper performance of public duty will not impact the liability of the public servant if there is an acceptance or attempt to obtain an undue advantage on the part of the public servant. In such a scenario it becomes very difficult to establish the intention requirement of Section 7 of the POC Act.

[37] See, Explanation 1 to Section 7, Prevention of Corruption (Amendment) Act, 2018. (Though this part of the amended provision creates a legal confusion also).

5. The Right to Privacy: Understanding the Dilemma of Public Servants

The analysis of the issue could not be completed without touching upon the rights of a Public servant. The previous sections of the paper deal only with the statutory duty of a Public servant. The legal complexity which rests at the core of this discussion is the balancing of the rights of a public servant viz - as - viz his duty to follow the statute and conduct accordingly and also the right of investigating agencies to proceed in the case without violating his right of privacy. The analysis relates to the right of an investigating agency to put surveillance over a public servant and to derive evidence through means which may prima facie appear to be unlawful. The issue regarding the fundamental right of Privacy of a public servant can be understood through the lens of various judgments of the Supreme Court. The apex court in K.S. Puttaswamy Case[38] held that:

> "*Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being.*"[39]

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[38] (2017) 10 SCC 1; *See also*, M P Sharma v. Satish Chandra ,1954 SCR 1077, Kharak Singh v. State of Uttar Pradesh, 1964 SCR (1) 332.

[39] The right of privacy in India has developed over a period of 60 years through a series of judgments starting from M P Sharma to R.C Cooper and then to Maneka Gandhi. The divergence opinion given in two earliest judgments on the point has given rise to the controversy whether the right to privacy is a fundamental right or not. The Nine Judges Bench in the Puttaswamy Case has unanimously held that the right to privacy is a fundamental right. The Constitutional provisions must be interpreted in a manner as to

The observation of the Court relating to privacy is nothing but a extension of a jurisprudential thought which reiterates that the term life as envisaged under Article 21 of the Constitution does not mean mere animal existence[40], it means an inviolable space which cannot be infringed at any cost and the state should not be concerned with it. Privacy is an integral part of human life and only because a person is a public servant the state cannot deny this right to him[41]. There should be a clear distinction between people's private and public life. The State should not be concerned with the personal life of an individual, as correctly stated "*Every man's home is his castle and he is the king of his castle*.[42]" The need for this discussion is the fear in the minds of a public servant of naming and shaming that may happen if his personal life becomes public. The intimidation caused by this threat often leads to deviance in his public duty as these incidents lead to departmental inquiry and suspension of the public servant. The threat of getting one's public image rotted often forces a public servant to succumb to the gallows of social and moral limitations. The personal life of a public servant should not be a ground for departmental action against him and given the liberty from societal norms in this regard, he may not become a victim of honey trapping.

Now, the other issue regarding the legal validity of an evidence procured illegally or through means not justified by the law, could be understood

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enhance its conformity with the International Humanitarian principles and moreover the right of privacy is quite essential for the meaningful exercise of other rights.

[40] Olga Tellis v. Bombay Municipal Corporation (1985) 2 Supp SCR 51.

[41] Maneka Gandhi v. Union of India (1978) SCR (2) 621.

[42] *See*, Semayne's Case, All ER Rep 62 (1604). Though this famous quote by Edward Coke was pronounced in the year 1604 in the context of an Englishman but it true even at this date that it doesn't matter whether the person actually owns a castle or not, his possession should be considered to be his private affair and he has every right to defend his possession and in the context of the right to privacy this quote has been used in the sense of an inviolable zone free from state interference, one's private affairs should be kept private state should not concern itself with the same. This famous quote has also been used by the Supreme Court in Kharak Singh's Case where the surveillance by the police was restricted and held to be in violation of his privacy; See also K.S. Puttaswamy v. Union of India (2017) 10 SCC 1.

through the analysis of the Judgment in State of Maharashtra v. Natwarlal Damodardas Soni[43], where a search was made by the police without complying to the provisions of the Customs Act and the legality of evidence collected at such search and seizure which was illegal in itself was in question. The Supreme held that:

> "*Taking the first contention first, it may be observed that the police had powers under the Code of Criminal Procedure to search and seize this gold if they had reason to believe that a cognizable offence had been committed in respect thereof. Assuming arguendo, that the search was illegal, then also, it will not affect the validity of the seizure and further investigation by the Customs Authorities or the validity of the trial which followed on the complaint of the Assistant Collector of Customs.*"[44]

The above Supreme Court decision amongst many others makes it clear that the courts are not concerned with the method of obtaining an evidence or whether there was any lacuna in the procedure for collection of evidence[45], the court has to look upon the admissibility of evidence on other factors and if it does not cause prejudice to the accused, the courts may accept that evidence. The Supreme Court is of the view that it should not look into the procedural lacunas but it has not yet touched upon the issue of infringement of privacy of the accused for the purpose of collection of evidence[46]. A judgement of the Delhi High Court touches upon the issue but in a hasty fashion, as it does not analyse the core of complexity, where the right of the parties and of investigating agencies

[43] AIR 1980 SC 593.

