Golden Jubilee
1974-2024

# SHRI DHARMASTHALA MANJUNATHESHWARA LAW COLLEGE

## CENTRE FOR POST GRADUATE STUDIES & RESEARCH IN LAW

(NAAC Re-Accredited with B++ Grade, CGPA 2.9)

(Affiliated to Karnataka State Law University, Hubballi & Recognized by BCI, Delhi)

**Managed by: Shri Dharmasthala Manjunatheshwara Education Society, (R.) Ujire, D.K.**

**President: Dr. D. Veerendra Heggade**



# LEX PLUS

## STUDENT LAW REVIEW 2024

### PEER REVIEWED JOURNAL
### VOLUME -4
### (AN IQAC INITIATIVE)

ISBN 978-93-6135-119-8

# EDITORIAL BOARD

## Disclaimer

# ABOUT US

*Shri Dharmasthala Manjunatheshwara Law College, Centre for Post Graduate Studies and Research in Law, Mangalore, is a professional college, established in 1974 and is functioning under the aegis of the SDM Educational Society(R) Ujire. The college aims at imparting holistic knowledge of law and mould students to be competent legal professionals, committed to the cause of community development through sustained economic activities and research thereby, promoting empowerment through legal education for building ethical society.*

*Presently, the college has been affiliated to Karnataka State Law University, Hubballi and is recognized by the Bar Council of India. The college offers Five Years integrated BA LLB, BBA LLB, Three Years LLB Course and Two Years LLM Programme. The college is the only Research Centre recognized by Karnataka State Law University, Hubballi.*

*The National Assessment and Accreditation Council (NAAC) in the year 2019 has re-accredited the college with "B++" grade and CGPA of '2.90'. In the year 2024 the survey conducted for Top Law Colleges in India by IIRF (Indian Institutional Ranking Framework), SDM Law College obtained 11th Rank in India and 2nd Rank in Karnataka. The college has an outstanding alumni in the judicial, administrative & host of other careers. The distinctiveness of the college is reflected in unique mooting events, law lab and functional arbitration centre. The year 2024 is observed as the golden jubilee year of the establishment of the college.*

# *Editorial*

*I am delighted to introduce this edition of our Student Law Review. This publication is a testament to the intellectual curiosity, critical thinking and passion for law that the students embody. The Student Law Review is more than just a publication - it's a platform for the students to engage with the legal community, share their perspectives and contribute to the ongoing conversation about the role of law in society.*

*In this edition, the students have tackled complex legal issues, demonstrating their ability to analyze, critique, and propose innovative solutions. Their work showcases the depth of knowledge and understanding they have gained through their rigorous academic programs.*

*I am proud of the dedication, creativity and expertise that the students have brought to this publication. Together, let us empower the next generation of legal minds to shape the future of justice.*

*I would like to extend my sincerest gratitude to the dedicated members of the editorial board headed by Dr. Annapoorna shet with the help of Student Editorial team comprising of – Mr. Anantha Padmanabha Pai, Ms. Apeksha Poojary K. K. and Ms. Niriksha who have worked tirelessly to bring this edition of the Student Law Review to fruition. Their commitment to excellence, meticulous attention to detail and passion for legal scholarship have been instrumental in shaping this publication into a valuable resource for the legal community. The Editorial Board's efforts have not only showcased the best of the students' academic abilities but have also demonstrated their potential as future leaders in the legal academics. A special mention to our own student Mr. Suneeth Bhat who has designed the journal and certificate of appreciation.*

*I place on record the benevolent patronage extended by Poojya Dr. D. Veerendra Heggade, the president of SDME Society for all our endeavors. I also acknowledge with humility the support extended by Dr. Sateeschandra S., the secretary SDME society. To conclude to create legally vigilant society, we can bring dynamism, optimism and realism only through the instrument of law.*

*Congratulations for the whole Editorial team for the successful compilation of both the volumes of the academic year 2023-2024.*

**Dr. Tharanatha**
Principal

# *About Lex Plus*

*Lex Plus peer reviewed student law journal, plays a crucial role in addressing contemporary legal issues by providing a platform for in-depth, scholarly analysis from a student perspective. This publication is instrumental in exploring a broad spectrum of modern legal challenges, from emerging technologies and evolving constitutional interpretations to shifting regulatory landscapes and societal impacts on law.*

*Contributors to Lex Plus typically law students, bring innovative viewpoints and rigorous research that often highlight underexplored areas or new dimensions of current legal debates. Their articles frequently address how contemporary issues like digital privacy, environmental law, or human rights are being shaped by recent legal developments and societal changes.*

*By offering a forum for these analyses, Lex Plus not only enriches the legal discourse but also helps to bridge the gap between theoretical legal education, practical and real-world issues. It reflects the evolving concerns of the legal community and provides valuable insights into how the law is adapting to the complexities of the modern world.*

**Editorial Team**

# *PREFACE*

*It's with a great pleasure SDM Law College Mangalore presents LexPlus Student Law Review 2024. SDM Law College Mangalore, established in 1974 has set a benchmark in quality legal education in South India. Over the years, the college has tried its best efforts to inculcate within the students aiming to improvise learning process through research and innovation. The stress lies on commitment towards the values of individual concern and growth, reliance and encourage students' desire to learn, flexibility in the learning process and a rigorous academic progress to meet the demands of a global society. The college has laurels in securing 11th position at the National level and 2nd position in the state level in IIRF rankings 2023-24.*

*This year it's a proud moment for us to celebrate 50 years of the institution marking a significant milestone in our remarkable journey of achievements and contributions. A myriad of activities enrich the academic experience for students, encompassing both competitive and non-competitive events. Among these, the LexPlus Student Law Review stands out as a beacon for fostering research acumen and honing writing skills. Through the platform provided by the LexPlus Student Law Review, students are provided with the opportunity to delve into pressing legal issues, engage in rigorous research and contribute meaningfully to the discourse surrounding the legal field. We are thrilled in successfully bringing out* ***Two volumes*** *of the journal due to the overwhelming responses, Vol- 3 and Vol-4 comprising of articles of different spheres signifying the legal aspects filled with information .The aim is to enhance writing skills , boost creativity and present fresh perspectives, enrich the legal profession's intellectual landscape, fostering dialogue and facilitating positive change.*

***Table of Contents***


| Sl No | *Title of the Article & Authors* | *Page No.* |
|---|---|---|
| 1. | *Judicial Scrutiny of Administrative Actions: A Comprehensive Analysis*<br>***Harsh Raj & Divya Rani*** | 1 |
| 2. | *Legal Rights of Children Born in Live-In Relationships*<br>***Shravya Rao*** | 10 |
| 3. | *Dilemma Of Mining Contravening Basic Human Rights*<br>***Hardik Maheshwari & Arindam Rathore*** | 18 |
| 4. | *Status Of Women Participation in Politics in India*<br>***Keerthana V. & Anjana K.*** | 36 |
| 5. | *The RTI Conundrum in India: Navigating A Balance Between the Right to Information of Voters and Informational Privacy of Political Parties*<br>***Neha Agarwal*** | 40 |
| 6. | *Human Rights and Tech Giants: The Role of Artificial Intelligence in Widening Biases and Discrimination.*<br>***Mahalakshmi. G. S.*** | 50 |
| 7. | *Copyrightability Of Distinctive Sports Celebrations*<br>***Amruta Oke*** | 63 |
| 8. | *Impact Of Uniform Civil Code on Personal Laws*<br>***Kareena Mary John & Swapna Surendran Menon*** | 72 |
| 9. | *Climate Justice and Indigenous Rights in India: Legal Frameworks and Grassroots Movements*<br>***Lavanya*** | 81 |
| 10. | *Breaking Barriers: Understanding And Advancing Transgender Rights in India*<br>***Ishita Gupta & Madhuhasini Pasupuleti*** | 90 |
| 11. | *Reconciling Equality Rights Gender Quotas: The Case of The Women's Reservation Act*<br>***Nimisha Verma*** | 102 |
| 12. | *An Analysis of The Compatibility Between Classical Islamic Law and Modern Bankruptcy: A Framework for The Contemporary Banking System*<br>***Yasir D. Pathan*** | 114 |
| 13. | *Hearsay Evidence in Indian Courts: A Contemporary Assessment*<br>***Trishna Agrawalla & Lavanya*** | 126 |
| 14. | *Navigating The Depths of Software Piracy in Cyber Crimes*<br>***Srivaasthi M & Swerna Raksha S*** | 135 |
| 15. | *Educational Loans*<br>***Navya UK.*** | 144 |

| | | |
|---|---|---|
| 16. | *Surrogacy And Women's Reproductive Health Rights: Issues and Perspective and Role of Indian Courts*<br>***Gaurav Kumar Yadav & Janhvy Pandey*** | 152 |
| 17. | *Deciphering The Jio-Disney Merger: Scrutiny Under Competition Law*<br>***Riya Kumari & Nupur Jajoo*** | 165 |
| 18. | *The Mental Health of Workers Under the Employee State Insurance Act 1948, And Employee Compensation Act, 1923.*<br>***Rose Ann Baiju & Navya L*** | 174 |
| 19. | *Constitutional Validity of Electoral Bonds*<br>***Tanu Kaushik & Nancy Prajapati*** | 182 |
| 20. | *Community Service in India- An Alternative to Corporeal Sentencing in Bharatiya Nyaya Sanhita*<br>***Sanika Brahme*** | 191 |
| 21. | *Decoding The Abrogation of Article 370: Historical Significance, Legal Grounds, And Present-Day Implications*<br>***Shebin Paul*** | 208 |
| 22. | *An Analytical Overview of Land Acquisition Laws and Farmer Protests*<br>***Vanshika Shukla*** | 217 |
| 23. | *The Porche Case: Revisiting Juvenile Justice in India*<br>***Anureet Kaur & Namandeep Kaur*** | 229 |
| 24. | *Analysis Of Collegium System & Discovering Alternative System for Judicial Appointment Concerning Best Practises in The World*<br>***Shivashankar*** | 238 |
| 25. | *Beyond The Grave: Necrophile and Legal Rights of The Dead Body*<br>***Ankisha Vandana*** | 248 |
| 26. | *A Commentary Upon the Ever-Evolving Interface Between Competition Law and Intellectual Property Rights*<br>***Vedant Saxena*** | 257 |
| 27. | *Election And Democracy in India: Assessing the Impact on Democratic Values*<br>***Om Narendra Singh*** | 265 |
| 28. | *Gig Workers: Unlocking Security with Portable Benefits*<br>***Anam Sajid & Shiraz Zafar*** | 272 |
| 29. | *Examining The Powers of Police and Magistrates in Conducting Inquest Proceedings Under the Bhartiya Nyaya Sanhita*<br>***Aditi Solanki*** | 281 |
| 30. | *Gender Justice In India: The Future We Demand*<br>***Aditi Tiwari*** | 290 |
| 31. | *Algorithmic Bias in Predictive Policing in Law*<br>***Saanvi Aggarwal*** | 296 |
| 32. | *Media Trials In Digital Age*<br>***Aditya Kumar*** | 307 |

| | | |
|---|---|---|
| 33. | *Ai In Indian Healthcare: Legal Considerations*<br>***Shreya Sehgal*** | 315 |
| 34. | *Right To Private Defence: Scope, Limitations, And Legal Interpretations Within the Indian Penal Code 1860*<br>***Snehil Prakash*** | 328 |
| 35. | *Insolvency And Bankruptcy Code 2016: A Guardian Angel or Peril to The Corporates*<br>***Alex K. Manoj*** | 339 |
| 36. | *Patenting Military Weapons – A Security Concern in India*<br>***Pranav*** | 346 |
| 37. | *Involvement of Minors in Crimes in India: Consequences and Reasons*<br>***Rohil P. Shetty*** | 351 |
| 38. | *Comparative Study On Indian Laws For Animal Protection With Global Standards*<br>***Piyush V. Amin*** | 357 |
| 39. | *How The Boundless Frontier of Freedom: Exploring the Dynamics of Free Speech*<br>***Amisha Runa Serrao*** | 364 |
| 40. | *Delays Caused by Adjournments*<br>***Hansa Vani Verkila Nath*** | 372 |
| 41. | *Traditional Knowledge for Sustainable Practices: Indigenous Tribal People Cognizance on Climate Change*<br>***Shreya Bisht*** | 384 |
| 42. | *Discourse Over Age of Consent Under the POCSO Act*<br>***Parinati Mishra*** | 395 |

# JUDICIAL SCRUTINY OF ADMINISTRATIVE ACTIONS: A COMPREHENSIVE ANALYSIS

**Harsh Raj**[*]

**Divya Rani**[**]

***Abstract***

*The administrative actions and decisions are not only guided by the statutes which confer them power but it also elucidates situations where they can emulate new principles of the administrative law to revitalize the domain of administrative law. The administrative body mainly encompasses statutes, ordinances, regulations, orders, rules, bylaws, etc., for their functioning. These rules, and regulations of the body of the body are generally framed by the administrators themselves under the power bestowed upon them under parent legislation which led them to ignore the established judicial norms.*

*This paper tries to understand the necessity of judicial review of such orders and their implementation and & their potent use for such actions & inactions. The administrative law in India is not a codified legislation and has emerged from the common law system owing to the British common law principles which further developed in independent India. The courts have time to time propounded new doctrines and rules trying to cure the existing mischief in administrative law which are sometimes contrary to each other. This is why It is keen to observe the tussle between the different doctrines in administrative law and the ambit of judicial review for providing a guidance to the administrative body in their functioning.*

*The paper also delves into the need for a balanced approach to judicial Review and administrative autonomy. Ultimately, this paper analyses the scope of the evolution of administrative law in India while also observing the global trends and the possible benefits it can reap to adapt and compete in the global arena while also giving due purview to our societal needs.*

**Keywords: Administrative, judicial review, interpretation, globalization.**

## Introduction

The administrative functions are neither judicial nor legislative, but it is a mere extension of the executive part of the government that has to make many decisions which is

[*] Pursuing LLM from Central University of Punjab, Bathinda.

[**] Pursuing LLM from Central University of Punjab, Bathinda.

similar to all the three organs of the government[1]. However, all its decisions cannot be sound and it may be because people who are involved in the administrative process are such people who don't possess the legal acumen of the judges or lawyers. After all, they are not trained to do so. The very bedrock on which the administrative decisions are challenged is procedural fairness because the person making the decisions is well versed in his domain but lacks the acumen of the persons involved in the legal matters. The ultimate aim of the court is to maintain the rule of law and that is the sole ground for review and interpretation of administrative decisions.

The rule of law has five dimensions which shall be present in the decision-making of the administrative body.

- *Firstly*, there shall be authorization by the government for the administrative body to function in a particular domain.
- *Secondly*, the notice of such authorization should be made public.
- *Thirdly*, such authorization must justify itself.
- *Fourthly,* it should be coherent, and
- *fifthly*, the administrative body must act with procedural fairness with an unbiased and transparent approach which shall be backed by logic and evidence.[2].

However, that is not the only case, why judicial review of administrative bodies is important, it is a means to make them accountable it is also necessary to keep a check on their intentions as 'they are to serve not to rule'[3]. They are bestowed upon the various powers to take care of their daily function because all the actions cannot be dictated by the legislative or executive hence, they are provided with some level of autonomy. They also take the role of quasi-judicial body for expedient remedy and decisions.

That's why the courts consider the purposive interpretation while deciding administrative cases. This may be the reason because courts also possess limited knowledge of technical aspects of any matter in comparison to administrative bodies, hence they mainly

[1] Conor Casey, *Political Executive Control of the Administrative State: How Much Is Too Much?*, 81 MD. L. REV. 257 (2021).
[2] Kevin M. Stack, *An Administrative Jurisprudence: The Rule of Law in the Administrative State*, 115 COLUM. L. REV. 1985 (2015).
[3]Jerry L. Mashaw, *Judicial Review of Administrative Action: Reflections on Balancing Political, Managerial and Legal Accountability*, DIREITO GV L. REV. 153 (2005).

focus on the procedural anomaly of the decision of the administrative body[4]. Hence, Judicial Review is the ultimate remedy available to the person.

**Research Objective**

The objective of the research is to study the scope and need for judicial review of administrative action and to outline the conflict between the administrative body and judiciary.

- To analyze the role of the judiciary in outlining the development of administrative law
- To identify and suggest the means to balance the judicial review and administrative action
- To highlight the changing trend in administrative law around the world and possible benefits.

**Method of Research**

This project is based on the Doctrinal Method of Research as no field work has been done. All of the work in this paper has been done by taking the data available in the public domain and the news reported by esteemed newspapers, magazines, and the analysis of the various academicians in various Journals. This paper has been written with the use of secondary sources of data such as Books, websites & E-Journals, and data published on the websites of government-funded institutions, and organizations of esteemed reputation & NGOs.