[44] There has been a plethora of judgments of the Supreme Court where the evidence obtained by illegal means has been admitted before the courts, but there are few conflicting decisions of High Court for e.g. Mysore High Court has rendered the evidence obtained by illegal means as inadmissible. The Allahabad and Delhi High Court has admitted the evidence obtained illegally but there is a need of an interpretation by the Supreme Court as to the admissibility of the evidence if it has been obtained by the infringement of privacy of a person.

[45] Bai Radha v. State of Gujarat AIR 1970 SC 1396.

[46] *Supra*, note 38.

are to be decided. In ***Deepti Kapur v. Kunal Julka***[47], where a person installed an audio-visual camera in his wife's bedroom and recorded her conversations with a third person, the Delhi Court held that:

> "*This court is of the opinion that the conversation between the respondent and her friend, wherein, she has allegedly spoken about the petitioner/ his family and the status of the matrimonial life would, certainly assist the court in effectively deciding the dispute between the parties. Such a piece of evidence is certainly relevant. Therefore, in view of Section 14 of the Family Court Act, the evidence cannot be thrown out on the ground that the same is inadmissible*."

In this case, the wife has raised a very pertinent question on the admissibility of the evidence collected in the form of her conversation recorded in CD (compact disc) by stating that the evidence is not admissible as it breaches her fundamental right to privacy. The Delhi High Court referred to and relied upon the various judgements[48] available on the subject of illegal means of obtaining evidence and their admissibility and said that as maintained by the precedents, the admissibility of the illegally obtained evidence would not be impacted by the situation where the breach of right to privacy of a person occurs as right to privacy is not absolute and moreover, in cases where right to privacy is in conflict with the right to fair trial, the latter should be given an upper hand[49]. However, in paragraph 37 of the judgement, the Delhi High Court also remarked in Obiter:

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[47] CM APPL. No.1226/2019.

[48] For instance, See, Pooran Mal vs. The Director of Inspection (Investigation), New Delhi & Ors (**1974 AIR 348); Malkani v. State of Maharashtra (1973 AIR 157**); State v. N.M.T. Joy Immaculate (Appeal (crl.) 575-576 of 2004). Sahara India Real Estate Corporation Limited & Ors. vs. Securities and Exchange Board of India & Anr (CIVIL APPEAL NO. 9833 OF 2011); Justice K. S. Puttaswamy (Retd.) & Anr. vs. Union of India & Ors. (WRIT PETITION (CIVIL) NO 494 OF 2012), etc.

[49] *Supra note 47,* at para 24.

> *"While consistency in law is of utmost importance and law must get its full play regardless of the fact situation, this court must record the unease it feels with regard to a certain aspect that has arisen in this matter. Marriage is a relationship to which sanctity is still attached in our society. Merely because rules of evidence favour a liberal approach for admitting evidence in court in aid of dispensation of justice, this should not be taken as approval for everyone to adopt any illegal means to collect evidence, especially in relationships of confidence such as marriage. If the right to adduce evidence collected by surreptitious means in a marital or family relationship is available without any qualification or consequences, it could potentially create havoc in people's personal and family lives and thereby in the society at large... So, while law must trump sentiment, a salutary rule of evidence or a beneficent statutory provision, must not be taken as a license for illegal collection of evidence".*

It would not be wrong to say that the Delhi High Court in this case has indirectly touched upon the issue of privacy and has definitely made a beginning on the pertinent issue of violation of right to privacy. However, it may be stated that the Court's reluctance to answer the question of privacy raised in the case may have been impacted by the many precedents of the question of admissibility of illegally obtained evidence. Despite this, the question of privacy of public servants should be treated as relevant. The Delhi High Court also seems to have hinted in its judgement that there cannot be a straight jacketed formula to decide upon the questions of privacy and the same should be decided on a case to case basis.[50]

6. Conclusions and Recommendations

The Prevention of Corruption Act, 1988 has been amended in 2018 in order to enlarge the ambit of the liability of the Public Servants. The critical issues which have been pointed out in the third section of this

[50] *Id.,* at Para 21.

paper seem to have an answer on the basis of available legal literature. However, the issue of contemporaneity remains to be unresolved and needs dire attention. The case studies like those of Lucknow University exam paper leak case and Madhya Pradesh honey trap etc. are just few cases among the many. , While today's world of technological advancement has made communications easy, it has complicated the communication mediums by assuring data privacy and protection via encryption systems. Secondly, cases of obtaining undue advantage are happening behind the curtains and not expressly on communication networks. With the growth of online platforms, sending information has become easier. But with all this, data privacy has emerged as a right and it still needs to be seen, to what extent such private networks be interfered in order to extract information and make public servants culpable. Talking about the present status, as discussed in the fourth section, it is a well settled principle of law that an evidence obtained through illegal means is admissible before the Courts as the Courts are not concerned with the means of obtaining an evidence. But, the available literature on Supreme Court and High Court judgements is silent about the subject matter that pertains to a situation where, whether an evidence is obtained through the infringement of right to privacy of an individual, would be admissible before the court or not. In the light of the development of law on the point, Privacy is considered to be of paramount significance and investigating agencies should not interfere with an individual's privacy without an authorisation from the Courts. There is a dire need to frame legislation on the subject matter thereby establishing a clear rule based framework. In a nutshell, the authors would like to point out following conclusions and recommendations on the basis of the research undertaken in this paper:

a) Honey Traps have been one of the most popular tools for extracting fundamental information from the persons holding public offices or offices of public importance. Hence, it is pertinent to develop within a legal system a clear and comprehensive set of rules to determine the cases concerning honey traps since the availability of direct evidence is difficult.