**Judicial Interpretation of Administrative Actions and its Contribution to Administrative Law**

The prerogative of the court to check any decision of an administrative body is embodied itself under the Doctrine of Judicial Review, the court can review all such laws[5], decisions, and policy matters. Hence, it extends to executive, legislative & administrative actions also. This judicial review doctrine was propounded in America in *Marbury vs.*

[4] *ibid.*
[5] The word "Law" here denotes all such things which are included in the Article 13(3)(a).

*Madison*[6] to review the action of the executive. In India, the major theme for the interpretation of Judicial actions is mostly based on the violation of fundamental rights. Any administrative action is very firstly checked in the backdrop of fundamental rights which may seem unfair but that itself covers a large part of problems in any administrative decisions. Any decision of an administrative body that may infringe the rights guaranteed under Part III of the constitution is under the scope of Judicial Review under Article 13[7]. The recourse to such violation is dealt with under Articles 32 & 226[8] of the Indian Constitution.

The next ground on which the administrative action is reviewed is in the form of long-followed and unwritten common law principles such as natural law justice which has been applied by court from time to time when the relief is not available under constitutional law. The Supreme Court can use any tool available for providing "Complete justice" as is bestowed upon it by the Constitution of India under Article 142.[9] The three bases of natural justice are the pillars of natural justice. Firstly, rule against bias, *secondly*, The party should be given a reasonable opportunity to defend himself and *thirdly*, the reason behind the decision of the administrative body[10].This three basis of principles of natural justice is to maintain procedural impropriety. The importance of natural justice was highlighted by the court in *Maneka Gandhi vs. Union of India*[11]. The Court inscribed natural justice as a means for fairness in the legal system and constructed the way for Natural justice through the interpretation of Article 21[12]. The Court in the *Maneka Gandhi* case, redefined the rule of law by incorporating due process of law to bring procedural fairness in the administrative law[13].

The Supreme Court has subscribed to develop various doctrines to ensure the legality and accountability of the administrative bodies. Here the court intends to clarify ambiguities in case of doubt related to the statutes, and regulations for their efficient functioning. The

---

[6] Marbury vs. Madison 5 U.S. (1 Cranch) 137, 177 (1803).

[7] Santanu Sabhapandit, *Article 12 and Judicial Review of Administrative Action: An Analysis*, 2 Indian Law Review 5 (2018).

[8] Article 32 provides citizens the opportunity to approach the supreme court in case of violation of Fundamental rights and to remedy the wrong while Article 226 provides the similar recourse, where persons can knock the door of High Courts for appropriate remedy.

[9] Article 142 gives power to the supreme court to imply any tools by passing an order, decree in order to achieve "complete justice" in the case pending before it.

[10] Lawrence B. Solum, *Natural justice*, 51 Am. J. Juris., 65 (2006).

[11] Maneka Gandhi vs. Union of India, AIR 1978 SC 597.

[12] Mohinder Singh Gill vs. Chief Election Commissioner, 1978 AIR 851.

[13] Vakil Raeesa, *Constitutionalizing administrative law in the Indian Supreme Court: Natural justice and fundamental rights*, 16 International journal of constitutional law, 475 (2018).

Indian court has followed the unreasonable principle after being influenced by Wednesbury's reasonableness[14]. Although India also followed this common law principle owing to its common law heritage from the UK, India soon adopted the doctrine of proportionality[15] which was commonly recognized all around the world owing to its inception from droit administrative law[16]. The proportionality test relies on two other tests if any decision of the administrative authority is taken in the context of Human Rights; those are the "Necessity Test"[17] and the "Balancing test"[18].

In *Hind Construction & Engineering Co. Ltd vs Their Workmen*[19], the Supreme Court applied the doctrine of proportionality and set aside the decision of the employer to fire by giving the rationale that it is too unreasonable to fire those workers who took leave believing any particular day as a holiday and a reasonable employer could have imposed other suitable punishment for the same.

The concept of proportionality was reiterated in *Justice K S Puttaswamy v. Union of India*[20] where Justice A K Sikri applied the balance and necessity test and also suggested that any decision must be taken to achieve a legitimate goal and a suitable means to be followed while achieving it[21]. Another recourse to administrative decisions can be taken under the doctrine of Ultra vires.[22]

The court exercised this doctrine in *Khoday Distilleries Ltd. v. State of Karnataka*[23] and said that any act of the administrative body exceeds the boundary and the purpose for

[14] Associated Provisional Picture Houses Vs. Wednesbury Corporation (1947) 2 All ER 74 (CA). This case laid down that courts will strike down the administrative action if it is too unreasonable and no prudent man can think it to be fit to be done by administrative authority.
[15] This doctrine is similar to Wednesbury's reasonableness but it is having wider scope and tests the law on the three bases i.e irrationality, illegality and procedural impropriety.
[16] C K Takwani, Lectures on Administrative law 337-342 (6th ed. 2018).
[17] This test takes into account the necessity of taking the particular decision and onerous penalty which means to say it tries to find if there is a less stringent and arduous way of achieving the same effect.
[18] This test tries to weigh the interests of the parties in order to find out whether benefits of such actions justify the harm done to the party.
[19] Hind Construction & Engineering Co. Ltd vs Their Workmen, 1965 AIR 917.
[20] Justice KS Puttaswamy v. Union of India AIR 2018 SC (SUPP) 1841.
[21] Aditya AK, *Proportionality Test for Aadhaar: The Supreme Court's two approaches*, Bar and Bench (Sept. 26, 2018) Available at, https://www.barandbench.com/columns/proportionality-test-for-aadhaar-the-supreme-courts-two-approaches.
[22] This doctrine provides that the power should be exercised for the purposes it is granted, if it is exercised without utmost discretion then, the court will strike the effect of exercise of such power to the extent it exceeds its limit. This Doctrine is also called doctrine of jurisdictional error; Mark Elliott, *The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law*, 58 Camb.L.J., 129 (1999).
[23] Khoday Distilleries Ltd. v. State of Karnataka, 1995 SCC (1) 574.

which the legislature has granted them power if they do so, they must explain the reasonable ground for exercising such a judgment. if their power traverses without any limitation or is arbitrary, then it will be struck down by the court.[24]

The people in the society have some distinct expectations and if such expectation of the person is because he is led by someone of authority to believe in a particular way and to have a legitimate expectation even though such expectation may not be because of law but he had a reasonable basis to base his expectation on. This is also protected under administrative law through the rule of legitimate expectation[25]. The UK court has applied this principle *Council of Civil Service Unions and Others v. Minister for the Civil Service* when the rights of the person are altered by the authority or are liable to get benefits until it is stopped by the authority and its communication reaches him. The principle was applied in India in the case of *Ram Pravesh Singh and Ors. v. State of Bihar and Ors*[26]where the court said that this rule will be applicable if any promise is made by the authority or there is any evidence of such past practices. This rule was a device to stop the mistreatment of their authority for personal benefit.

Justice Mathew in *Kesavananda Bharati v. State of Kerala*[27] pointed out that after the independence, the court looked at fundamental rights through textual interpretation but there is more to it, the words of the Fundamental rights are more like an empty vessel that can be filled by the newer generation through their own experiences by adopting a liberal and beneficial construction in the favor of the society and this is the reason why so many doctrines have been enunciated by the court.[28]

**Balancing Judicial Review and Administrative Actions**

The Judicial review of administrative action is the most important remedy for oppressive actions of the Authority but the remedy shall also not act in a way that becomes a hindrance to the functioning of the administrative body. The balance must be struck by the

[24] Chamila S. Talagala, *The Doctrine of Ultra Virus, and Judicial Review of Administrative Action, 17* Bar Association Law Journal, 1 (2011).
[25] Samriddhi Mishra, *Grounds for Judicial Review of Administrative Action*, Intolegalworld (June 21, 2023), https://www.intolegalworld.com/article?title=grounds-for-judicial-review-of-administrative-action.
[26] Ram Pravesh Singh and Ors. v. State of Bihar and Ors.
[27] Kesavananda Bharati v. State of Kerala (1973) 4 S.C.C. 225, 880.
[28] *Supra* note 13.

court to limit judicial overreach[29]. However, it is not a futile argument that the lack of legal knowledge often leads them to violate the rights of the individuals which needs to be corrected but such decisions of the courts often become the precedent that cannot be easily changed or revoked but as we live in a democracy, the lawmaking power lies in the hands of elected people and judges are nobody but the manifestation of legal spirit but on the other hand, unlimited power in the hands of elected people will lead to infringement of rights, so a middle ground is needed[30].