b) Public servants doing an act or omission prohibited by the Prevention of Corruption Act, 1988 can be punished only when such act/omission is coupled with a malice intention. However, the addition of Explanation 1 to Section 7 of the POC by the 2018 amendment creates a legal confusion which needs to be clarified either by the legislature or by the means of judicial interpretations

c) Indian Judiciary has inadvertently failed to analyse, if a person does an act prohibited by the Prevention of Corruption Act, 1988 without any illegal gratification but under a compulsion, then in that case will that person be made liable under relevant provisions. This needs legal clarification.

d) There may be cases where the act of obtaining or accepting or attempting to obtain an undue advantage may be hidden or in latent form. The current legal climate of India does not provide suitable answers to such situations. The legislature needs to clarify on the same.

e) The question of contemporaneity as discussed in previous sections of this paper still needs to be clarified by the Indian Judiciary.

f) The available literature on Supreme Court and High Court judgements is not conclusive on the issue as to whether in a case where evidence is obtained through the infringement of right to privacy of an individual would be admissible before the courts or not. The authors would like to opine that even though the Right to privacy has been held to be a Fundamental right under the Indian Constitution, however, the form and scope of the right is yet to be defined.

Moreover, the larger question is whether it is really necessary to define the scope and application of the right in a variety of situations just like the one discussed in this paper. In *Govind v. State of MP*[51], it was opined by the Court that this right has to be developed on a case to case basis.

[51] AIR 1975 SC 1378.

Similarly in the case of *PUCL v. Union of India*[52], it has been observed that it would be too moralistic to define this right judicially. Should this observation be understood to also mean that the contours of this right be left for judicial interpretation from case to case basis? The situation like the one in this paper where obtaining evidence by illegal means and which directly impacts the right to privacy of individuals could be appreciated differently in different situations. The answer to these questions lie in the inquiry as to whether and in what situations obtaining evidence becomes more essential as compared to respecting the right to privacy of the individual and vice-versa. This will depend upon the gravity of the situation or case at hand. Hence, we feel that it may not be necessary for the Courts to create a straight jacketed formula for determining the legality of evidence obtained illegally in different cases.

[52] AIR 1997 SC 568.

AADHAAR ENABLED PUBLIC DISTRIBUTION SYSTEM (AePDS) - AN e-GOVERNANCE INITIATIVE OF ACCOUNTABLE, TRANSPARENT AND TIME BOUND SERVICE DELIVERY

Dr. K. Prabhakar[1]

Abstract

The Public Distribution System (PDS) plays a significant role in the Indian government's poverty alleviation programmes and in discharging its social development obligations by providing food grains and essential items to the rural and urban poor at subsidized rates. While the social objective is to protect poor citizens from the vagaries of market forces, the current system has several well documented problems like lack of transparency, accountability, poor governance, and poor service delivery mechanisms.

In order to increase transparency, accountability, and efficiency in the PDS, Government of Andhra Pradesh initiated Aadhaar enabled PDS (AePDS) with electronic Point of Sale (ePoS) devices for automation of Fair Price Shop (FPS) in all 13 districts of the State. The objective of the AePDS through e-PoS, is to ensure that only genuine cardholder or his/her family members whose name is mentioned in the ration card can buy subsidised commodities.

Using the Citizen Report Card (CRC) approach, a total of 1200 PDS users and 100 officials were interviewed across 80 Fair Price Shops (FPS) from four districts of Andhra Pradesh. In each district, 300 PDS users, 20 dealers, and five officials were interviewed. The user survey enabled us to analyse their experiences on the quality of service delivery under PDS through AePDS and ePOS. The study covered a total of four districts in Andhra Pradesh state and compared the the impact of the two new

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initiatives (AePDS & ePos) on transparency, accountability, and efficiency in service delivery of PDS compared to the previous system.

Key words: *Good Governance, e-Governance, Transparency, Accountability, Time bound Service Delivery and Food security*

1. INTRODUCTION

In order to increase transparency, accountability and efficiency in the Public Distribution System (PDS), the government of Andhra Pradesh initiated Aadhaar enabled PDS (AePDS) with Point of Sale (PoS) devices for automation of Fair Price Shops (FPS). This scheme was taken up in nearly 28,600 shops in two phases across the 13 districts of the State. The objective of the AePDS through e-PoS, is to ensure that only genuine cardholder or his/her family members whose name is mentioned in the ration card can buy subsidised commodities. It would help record all FPSs transactions electronically which enables real-time accounts of opening stock, daily sales, and closing stock. In turn, this would facilitate monthly allotment of stocks to FPS based on the stock position and also facilitate monitoring and detection of fraudulent transactions.