The autonomy given to the administrative body is to take care of the circumstance which the legislature cannot have foreseen, hence the very discretionary power cannot be snatched by the body itself as it will limit their function and efficiency and ultimately lose its purpose[31]. That's why the role of the court is very essential, as it fixes the inconsistencies in the law, clears ambiguities, and does not let the administrative body run amok by settling the issues through the judicial Precedent. The Judiciary on the other hand cannot look at things through the technical aspect into which they hold their mastery and expertise.[32] The judiciary can act only as an oversight on the administrative body and sometimes act under the supervision of the administrative body because it will require the technical mastery to apply the legal principles on any issue.

It is imperative to think that when an administrative body is dealing with issues that are new to the world, it is bound by the law to act in a particular way, which may be prejudicial to the interest to larger public interest That's why it is a very important aspect for the judiciary to be dynamic in their approach, precedents one settled can be overturned, doctrine once settled can be replaced as it is very important to adapt to the societal changes.[33]

[29] David Bennett, *Balancing judicial review and merits review [Text of a paper delivered at an administrative law conference (1999)]*, 53 Admin Review, 3 (2000).
[30] Matthias Klatt. *Positive rights: Who decides? Judicial review in balance*, 13 International Journal of Constitutional Law, 354 (2015).
[31] Tobias Bach, *Administrative autonomy of public organizations, Global encyclopedia of public administration, public policy, and governance*, Cham: Springer International Publishing, 269 (2023).
[32] Ronald A. Cass, Vive la Deference: Rethinking the Balance between Administrative and Judicial Discretion, 83 GEO. WASH. L. REV. 1294 (2015).
[33] Diksha Sobti & Shubham Saini, The Scope and Extent of Judicial Review in Administrative Action, 9 j. res. soc. sci. Humanit. 17 (2021).

**Future Trends & Globalization in the Interpretation of Administrative Law**

Globalization has made every country closer than we think or believe, which had a positive impact on the judicial system and administrative systems in the world. The different countries can now learn from each other's successes and experimentation, which can be molded into countries' legal systems. The Indian Court can look into the various doctrines laid down by the courts of other countries. The Supreme Court of the US laid down the deference doctrine in *Chevron's* case[34] under which the court accepted the interpretation of statute made by the agency for whom such statute was made to function but only in cases where interpretation is contemporaneous with the legislation and the legislator is not clear with its intentions or left any matter open[35].

Such an interpretation was accepted by the federal court until the interpretation made by the administrative agency was too absurd. The rationale behind this doctrine is that the court can pay due regard to the agency's purposive interpretation if it coincides with the court's view of legislation[36]. This doctrine recognized the expertise of the administrative body in its domain. The other doctrine known by Auer's deference[37] reinforced the autonomy of the administrative body, where the court defers to the interpretation of the agency's regulation unless it is erroneous. The doctrine was backed by the court's initial precedent which also propounded the same but had a little different context[38]. The court adopted this approach to provide the agency a free hand in its work, especially during wartime price control but later on, it started to have a little bit problem with due process of law[39].

An important aspect of the globalization of administrative standards will be the harmonization of standards because, these days individuals are not subject to one legal jurisdiction, they can live in multiple jurisdictions because of their occupation, marriage, tourism, job, business, etc. This creates impediments in the functioning of administrative bodies that's 'why, the governments are trying to harmonize their legal system and try to

[34] 'Chevron U.S.A. Inc. v. NRDC, 467 U.S. 837 (1984).
[35] Cass R. Sunstein, Alan B. Morrison, Kenneth W. Starr & Richard K. Willard, Judicial *Review of Administrative Action in a Conservative Era*, 39 Adm. Law Rev, 353 (1987).
[36] *ibid.*
[37] Auer v. Robbins, 519 U.S. 452 (1997).
[38] This approach was first taken in Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945) but it took a different turn giving administrative body a little too space to take control of things having an adverse effect on the rights of the individuals.
[39] Ronald A. Cass "*Auer Deference: Doubling Down on Delegation's Defects*." 87 Fordham L. Rev, 531 (2018).

bring uniformity to the legal system[40]. Some such steps in this direction are TRIPS, WIPO, UNCITRAL model, etc. These model acts ensure the standardization and uniformity of laws around the world[41].

**Conclusion**

The doctrine of judicial review plays a vital role in the interpretation of administration action. It is more of a curative action against the arbitrary stance of the administrative body. The administrative body needs to have a clear legislative mandate to increase its efficiency. A clear legislative mandate does not only mean clear demarcation of power but also its limitations. The clear demarcation of boundaries helps reduce arbitrary actions and it also helps courts from being burdened by administrative cases, as administrative cases are more technical, it drowns a lot of energy of the judges in the proceedings. The transparent procedure should be followed in the administration body while incorporating the principles of natural justice to make the proceeding much more acceptable to the parties.

It is also important to have administrative personnel get acquainted with administrative law through capacity-building programs and time-to-time seminars. The judges should also be given free orientation on the administrative process of the various bodies so that they get to know each other's work, to perform better in their domain. A periodic review of administrative decisions and settled laws can be done to remove inconsistencies and to provide feedback where policies and laws can be recalibrated. These things can help maintain judicial oversight and administrative efficiency. The principle of interpretation can be applied by the court to give ample feedback to the administration, it shall not be interpreted in the strict Sense. Mere textual interpretation for a long time will not allow the administrative body to adjust to the changing needs of society. Hence. The court while applying judicial doctrine should not see the administrative body as a mere instrumentality of suppressing the rights, It should look at things beyond the words of law and in the backdrop of economic, political, cultural, or other reasons.

[40] Sitorus, Lily Evelina, Anna Erliyana, and Yunus Husein, *Harmonization of Legislation: Reviewing the Laws of Government Administration*, Annual Conference of Asian Association for Public Administration:" Reinventing Public Administration in a Globalized World: A Non-Western Perspective, Atlantis Press, 312 (2018).

[41] John Linarelli, *The Economics of Uniform Laws and Uniform Lawmaking*. 48 *Wayne L. Rev*, 1387 (2002).

# LEGAL RIGHTS OF CHILDREN BORN IN LIVE-IN RELATIONSHIPS

**Shravya Rao***

***Abstract***

*In India marriage is a sacrament, which is a recognised form of family formation. Recent trends have led to many changes in it, one such change is the Live-in Relationship. A Live-in-relationship means, a practice of a couple living together without any social or legal marriage as such. Such a practice was criticised by Indian society as immoral and unethical and it was a way to run out of the duties and responsibilities that an individual may have if he/she gets into the social or legal ties of marriage.*

*The transformation in societal norms has led to the emergence of Relationships as a recognised form of cohabitation. Now the question arises, when live-in couples form a family without marriage, what is the legal status of children born under Live-in-relationship? Whether they are entitled to get the same status as the child born to legally married couples? At this juncture, this paper focuses on the legal status of children born under a relationship, social recognition, and judicial approach towards such children.*

*Even though we are standing in the AI century, there are still criticisms from society when it comes to the matter of societal recognition of children born to couples who are in relationships. There are still social stigmas on the legitimacy of such children. Society should stop categorising them and help them to live with dignity which every human deserves, as they should not suffer for no fault of theirs. The Honourable Supreme Court ruled that children born out of Live-in-relationships are entitled to get the same rights as those who born to legally married couples. Information provided in this paper is extracted from various articles, blogs, research papers internet sources and books related to family law, inheritance law, etc*

**Keywords: Legitimacy, live-in-relationship, inheritance, maintenance, ethical, legal-heirs.**

* 4th year B.A. LL.B, Shri Dharmasthala Manjunatheshwara Law College, Mangalore, Karnataka

## Introduction

The live-in relationship which is also termed cohabitation, is not uncommon, it was from the Vedic times. In ancient India historical scriptures and manuscripts emphasize the custom of "Gandharva Vivaha"[1]. It was a type of marriage in which partners choose to live together without the need for formal ceremonies or social approval. Over some time, due to the changes in cultural, and social norms, traditional beliefs, and legal frameworks, this led to a decline in such arrangements.

In modern India, live-in relationships becoming more popular, due to the influence of factors such as changing societal attitudes, economic factors, personal freedom and other factors. Western ideas contributed to accepting the concept of live-in relationships among certain segments of Indian society, especially in urban areas. Even though there is a gradual growth in the acceptance of such relationships, there are still social stigmas, legal uncertainties, and family oppositions. There is a lack of legal frameworks which govern live-in relationships. The landmark judgements in this regard play a vital role in providing legal status and rights to live-in partners and children born out of such relationships.

## Legal Recognition of Live-in Relationship

In India, there is no specific legislation or comprehensive laws to govern the rights and duties of partners in Live-in Relationships. India lacks in providing legal frameworks to govern live-in relationships or to outline the rights and responsibilities of partners in such relationships. But the Honourable Supreme Court in several landmark judgements recognised and accepted Live-in Relationships as a valid form of companionship.