The study adopted the Citizen Report Card (CRC[2]) approach to authenticate to what extent transparent, accountable and time bound service delivery is taking place because of AePDS. CRC is a simple and powerful social audit tool used to get systematic feedback about various quantitative and qualitative aspects of a service provider's performance. CRC[3] is a tool used in order to assess the overall performance of a public agency based on observations of users on quality and satisfaction to

[2] The World Bank (2004b). Citizen Report Card Surveys, a Note on the Concept and Methodology, Social Development Notes, Participation and Civic Engagement, No. 91, February 2004

[3] Samuel Paul, Suresh Balakrishnan, K Gopakumar, Sita Sekhar, M Vivekananda (2004) State of India's Public Services -Benchmarks for the States, Economic and political weekly February 28, 2004 pp 920 to 933.

specific attributes of services such as access, availability, quality, and reliability in addition to agency responsiveness and transparency.

For our study, we interviewed 1200 PDS users and 100 officials, covering 80 Fair Price Shops (FPS) from four selected districts of Andhra Pradesh. The user survey enabled us to analyse their experiences on the quality of service delivery under PDS through AePDS and cashless transactions. This paper describes the implementation of Public Distribution System in Andhra Pradesh using CRC approach to analyse the success of AePDS & Cashless Transactions in achieving its objectives and results with reference to extent of transparency, accountability and efficiency in service delivery of PDS.

We also examine the Pre (Prior to 2015) and Post AePDS service delivery to understand its impact in bringing transparent and accountable PDS distribution to the beneficiaries.

2. EVOLUTION OF PUBLIC DISTRIBUTION SYSTEM (PDS)

The Public Distribution System (PDS) plays a significant role in the Indian government's poverty alleviation programmes and discharging its social development obligations by providing food grains and essential items to the rural and urban poor at subsidised rates. The history of PDS dates back to before the first Five-Year Plan. but it did not focus on universal coverage as it was mainly for price stability and availability of food grains in urban areas and some deficit areas. The focus of the PDS hence remained somewhat unchanged till the sixth Five-Year Plan. It was during the eighth Five-Year Plan that the focus shifted on targeting poor people and excluding those from better off economic backgrounds. From June 1997, the government launched the Targeted Public Distribution System (TPDS). The TPDS was the government's effort to cater to the needs of the marginalised sections of society like the rural poor, tribal population, etc. The government thus initiated the increase in the number of PDS Shops or Fair Price Shops and increased the number of ration cards. It is the responsibility of the State government to identify the poor and ensure that they are getting the benefits of the PDS. State wise Below Poverty Line (BPL) quota is fixed on the basis of the adjusted

poverty share determined by the Planning Commission based on official poverty lines in 1993-94, adjusted for growth in population in the interim.

Shri Amartya Sen argues that democracy can tackle natural disasters like famines and drought in an effective manner, unlike in totalitarian regimes. He cites that independent India had not seen a severe famine where people perished. He argues that because of democracy, India could survive famines like that of 1987. Further, he cites examples of famines where people perished in the case of colonial India and China. Along with democracy, however, PDS also appears to be an important factor in controlling the adverse impacts of famines, droughts, and floods. By PDS we mean a system of food distribution where either the whole or a part of the system is controlled by public authorities on behalf of the general public for their well-being. It has a social objective of making a commercial activity, a welfare activity. In areas where local production was sufficient for local consumption, dependence on public distribution was limited to periods of shortage. The PDS aims to provide fair distribution and self-sufficiency ingrains to the public. This system works as an instrument for efficient management of consumer goods for "maintaining stable price" conditions (Chakraborty, M. (2000)[4].

According to the Planning Commission and the Ministry of Consumer Affairs, Food and Public Distribution evaluation of TPDS performance by the Programme Evaluation Organisation (PEO) found that about 58 per cent of the subsidised food grains issued from the central pool do not reach the BPL families because of identification errors, non-transparent operation, and unethical practices in the implementation of TPDS. The cost of handling food grains by public agencies is also very high. According to the study, for one rupee worth of income transfer to the poor, the GoI spends Rs.3.65, indicating that one rupee of budgetary consumer subsidy is worth only 27 paise to the poor. These results deserve careful consideration and measures for improvement. It finds

[4] Chakraborty, M. (2000). The Public Distribution System in India. Teaching Public Administration, 20(2), 27–33. https://doi.org/10.1177/014473940002000203

that Tamil Nadu and Himachal Pradesh continue to be the leading performers, but early movers like Odisha saw improvements in the functioning of the PDS between 2004-05 and 2009-10. Late movers like Bihar and Jharkhand, improvement was evident between 2009-10 and 2011-12. The share of the PDS as a source of rice and wheat has increased over time, suggesting an improvement in its outreach (Rahman, A. (2014)[5].

While the social objective is to protect poor citizens from the vagaries of market forces, the current PDS has several well documented problems such as lack of transparency, accountability, poor governance, and poor service delivery mechanisms. Several suggestions have been made for improvement through technology. The Smart PDS solution that has been developed uses low-cost mobile technologies and a workflow based request tracking system to enable the delivery of critical governance services, such as food entitlements, at the doorstep of the citizen. The system leverages the expanding cellular network to enable a consumer to place an order on a mobile phone and the entire process of PDS service delivery can be monitored and tracked in near real-time. An electronic voucher scheme has been developed to implement a cashless benefits transfer system to reduce leakages in the system and improve tracking of a PDS transaction from the generation of a consumer request to the delivery of food items to the consumer (Garg, S., & Sundar, K. (2013)[6].

This PDS system works as an instrument for efficient management of consumer goods for "maintaining stable price conditions." In areas where local production was sufficient for local consumption, dependence on public distribution was only resorted to in periods of shortage. The 'puzzle of under-purchase' in PDS quotas is analysed by extending the dual-pricing model to account for supply-side (for example, diversion)

[5] Rahman, A. (2014). Revival of Rural Public Distribution System. Economic & Political Weekly, xlIX (20), 62–68.

[6] Garg, S., & Sundar, K. (2013). A Mobile Solution for an Inclusive Public Distribution System in India. Electronic Journal of E-Government, 11(1), 210-227. Retrieved from http://www.ejeg.com/issue/download.html?idArticle=304

and demand-side (for example, transaction costs) constraints. Primary and secondary data as well as field observations suggest that under-purchase is mainly due to supply constraints and at all-India level, the PDS is estimated to reduce the poverty-gap index of rural poverty by 18% to 22%. The corresponding figures are much larger for states with a well-functioning PDS, e. g., 61% to 83% in Tamil Nadu and 39% to 57% in Chhattisgarh (Dreze, J., & Khera, R. 2013[7] & 2015[8]).

3. DESIGN OF THE STUDY

3.1 OBJECTIVES OF STUDY: The core objective of the study is to systematically assess the quality, responsiveness and outcomes (effectiveness) of the e-PoS (AePDS) and cashless service delivery of PDS services provided by Fair Prices Shops/unit office to the public.

3.2 METHODOLOGY:

3.2.1 Citizen Report Card Process: The Citizen Report Card (CRC) methodology is employed in this study. It is a simple but powerful and credible tool to provide systematic feedback to public agencies about various qualitative and quantitative aspects of their performance. Citizen Report Cards[9] (CRCs) are participatory surveys that solicit user feedback on the performance of public services. CRCs can significantly enhance public accountability through the extensive media coverage and civil society advocacy that accompanies the process. Citizen Report Cards are used in situations where demand side data, such as user perceptions on quality and satisfaction with public services is absent. Specific CRC methodologies may vary depending on the local context.

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[7] Drèze, J., & Khera, R. (2013). Rural Poverty and the Public Distribution System. Economic and Political Weekly, XLVII (45 & 46), 55–60

[8] Garg, S., & Sundar, K. (2013). A Mobile Solution for an Inclusive Public Distribution System in India. Electronic Journal of E-Government, 11(1), 210-227. Retrieved from http://www.ejeg.com/issue/download.html?idArticle=304

[9]https://openknowledge.worldbank.org/bitstream/handle/10986/11277/286010CRC0SD0note09101public1.pdf?sequence=1

The analysis of service delivery was done through a random sample survey of users, FPS dealers, and officials. The survey of users focused on their experience in analysing the difference in service delivery before and after implementation of AePDS and thus shed light on areas where the department can improve their services. Interviews with the FPS dealers elicited their views on to understand their experiences of operating the shops and being a part of the PDS. Similarly, interviews with the PDS officials gave us insights into their feedback for the implementation of Aadhaar enabled PDS (AePDS) with electronic Point of Sale (ePoS) devices for automation of Fair Price Shop (FPS) from both demand-supply side and improvements to make it more efficient and effective for its users. The data collection for the CRC exercise covered the following aspects: awareness of the service, usage of the service, service quality and reliability, problems and resolution, corruption, satisfaction, and suggestions for improvement.

3.3 Questionnaire design: Questionnaires, designed for the staff assessment formed the base and were modified to suit contextual requirements. Three sets of data collection instruments were designed:

a. Questionnaire for PDS users;

b. Questionnaire for PDS dealers; and

c. Questionnaire for PDS staff

The questionnaire for PDS staff also included details about their job, support from department and community, responsiveness and reasons for success/failure in implementation of the scheme.

3.3 Sample Selection: The scope of this study limited to a total of four districts (one fourth from the total districts) from Andhra Pradesh state. The four districts are: East Godavari, Srikulam, Krishna, and Anantapuram. The four districts were selected based on systematic random sampling. A total of 1200 PDS users and 100 officials were interviewed from all four districts. Out of every selected district, 300 PDS users and 25 officials as shown in table 1 were interviewed. Further, the study covered 20 Fair Price Shops from each selected district, following systematic random

sampling. From every selected FPS shop, 15 beneficiaries were selected randomly for the interview to collect user feedback. The beneficiaries were selected from the database or register kept/ maintained at each of the selected FPS and were interviewed in their homes.