The Supreme Court in *Badri Prasad V. Dy. Director of Consolidation,*[2] for the first time observed that if a man and a woman lived together for a long time, such a relationship was presumed to be a marriage. In *S. Khushboo V. Kanniammal & Anr,*[3] Supreme Court held that there is no law to prohibit live-in relationships or pre-marital sex and such relationships

[1] Sandeep Kumar Sharma & Narendra Bahadur Singh. "The Concept of Live-in-Relationship in India: Societal Trends and Legal Perspectives." Innovations, No. 76 March 2024. www.journal-innovations.com. last visited on 10th June 2024.
[2] Badri Prasad V. Dy. Director of Consolidation. 1978 AIR 1557.
[3] S. Khushboo V. Kanniammal & Anr. AIR 2010 SC 3196

are not illegal, it is highlighted as part of the right to life provided under Article 21 of the Indian Constitution.

Even the recent judgements of the Apex Court held that live-in relationships were given rights of property inheritance, maintenance and other rights. Live-in Relationships in India are progressively becoming more and more common and getting legal recognition.

**Legal Status of Child Born Under Live-in Relationship**

Modern societies are characterised by a changing social structure that has led to the growth of distinctive family structures, as mentioned above. Such type of agreements put traditional legal systems to the evaluation, requiring modifications to safeguard the rights and welfare of children from these types of relationships. Children born in live-in relationships often face the question of their legitimacy, legal recognition, legal rights and other rights. Recently, several legal systems have developed especially, jurisdictions developed to recognise the rights of these children which are impacted by traditional common laws.

The Supreme Court in *S.P.S Balasubramanyam V. Suruttayan*,[4] for the first time addressed the question of the legitimacy of children born from Live-in Relationships. It was held that "If a man and women are living under the same roof and co-habiting for some years, there will be presumption under Section 114[5] of the Indian Evidence Act that they live as husband and wife and the children born to them will not be illegitimate."

In the subsequent case, *Revanasiddappa V. Mallikarjun,*[6] the court ruled that "the child born out of that relationship must be regarded separately from the relationship between his/her parents, regardless of the legitimacy of the relationship between parents." "The child born from such a relationship is innocent and entitled to all the rights and privileges conferred to children born from valid marriages" as determined by Justice A.K Ganguly.

[4] S.P.S Balasubramanyam V. Suruttayan. 1994 AIR 133.
[5] Section 114 of the Indian Evidence Act – "the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of their particular case."
[6] Revanasiddappa V. Mallikarjun. 2023 SCC OnLine SC 1087.

Hindu Marriage Act, of 1955 does not directly recognise the live-in relationship but indirectly provides legitimacy to such children born to live-in couples provided under Section 16.[7]

In *Vidyadhari V. Sukharna Bai*[8], the Apex Court held that as per Section 16 of HMA,1955 children born out of live-in relationships should be provided with the status of "Legal Hiers" and are entitled to get the right of inheritance of property of their parents.

Due to legal reasons, children born out of live-in relationships were not considered legitimate before 2010, later in the case of *Bharatha Matha & Anr. V. R. Vijaya Ranganathan & Ors*[9]. The legitimate status of children depended primarily on the validity of the marriage of their parents, indicating that the actions of their parents were beyond the control of innocent children. But due to no fault of its own, the helpless infant had to endure an irreversible setback in life and the eyes of society when it was deemed to be illegitimate[10]. The lawmakers did a commendable and honourable thing in passing Section 16 to stop a significant social curse. The Apex Court in the above case ruled that "children born out of the live-in relationship are legitimate and upheld their inheritance right in the property".

**Rights of Children Born Out of Live-in Relationships**

It is essential to define Live-in relationships in the context of India through laws that provide both parties rights and a set of duties and responsibilities, thereby limiting the scope of these kinds of relationships. This paper examines the legal rights of children born to live-in couples, focusing mainly on the aspects of legitimacy, inheritance, custody, and maintenance.

**i. Legitimacy of Child**

Legitimacy in legal terms refers to the status of a child being lawfully recognised as the offspring of their parents. This concept has significant implications for the legal rights and status of children within the family as well as in society. As already mentioned above in the case of *S.P.S Balasubramanyam case*[11] and in *Vidyadhari's case*[12] it is clear that children born out of live-in relationships are

[7] Section 16 of HMA,1955 – The children of void as well as voidable marriage are legitimate.
[8] Vidyadhari V. Sukharna Bai. AIR 2008 SC 1420.
[9] Bharatha Matha & Anr. V. R. Vijaya Ranganathan & Ors. AIR 2010 SC 2685.
[10] https://indiankanoon.org/doc/1513913/ last visited on 11th June 2024.
[11] Supra., 5
[12] Supra., 9

considered legitimate and are provided with the status of "legal heir" and entitled to get the right of inheritance of their parent's property. In the landmark case of *Tulsa V. Durghatiya,*[13] the Supreme Court ruled that children born out of long-term live-in relationships should be considered as legitimate. This judgement was pivotal in recognising the rights of children born to live-in couples, ensuring them that they are not deprived of inheritance and other legal rights.

There are legislative provisions that protect the rights of children born to live-in couples, such as the Protection of Women from Domestic Violence Act, 2005 recognises "relationships like marriage"[14] and extends protection to women in such relationships. This provision indirectly supports the legitimacy of children born from such relationships, by providing a legal framework that acknowledges and protects the rights of live-in partners as well as their offspring.

**ii. Right of Property Inheritance**

Most of the time, the issue of legitimacy gives rise to the question of inheritance. Indian Courts have been increasingly addressing the issue of the right of inheritance for children born out of live-in relationships. Traditionally, children born to a legally recognised marriage were the individuals who received inheritance rights. Subsequently, with cultural developments and the rise of live-in relationships, the legal system has developed to ensure that such children are not discriminated against and are allowed equal inheritance rights. Thus, the courts have always ensured that any child born after an appropriate duration of live-in relationship is not denied the right of inheritance, which compliances with Article 39(f) of the Constitution[15]. As described in *Vidyadhari's case*[16], it was addressed by the court's judgement that the inheritance right to the children born from live-in relationships and attributed them with the status of "legal heirs".

Even in legislative provisions such as the Indian Succession Act, of 1925 and the Hindu Marriage Act, of 1955[17] which protects the rights of children born to live-in couples indirectly.

[13] Tulsa V. Durghatiya. AIR 2008 SC 1193.
[14] Section 2(f) of PWDV Act, 2005.
[15] Article 39(f) of the Indian Constitution – "Children are given opportunities and facilities to develop healthily and conditions of freedom and dignity and that childhood and youth are protected against exploitation and moral and material abandonment."
[16] Supra., 13
[17] Section 16 of the Hindu Marriage Act, 1955.

### iii. Custody of child under live-in relationship

The question of custody of the child in a live-in relationship is a relatively new concept in the legal system of India. Since live-in relationships are not legally recognised, unlike traditional or legally recognised marriages, there are particular difficulties in deciding custody of the child. The principle of welfare and the best interest of the child are of utmost concern while deciding the custody cases and even this principle applies equally to children born within marriages and those born under live-in relationships. As a result, the Indian Judiciary has progressively addressed these problems.

The Hindu Minority and Guardianship Act, of 1956 provided that "the father is the natural guardian of his legitimate minor children, the mother becomes natural guardian in the absence of the father, which means when the father is not capable of acting as his child's guardian"[18]. In the same act, it is provided indirectly by granting custodian rights to the mother in the case of children born from illegitimate relationships. The Guardians and Wards Act, of 1890 also provides for the custody of children irrespective of their parent's marital status. There is uncertainty about how the personal law applies to children born from live-in relationships. It has been noted that a particular law about custody rights is necessary to address the custodial aspect of children born out of cohabitation.

### iv. Maintenance of children born from live-in relationships

The obligation to provide for another person is a common explanation for maintenance. When a child is born out of a live-in relationship, it becomes a crucial factor. In the landmark case *Dimple Gupta (Minor) V. Rajiv Gupta*[19], it was held that "even an illegitimate child born from an illegal relationship is entitled to maintenance provided under Criminal Procedure Code 1973, which provides maintenance to children, legitimate or illegitimate, while they are minors and even after they reach the age of majority if they are unable to support themselves."[20]

In the landmark case, the live-in partner assumed the role of the wife was not granted maintenance but, a child born out of such a relationship was granted maintenance[21]. Denial of providing maintenance to a child born to such a couple can

[18] Section 6 of The Hindu Minority and Guardianship Act, 1956.
[19] Dimple Gupta (Minor) V. Rajiv Gupta. AIR 2008 SC 239
[20] Section 125 of CrPC 1973
[21] Savitaben Somabhai Bhatiya V. State of Gujrat and Ors. AIR 2005 SC 1809.

also be challenged under Article 32 as it is violative of the child's fundamental rights under Article 21 of the Indian Constitution. Denial can deprive an individual of the right to lead a life with dignity[22].

**Suggestions**

Even though we accept the live-in relationship, it is difficult to make changes in society as we are living in a rigid social system, there are oppositions, and discrimination from society while accepting the child born out of the live-in relationship as there is no fault of such infants. Married persons have a variety of rights and privileges to perform under our legal system as well as in our traditions. This is one of the major reasons why individuals started practising the Western culture which is live-in relationships, rather than getting married. Before getting married, couples may decide to live together to check their compatibility and other necessities, because a live-in relationship may end easily compared to the legal ties of marriage.

- India mainly lacks legal frameworks for live-in relationships. The introduction of specific legislation that clearly outlines the rights of children born from live-in relationships is the need of the hour. Equal and standardised laws protect children from discrimination, and to have a dignified life in society, irrespective of the marital status of their parents.
- Implementing mandatory birth registration of such children, to enjoy the legal rights. Legal mechanism to recognise parents' names in the birth certificate of children born out of live-in relationships, to prove the legitimacy of such children.
- Amendments to the current inheritance laws, provide equal rights to children born under live-in relationships, to guarantee them the same rights to inherit the property as of children born within marriage. As previously mentioned, custody of children is mainly influenced by the principle of the best interest of the child, it is the responsibility of parents to provide maintenance, irrespective of their marital status, non-compliance of the same must be penalised, so it is joint parental responsibility to protect the child.
- Implementation of non-discriminatory policies and measures in schools, healthcare facilities and other public services, fast-track service mechanisms in courts while dealing the disputes about children born under live-in relationships.

[22] P.V Susheela V. Komalavally. I(2000)DMC376

- Public awareness campaigns to educate society and to remove the social stigmas about live-in relationships and children born to such couples.
- Some countries accept such relationships and they have legal frameworks for the same, even though some countries do not have legal frameworks they have some practices to protect the rights of children born to live-in couples, incorporating relevant principles into Indian legal frameworks.

These are some of the measures that can be taken by policymakers while incorporating the laws to protect the rights of children born in live-in relationships.

**Conclusion**

*"Dance according to the beat and change according to the time, change is the rule of the world"*

The changes in relationships and family structure in India, which led to an increase in live-in relationships, signify a substantial change from customary practices. This change necessitates a revaluation of existing laws and social frameworks to ensure that they are equitable, open to all and able to meet the needs of every person, regardless of their relationship status, that may be the rights of live-in partners or the rights of children born to such partners.

The recognition and protection of the legal rights of children born to live-in couples are not only having legal implications but, also have social and moral implications. Ensuring that such children receive equal treatment, protection and opportunities in society is essential for their development and their integration into society. By implementing comprehensive legal frameworks, promoting social acceptance, and providing necessary support to such children, India can ensure that all children, irrespective of their parent's marital status, are allowed to lead their life to the fullest and with dignity. This approach will help to build a just and equitable society, which reflects the changing modern relationships and family structure.

# DILEMMA OF MINING CONTRAVENING BASIC HUMAN RIGHTS

**Hardik Maheshwari***
**Arindam Rathore****

***Abstract***

*Numerous scandals have dogged India's mining industry. The industry has been in the spotlight of policy discussions because of problems ranging from over-extraction and illicit sales to the disregard and poor execution of regulations and policies protecting the environment and community rights. Human rights and equality are seriously jeopardized by illegal mining, especially in areas with abundant natural resources.*

*This article explores the negative impacts of illicit mining on impacted communities, emphasizing how it deprives people of their fundamental rights and perpetuates socio-economic disparities. Since it jeopardizes the lives and health of residents in affected areas, illegal mining deprives the populace of their right to personal liberty and the right to life guaranteed under Article 21. The property right is guaranteed under Article 300A. This right may be violated as it results in encroaching on private or public lands without the required permits.*

*In addition to addressing concerns about poverty and lax enforcement of laws and policies, this article examines several incidents and movements against illicit mining around the country. It also discusses the principle of access to justice its practical implications for judicial reform and the role of the court system. This research aims to provide a general overview of how mining activities affect the socioeconomic circumstances and certain rights of the local people residing in various places, particularly those who are forcibly evicted and do not get sufficient compensation.*

**Keywords: Illegal mining, Government policies, Equality, Violation of Articles and rights under the Constitution, Individual rights, Access to justice**

* 3rd year law student, Nirma University, Ahmedabad

** 3rd year law student, Nirma University, Ahmedabad

## Introduction

Mineral resources are a valuable resource for humanity, mining is also viewed as one of the inevitable evils of the contemporary world. Even as it has raised living standards and boosted economic growth, it has also had a significant effect on both the local population's socioeconomic circumstances and the environment. The dilemma attached to the mining is, that if policies are not implemented properly and executed properly, they violate the fundamental rights of the population, illegal mining robs the public of their right to personal liberty and the right to life protected by Article 21[1]; it also endangers the lives and health of local populations.

It may also lead to an unfair allocation of resources and advantages, favoring certain individuals or groups over others, which is against Article 14[2], which states that everyone has the right to equality. Article 300A[3] guarantees the property right and this right could be infringed upon if someone encroaches on public or private property without the necessary authorization. The trademarks of mining operations include extensive resource extraction, processing, and excavation. These activities typically harm nearby ecosystems, taint water sources, and worsen air quality, putting the health and welfare of the communities they affect in jeopardy. The consequences include long-term health risks such as lung infections, waterborne infections, and brain abnormalities in addition to immediate environmental problems.

With the introduction National Mineral Policy, 2019[4] the participation of private players would increase more than what was in 1990's. However, this would also increase the number of cases of fundamental rights violations. As more private actors entered the picture, the slim chance of holding the government responsible would also disappear. This paper also, argues government apart from stakeholders was also responsible for the facilitation of human rights violations.

This paper demonstrates how the existing balance is currently skewed towards the miners', or the state's, profit. What is meant by "illegal mining," what do social justice and equality imply, how the rights of Indigenous people who live or formerly lived close to mine regions are violated, and how much the state is accountable? The purpose of this study is to investigate the impact of recent legislative actions on the

[1] Constitution of India, art. 21.
[2] Constitution of India, art. 14.
[3] Constitution of India, art. 300-A.
[4] National Mineral Policy: Background and Aim, Unacademy, https://unacademy.com/content/upsc/study-material/geology/national-mineral-policy/, (1st March, 2024, 2024).

mining sector in India, as well as the environmental challenges that these industries confront.

Given that this paper focuses on regulations related to the mining industry, the researchers have concluded that a revision of these laws is necessary to fulfill demands on environmental concerns and execution of formulated policies, which curb the problem of corruption, which ensures population would not be forcefully evicted and fundamental rights should not be violated. The paper also outlines the changes that would be necessary to preserve the rights of the residents and the balance of profit in the vicinity of the mining zones and also, explores what possible remedies or solutions, be executed to curb down all such issues.

**Background**

This article will explore the mining industry in India, a country that has rapidly developed into the fifth-largest economic juggernaut in the world. India boasts a vast natural resource base that continues to grow the country's economy. India produces 95 different types of minerals, including those needed for the nation's infrastructure and industrial industries. Of these, 4 are fuel minerals, 10 are metallic, 23 are non-metallic, 55 are minor minerals, and 3 are atomic minerals.

This is the situation after just 20% of the world's mineral reserves have been mined: the mining industry makes up to 2.4% of GDP[5]. Just 1.35 million individuals were working in the mining sector in 2022, and this is the situation after just 20% of the mines' total deposits had been explored.[6] In the upcoming years, the mining industry will be very important since the Indian government is placing greater emphasis on the concepts of Made in India and Atmanirbhar Bharat. As of 2022, India is the third-largest producer of iron ore[7], sixth-largest producer of bauxite[8], and the fourth-largest producer of zinc[9]. The mining sector stimulates the nation's manufacturing sector by having a significant impact on industrial production. Given

[5] Neeraj Menon, Karthy Nair, Mining In India, Lexology (2018).
[6] Manya Rathore, Number of Employees in the Mining Sector India FY 2017-2023, Statista, https://www.statista.com/statistics/1284360/india-mining-sector-employment/#:~:text=The%20mining%20industry%20in%20India,people%20in%20financial%20year%202023, (1st March, 2024).
[7] Global Data, Iron Ore Production in India and Major Projects, Mining Technology, https://www.mining-technology.com/data-insights/iron-ore-in-india/?cf-view, (1st March, 2024).
[8] Global Data, Zinc Production in India and Major Projects, Mining Technology, https://www.mining-technology.com/data-insights/zinc-in-india/, (1st March, 2024).
[9] Global Data, Zinc Production in India and Major Projects, Mining Technology, https://www.mining-technology.com/data-insights/zinc-in-india/, (1st March, 2024).

the sector's potential, the government has increased its budget to Rs 1,911.60 crore[10] to lessen its reliance on mineral imports, which can be accomplished as the mining industry becomes more and more privatized.