4. FINDINGS OF THE RESEARCH

In order to make a holistic assessment of the implementation of Aadhaar enabled PDS (AePDS) with electronic Point of Sale (ePoS) devices for automation of Fair Price Shop (FPS) this study was made to gain feedback from above categories to understand their experiences. This section elaborates the findings from the PDS users, FPS dealers and officials.

4.1 Quality of PDS Services - PDS Users : Almost all households (HH)s (99.5%) reported regular ration supply on a monthly basis in the state of AP. Most of them declared that they are getting commodities as per their limit while some of them from the Scheduled Caste informed that they did not take all commodities as per their entitlement mainly due to the poor quality of the commodities. A main reason cited by those few who do not take commodities from the FPS is the poor quality of the commodities distributed.

***4.2 AePDS*: All** HHs are conscious of the implementation of AePDS in the state of AP. They reported that their FPS issued commodities through AePDS. For almost all the HHS the procedure of Aadhar seeding into the AePDS for family members is completed. However some of the beneficiaries are not yet registered due to failure to recognise fingerprints (75%) or iris (12.5%) and technical problems with the seeding machine. There have been some efforts made throughout the state with respect to orientation of PDS users on AePDS. In Anantapuram and Srikakulam, less than 40% of HHs and in East Godavari 81% of HHs reported that they were oriented on how the AePDS works.

***4.3 Problem incidence*:** HHs in all four districts reported some issues for integrating AePDS in the PDS. Anantapuram is the district with the highest number of HHs reporting problems with the system with 43%,

followed by Srikakulam at 31%, East Godavari at 21%, and Krishna with 17%. The frequency of problem incidence is once in a while as per the majority of HHs (78%). The nature of problems vary between districts, some of the important problems narrated are listed below table 1

Table 4.1: Nature of problems reported by HHs for AePDS

Nature of problem	East Godavari	Srikakulam	Krishna	Anantapuram	Andhra Pradesh
Connectivity	81%	77%	46%	88%	77%
Power	42%	34%	52%	30%	37%
Training capacity	8%	11%	4%	18%	12%
Literacy levels of FPS Owner	17%	5%	2%	16%	11%
Appln. architecture & Development	8%	10%	6%	5%	7%
Software update	22%	3%	4%	0%	6%
Infrastructure	9%	4%	2%	0%	3%

Only 11% among those that faced problems have lodged complaints regarding their problems. Among them, 58% have reported that their problems have not been resolved after lodging complaints. Problems not being resolved is found to be more than the average among ST (75%) users.

4.4 FPS Dealers & Officials:

AePDS: 99% of dealers in Andhra Pradesh are aware of how AePDS works. All the respondents in all four districts have undergone training/ orientation on the working of AePDS. All the staff members are aware of

the AePDS across the four districts (100%). On an average, 80% shops in their jurisdictions are completely covered under the AePDS initiative. Those few shops that do not issue commodities under this initiative do so because of the connectivity issues as reported by the staff members. ***Problem incidence***: Connectivity issues have been reported everywhere and it happens once in a while (83%). Issues with software updates have been reported by staff members of all four districts. Many of those who faced problems (89%) have lodged complaints regarding the same. A little more than half of those who lodged complaints (56%) have reported that their problems have been resolved.

4.5 Pre AePDS vs AePDS comparison

PDS Users - An attempt was made to analyse the difference in service delivery before and after implementation of AePDS by interpreting the data obtained from beneficiaries. All the users reported that after the introduction, things have changed for them as per the core aim of AePDS.

Table 4.2: The table below shows difference between Pre and post AePDS:

Pre - AePDS	Post - AePDS
✓ Incorrect weighing of commodities ✓ Ration slip receipt not issued ✓ Bogus Card ✓ Benefits given to non-beneficiaries ✓ Commodities are sent to black markets	✓ Improved service delivery ✓ Receipt issued at each purchase ✓ Timely distribution ✓ Receiving accurate commodities ✓ Very transparent ✓ Benefits are reaching to actual beneficiaries ✓ Very accountable

4.6 Grievance Redress System

PDS users - On an average, one-third users reported that the information regarding grievance redress (complaints) is displayed at the FPSs. An

average 32% users reported that the complaints register was prominently displayed in the shops. Overall awareness about the process of lodging complaints is very low at 10% on an average. A majority of the users (92%) do not have complaints regarding the PDS in the state. Very few (14%) among those who had problems with PDS (8%) have made the effort to lodge complaints.

PDS officials - On an average, 95% staff members reported that the information regarding grievance redress (complaints) is displayed at the FPSs in their jurisdiction. A quarter of the staff members (25%) have reported that they have faced problems while discharging their duties The percentage is a little higher in Anantapuram district where 40% staff have reported the same. The nature of the problem reported by all staff members across all the four districts is the same – Network issues.