However, giving the mining industry a boost comes with its own sets of challenges, such as those related to the environment, socioeconomic effects, the rights of indigenous communities, and the problem of illegal miners. Indigenous people who have lived on their land for years are suddenly uprooted or forcefully evicted for economic development. Economic development at the expense of people's fundamental rights, including the right to a clean environment guaranteed by Article 21[11] (the right to life), which also imposes obligations on the state to preserve the nation's forests and wildlife, the right to land under Article 300-A[12], and the right to water, which is also covered by Article 21[13].

Additionally, it would be a societal injustice to withhold these rights. The conundrum also arises at this pivotal juncture in the nation's economic transformation. The conflict between economic progress and human rights, or, more simply, between profit and human rights. Striking a balance between the two may be extremely difficult, particularly in a nation with the largest population in the world, where everyone must have access to energy and manufacturing. However, these needs should not be met at the expense of the rights of the native people whose lands have been unlawfully or illegally encroached upon and who live close to the mining zones.

**Exploration Of Human Rights Violation In Mining**

With hundreds of thousands of jobs and a significant economic impact on the country, India's mining sector is becoming more and more significant. However, if mining is not adequately controlled, it may be very dangerous and destructive, as shown by a lengthy list of abuses and tragedies worldwide as it may encroach upon the fundamental rights of people. Additionally, the government's inspection and control of India's mining sector is mostly ineffective due to a deadly combination of weak institutions, corrupt practices, and flawed regulations. Chaos is the outcome. Human rights breaches are a common problem for mining operations in India,

[10] Aishwarya Nair, Budget@10: Mining Reforms in focus as India pivots towards sustainability, self-reliance, Money Control (2023).
[11] Constitution of India, art. 21.
[12] Constitution of India, art. 300-A.
[13] Id.

especially when it comes to issues with labor rights, environmental protection, and Indigenous populations. Majorly, these Articles are violated:

- Right to Life (Article 21[14]): The right to a healthy life of indigenous groups may be impacted by mining activities due to environmental deterioration, pollution, and community dislocation.
- Right to Livelihood (Article 21): Mining operations have the potential to uproot local populations and rob them of their means of subsistence. This is especially true in tribal regions where tribes depend on the land for their subsistence.
- Right to Equality (Article 14[15]): Mining activities often have a disproportionately negative impact on marginalized communities, such as tribal and indigenous populations, which results in unfair resource access and treatment.
- Right to Property (Article 300A[16]): Mining activities often led to displacement and forceful eviction of the local population, and hence they are entitled to be protected under this article.

In India, several social groups opposing mining operations have arisen as a result of worries about rights abuses, community dislocation, environmental damage, and loss of livelihoods. Among the noteworthy movements are:

Niyamgiri Movement[17]: This protest against Vedanta Resources' bauxite mining took place in the Niyamgiri Hills of Odisha. An agreement was made in 2003 between the state government and Vedanta Aluminium Limited to establish a bauxite mining facility and an alumina refinery in the Niyamgiri hills. The mining proposal was opposed by environmental groups and the Dongria Kondh tribe because it might hurt their sacred grounds, way of life, and ecosystem which is protected under Article 48A[18] of the Indian Constitution. The protest attracted attention from across the world and ultimately resulted in the Indian government rejecting Vedanta's mining project. In 2010, the government assembled a group of specialists. This group concluded that

[14] Id.
[15] Constitution of India, art. 14.
[16] Id.
[17] Amritpal Bhagat, Niyamgiri Tribals Movement, Conservation, Scribd, https://www.scribd.com/document/239457660/Niyamgiri-Tribals-Movement, (1st March, 2024).
[18] Constitution of India, art. 48A.

the tribes would suffer because of the mining project.[19] The Union Environment Ministry then suspended the project.

Kudankulam Anti-Nuclear Movement[20]: This campaign included worries about uranium mining in the area as well as the development of the Kudankulam Nuclear Power Plant. The Tamil Nadu-based campaign concentrated on the possible risks to human health which coherently falls under the ambit of Article 21 and the risk to the environment posed by nuclear power generating and uranium mining violating Article 48A. When locals learned that hot water discharge from the plant into the neighboring sea would jeopardize their livelihood, they were disgruntled with the project in 1988. In 1988, a large-scale demonstration was planned in Tirunelveli by residents of the districts of Kanyakumari, Tuticorin, and Tirunelveli. Ten thousand or more individuals came together to protest in May 1989.[21]

With these instances and movement cases, we can draw a line between how mining can lead to a significant impact on the minds of the people if it is done not considering the populace.

**Disparity Of the Population**

The mining industry has been progressing every day in its production of minerals and mining sector which is an industry that is a sleeping giant and the government through the new mineral policy is trying to wake up this industry. Through the National Mineral Policy, 2019[22] the participation of the private players would increase more than what was in the 1990's. But this would also bring with it more instances of violation of fundamental rights. With more private players coming onto the scene, the bleak ray of hope holding the government accountable would also vanish. The mining industry in 2021-22 saw an increase of 31.96% compared to the previous year's total value of mineral production.[23] This directly increases the

[19] Souvik Lal Chakraborty, The Niyamgiri Movement and the Failure to Implement Alternative Visions of Development, Australian Institute of International Affairs, (1st March, 2024), https://www.internationalaffairs.org.au/australianoutlook/the-niyamgiri-movement-and-the-failure-to-implement-alternative-visions-of-development/.

[20] The story of Kudankulam: From 1988 to 2016, The Hindu, https://www.thehindu.com/news/national/The-story-of-Kudankulam-From-1988-to-2016/article60528215.ece ( 2nd March, 2024).

[21] Ajmal Khan, Anti-Nuclear Movement in India: Protests in Kudankulam and Jaitapur, Journal of Global Security Studies (2022).

[22] National Mineral Policy: Background and Aim, Unacademy, https://unacademy.com/content/upsc/study-material/geology/national-mineral-policy/, (1st March, 2024, 2024).

[23] Ministry of Mines, National Mineral Scenario, Government of India, (1st March, 2024), https://mines.gov.in/webportal/nationalmineralscenario.

instances of human rights violations. More changes in the socio-economic aspect are to be expected.

Let us take a case to prove how economic development and mining considered as business to generate profits, is made at the expense of human rights violations. The mica mines are in two states i.e. Jharkhand and Bihar states which are infamous for their weak governance have over 22,000 children working in their mines and are paid meager Rs. 50 a day, which is equivalent to less than seventy cents. The children have to go underground in the mines which is a threat to their health as they are exposed to dust which can easily lead to pneumonia and with a lack of tools they use their bare hands which can cause skin infections.[24]

This violates their right to education under Article 21-A[25] of the Constitution of India. The state is also obligated under Article 39-E[26], which clearly states "that the health and strength of workers, men, and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength"; the state is also obligated under Article 42[27] which obligates the states to provide humane conditions and maternity relief and under Article 43[28] living wage for workers i.e. decent wage for workers and full enjoyment of leisure and social and cultural opportunities. Another such instance is of Rajasthan, Girls in Rajasthan marble mines are made addicted to drugs so that they can start working in the mines at a very young age. Many girls have to go with their parents to the mines so that they can take care of their young siblings.[29]

Let us now look at another case study of Kusumda village. Kusumda is one of India's largest coal mines, which is operated by South Eastern Coalfields Limited (S.E.C.L)[30]. Kusumda is located near Korba, Chattisgarh. In 2005 due to the shortage of coal and to meet the energy needs, the Kusumda mines were told to increase their production from 10 mtpa to 15 mtpa in 2009, to 18.75 mtpa in 2014 and 26 mtpa in early 2016. Now at the moment, it is seeking to expand capacity to a staggering 62.5 mtpa which requires over 1100 hectares. This will affect almost 9250 families in 17