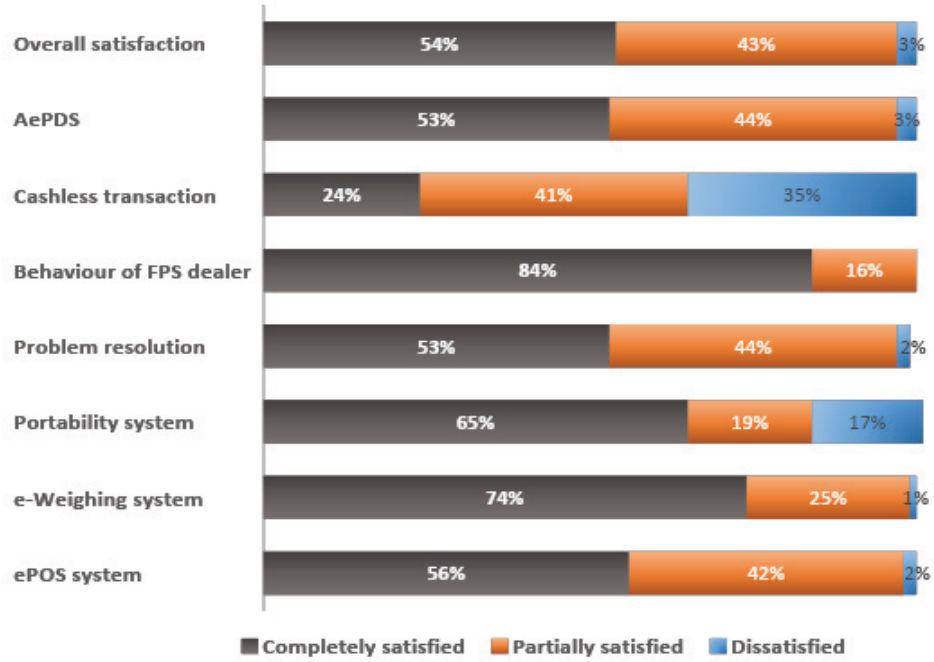
4.7 Customer Helpline: PDS users - On an average less than one tenth (9%) users are aware of the consumer helpline which is same for other districts. Even those who are aware (12%), have not made use of a helpline to lodge complaints about the PDS system.

4.8 Citizen Charter - On an average half of the users are aware of the PDS citizen charter. Of those aware, around 60% have gone through the charter, 96% of them opine that the information given in the citizen charter is helpful – 96% have found that the charter has helped them to understand their entitlements under PDS. Around 54% of those who are aware of the contents of the charter feel that the information provided is complete. On an average 73% of the dealers are aware of the PDS citizen charter. A majority of them (95%) have gone through the charter and have found the charter to be very helpful as it provided information about their entitlements under PDS. They also find the information given in the charter to be complete.

4.9 Overall satisfaction with PDS: On an average, a majority of the users of PDS are satisfied with the system in Andhra Pradesh. More than half of them are completely satisfied with the various aspects of the system such as AePDS, behaviour of staff, problem resolution and portability system, etc. Highest satisfaction is with the behaviour of staff while the

lowest is with the cashless transactions. Overall satisfaction with the PDS system across all the four districts was high.

Figure 4.1: Satisfaction levels of users' across various aspects of PDS



4.10 Factors contributing to the consumer's satisfaction on PDS service delivery to its Consumers/Users:

To know the factors which are more influential on consumer's satisfaction, we did an econometric model Order-Probit[10] analysis by testing significance of service and individual characteristics on overall satisfaction.

The reported level of satisfaction with the AePDS service is influenced by several factors. The four factors considered to influence the level of satisfaction of the service characteristics of the department and twelve individual characteristics of the users. The four individual characteristics

[10] Ordered Probit is a whole of the widely used probit analysis to the case of more than two outcomes of an ordinal dependent variable (a dependent variable for which the potential values have a natural ordering, as in poor, fair, good, excellenthttps://en.wikipedia.org/wiki/Ordered_probit

are the beneficiary / users' Gender, Occupation, Caste and Education levels. The selected twelve service characteristics are Taking/Collecting all items as per entitlements, Weighed/measured properly of rice distribution (Pre-AePDS), Weighed/measured properly of wheat distribution (Pre-AePDS), Weighed/measured properly of kerosene distribution (Pre-AePDS), Weighed/measured properly of sugar distribution (Pre-AePDS), Weighed/measured properly of rice distribution (AePDS), Weighed/measured properly of wheat distribution (AePDS), Weighed/measured properly of kerosene distribution (AePDS), Weighed/measured properly of sugar distribution (AePDS), Aware of cashless transactions in PDS distribution system, Had a problem with PDS service delivery? and Awareness about PDS citizen charter

An ordered probit analysis was carried out to explain the satisfaction levels for various indicators. The independent or explanatory variables are either dummy or continuous. Therefore, some of the categorical variables with more than two outcomes were converted into dummy variables. The dependent variable is the level of satisfaction viz., completely satisfied, partially satisfied and dissatisfied. The description of the independent variables and their significance is presented in the following table. The model formulated with the explanatory variables is highly significant.

Table 4.3: Individual and Service Factors influence on level of satisfaction -Order Probit analysis

S.No	Independent variables	Coefficients	Type of variable	
			1	**0**
1	Gender of the beneficiary/user	-.197	Male	Female
2	Occupation of the beneficiary/user	-.605*	Other than agriculture	Cultivator cum agriculture labourer

3	Caste of the beneficiary/user	-.316	Others	SC/ST
4	Education level of the beneficiary/user	.508***	Literates	Illiterates
5	Taking/Collecting all items as per entitlements	1.545*	Yes	No
6	Weighed/measured properly of rice distribution (Pre-AePDS)	.291	Yes	No
7	Weighed/measured properly of wheat distribution (Pre-AePDS)	-1.578**	Yes	No
8	Weighed/measured properly of kerosene distribution (Pre-AePDS)	.579	Yes	No
9	Weighed/measured properly of sugar distribution (Pre-AePDS)	-1.279*	Yes	No
10	Weighed/measured properly of rice distribution (AePDS)	-.491	Yes	No
11	Weighed/measured properly of wheat distribution (AePDS)	.080	Yes	No
12	Weighed/measured properly of kerosene distribution (AePDS)	.881**	Yes	No

13	Weighed/measured properly of sugar distribution (AePDS)	1.478**	Yes	No
14	Aware of cashless transactions in PDS distribution system	.418**	Yes	No
15	Had a problem with PDS service delivery?	.585**	Yes	No
16	Awareness about PDS citizen charter	-.816*	Yes	No

Satisfaction: 1=Dissatisfied, 2=Partly Satisfied, and 3=Completely Satisfied;

*= 1% error level, **= 5% error level and ***=10% error level;

Results of Order Probit Analysis: Except education level of the beneficiaries, other three individual characteristics were not significant. However, it is surprising to note that cultivator cum agriculture labourers turning out to be a significant variable to explain satisfaction levels. The service characteristics that are significant are Taking/Collecting all items as per entitlements, Non-Weighed/measured wheat distribution during Pre-AePDS, Non-Weighed/measured sugar distribution during Pre-AePDS, Weighed/measured kerosene distribution during AePDS, Weighed/measured sugar distribution during AePDS, No problem faced in course of PDS service delivery and Non-awareness about PDS citizen Charters.

5. CONCLUSIONS

Overall, the interviewed beneficiaries concluded that after introduction of AePDS (since 2015 onward) in PDS, benefits are reaching the actual beneficiaries (88%), the system is more **accountable** (71%), more **transparent** (53%), **accurate** commodities are distributed to consumers

(54%), **timely distribution** (50%) is ensured and overall improved service delivery (25%) was reported.

The users, staff and shop dealers have welcomed the **AePDS** scheme. Commodities are being delivered to genuine beneficiaries and black market fraudulent activities are averted. The weighing technique of commodities has improved during transactions at the FPS. More users from other backward castes and SC complained that all commodities were not being measured/ weighed properly prior to AePDS. After the implementation of AePDS, this has improved. However, the efficiency of this initiative has reduced due to infrastructure issues such as power failure and internet connectivity problems. Also, inability to recognize the fingerprint and iris has delayed the process of Aadhar seeding for some beneficiaries. It is vital that power supply and internet connectivity is improved to ensure smooth supply of commodities through AePDS without any interruption. Alternate power sources such as generators, solar power etc. can be explored where uninterrupted power supply from the main grid seems difficult. Public Private Partnership models with digital companies can be a possible solution to improve internet connectivity.

The knowledge of reporting all issues related to PDS (**Grievance Redress**) is low among all the stakeholders. The pro-active measures taken by the department at the FPS level towards grievance redress are below satisfactory. Few shops are equipped with complaint registers or display boards to lodge complaints. Card holders are less aware about the process of lodging complaints, vigilance committees at the FPSs, citizen charters, and consumer helpline numbers. Some shops do not have shop level functional vigilance committees. It is necessary to increase awareness among users about the various options/ channels available to card holders for lodging their complaints about the PDS services provided to them. The department has to conduct surprise checks of the FPSs whether the complaint registers have been maintained and kept in prominent locations within the shop. Obtaining feedback from the cardholders on a regular basis at the shop level can be introduced whereby they can be also educated on their entitlements and the

available channels of grievance redress. Unless the system gets honest and regular feedback from its citizens, the areas of improvement become unknown and it also becomes difficult to measure the success of the initiatives.

Many stakeholders are only partially satisfied which shows that there is a scope for improvement. By addressing the issues related to various aspects of the PDS such as internet connectivity, power issues etc., the department can ensure that partial satisfaction can be transformed to complete satisfaction.

Overall, this study highlighted the changes perceived as important by the officials, dealers, and beneficiaries further to improve the functioning of the Public Distribution System. Conflicts-affected relationships will also be fixed by providing information to beneficiaries and providers and encouraging them to engage in making distribution services more responsive to their needs.Since the study findings demonstrated that the AePDS is a successful method i to increase Transparency, Accountability and Efficiency all other states implement AePDS model to achieve the objectives of Public Distribution System across the country.

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