[24] Katarzyna Rybarczyk, Ending Child Labour in Mica Mines in India and Madagascar, Stop the Child Labour, https://stopchildlabor.org/ending-child-labor-in-mica-mines-in-india-and-madagascar/, (1st March, 2024).
[25] Constitution of India, art. 21-A.
[26] Constitution of India, art. 39-E.
[27] Constitution of India, art. 42.
[28] Constitution of India, art. 43.
[29] Dhaatri Foundation, Violation of Children's Rights in the Extractive Industries in India, https://www.ohchr.org/sites/default/files/Documents/HRBodies/CRC/Discussions/2016/Dhaatri.docx, (1st March, 2024).
[30] South Eastern Coalfields Limited, https://www.secl-cil.in/ (5th March, 2024).

villages who will be displaced once the expansion goes through. As part of the process, there is a public hearing kept by the Chhattisgarh Environment Conservation Board (C.E.C.B.)[31], the public hearing was presented as a mere formality by the state. In the hearing, the district administration and C.E.C.B. did not tell whether they would be compensated and rehabilitated under the Right to Fair Compensation and Transparency in Land Acquisition Act, 2013[32]. Even the concern about the effect that would take place after the mining expansion was not properly explained by the S.E.C.L. This would require the acquisition of land from five nearby villages. But in the interview given to Amnesty International the villagers at first didn't know about this decision until they got to know about this by word of mouth. The villagers even didn't know whether they would be compensated or not. This dilemma shows the production of coal is being prioritized more over the fundamental rights of the local population.

## The Policies Regarding Mining and Is Government Able to Implement Them

### The Mines Act 1952 [33]

The welfare, security, and well-being of mine employees are covered under the Mines Act[34] of 1952. The Act aimed to address every facet of worker safety concerns. The word "mine" is used in mines, oil wells, shafts, open pits, and covered works that are situated in or close to mines, power plants, and workshops due to the Act's and the Rules' applicability. Additionally, the regulation limited the number of employees who might be hired each day to 20. The maximum depth for an excavation is six meters; for coal-related excavations, the maximum depth is fifteen meters. Part 12 of the law also establishes a commission with the authority to exercise the inspector's duties. A minimum of one month before the start of mining activities, the owner, agent, or manager of a mine is required to provide written notice in the specified form to the District Magistrate, the Inspector General, and the Director of the Indian Bureau of Mines. The owner and agent bear the responsibility for

[31] Chhattisgarh Environment Conservation Board, Raipur (C.G.), https://www.enviscecb.org/, (5th March, 2024).
[32] Right to Fair Compensation and Transparency in Land Acquisition Act, 2013, § 105, Acts of Parliament, 2013.
[33] The Mines Act, 1952 & Mine Rules, 1955, https://www.teamleaseregtech.com/resources/acts/article/102/the-mines-act-1952-mines-rules-1955/.
(5th March 2024)
[34] The Mines Act, 1952, Ministry of Mines, Government of India, https://labour.gov.in/sites/default/files/theminesact1952.pdf .(5th March 2024)

overseeing and managing the mines, handling finances, setting aside more funds, and taking all required actions to comply with the law's requirements.

In order to establish a safe working environment, the Mining Law of 1955 [35] also places a strong emphasis on the health and welfare of employees; section 81[36] provides a kit for measuring blood alcohol content. Occupational health inspections are required for all employees, including those of contractors, per Rule 29-B. By Chapter IV-B, the purpose of the Mine Safety Commission's establishment is to enhance worker and accident safety during meetings conducted every 30 days, as well as to promote mine safety. In mining, the reason for an accident needs to be thoroughly analyzed and investigated. Recommendations for changes should be made in light of the inquiry. The Secretary of the Security Committee has to execute the Security Committee's recommendation if it is made within 15 days of receiving it.
Mine operations are governed by Mining Rules 1952 and 1955, which also include worker safety standards. After reading the legislation, it can be inferred that the state assumed accountability for maintaining the mines' safety and order as well as for the health of the workers.

However, there is a clear distinction between the intent behind these laws' introduction and how they are enforced. As noted in the Performance Audit Report[37], which was part of Coal India's Corporate Social Responsibility, there have been flagrant errors in the legislation's execution.

According to Coal India's findings, there was a breach of regulation 29-B, or the so-called health examination, in the mines' operation. According to their results, a relatively small percentage of contractor personnel had medical examinations performed in CIL. Between 2004 and 2009, there was no backlog in the workers' periodic examinations. Under the Mine Rules of 1955, FORM O was introduced to record medical history and aid in the accuracy of medical exams.

However, the audit report noted that this document was exclusively kept by the subsidiary. The audit also revealed a high rate of worker death from liver cirrhosis, or alcohol misuse, which begs the question of whether alcohol testing is being done under section 81 of the Mine Rules of 1955. During the 2016 meeting of

[35] The Mine Rules, 1955, Ministry of Mines, Government of India https://www.dgms.gov.in/writereaddata/UploadFile/Mines_Rules_1955.pdf (5th March 2024)
[36] The Mine Rules, 1955, Section 81, https://indiankanoon.org/doc/134308001/ (6th March 2024).
[37] Id.

the standing committee on coal mine safety, the Ministry of Labour and Employment, Dhanbad, reviewed their report and noted that a significant amount of safety equipment, such as shoes and caps, is of substandard quality. This constitutes a grave breach of the safety compromise front. It was advised to create a quality control system for these kinds of equipment as soon as feasible.

This laxity from the authorities can prove to be very costly as mining is a very dangerous profession. The workers of the mines put their lives at risk while working in these mines and in return, they expect that the state authorities will protect their rights. Like the right to life under Article 21[38] and under its ambit comes the right to health and medical aid. Even the state is under obligation under Article 42[39] i.e. providing just and humane conditions and for maternity relief. The state authorities by not providing the equipment for work and by not maintaining proper medical records of the workers are putting the workers at risk of their lives.

**Mines and Mineral (Development and Regulation) Act, 1957[40]**

The Mines and Mineral (Development and Regulation) Act, of 1957 [41]establishes guidelines for the issuing of licenses and leases, as well as the rights and conditions that are provided under the Act. The legislation set aside ten square kilometres for each mine permit that was granted, at the state's option. A mining lease is renewable and can be signed for a maximum of thirty years, with a minimum of twenty years. Any person who disobeys the guidelines or the action faces a maximum 5-year sentence in jail, a maximum fine of Rs. 5,00,000, or both. In the event of unlawful mining, the penalty maybe three years in jail, ten times the value of the material extracted, or both. Additionally, the perpetrator may not be allowed to apply for new permits.

Although this law penalizes illicit mining and seems to attempt to bring openness to the process of granting mining permits, the actual situation on the ground is considerably different. Illegal mining is a highly common occurrence, and many of these occurrences go unreported since the Indian Bureau of Mines does not conduct

[38] Constitution of India, Article 21.
[39] Constitution of India, Article 42.

[41] Mines and Minerals (Development and Regulation) Act, 1957, Ministry of Mines, Government of India, https://ibm.gov.in/writereaddata/files/07102014115602MMDR%20Act%201957_10052012.pdf (6th March 2024).

timely checks or renewals. The Gujrat government was chastised by the CAG for not conducting timely mine inspections, and they reaffirmed this recently.

In another case, the CAG tabled a report to the Chattisgarh government[42] that likewise emphasized the primary issue of illicit mining. Instances of unlawful activity that have been recorded have increased by 5410 points between 2020 and 21. Based only on the data and statistics for "reported cases of illegal mining" for the years 2022–2023, Telangana leads the state in the number of illegal mining cases with 17938, of which only 175 resulted in a formal complaint being filed and 7221.83 lakhs in fines being collected. The average number of recorded incidents of illicit mining in Madhya Pradesh, Maharashtra, and Kerala was 3726. Kerala filed no reports, Madhya Pradesh filed reports in four incidents, while Maharastra filed just 190 FIRs. This demonstrates unequivocally that there is a disconnect between what the law says and its actual application.

This further demonstrates the complete inertia of the state governments, who bear accountability for these issues. The Mines and Mineral (Development and Regulation) Act, of 1957 has penalized illegal mining and the fines are very stringent but given the statistics and the CAG reports there is a clear indication that the problem lies in the implementation of the law. Illegal mining causes a lot of loss to the state property and the perpetrators are mostly unscathed. These perpetrators earn a lot of profit as they don't have to pay cesses which incurred on the minerals. To curb illegal mining the proper implementation of the laws must be done and it will help the state to not go into the losses. With proper implementation routine checks of the mines are also required.

**Mineral Conservation and Development Rules, 1988 [43]**

The Mines and Mineral Resources (Regulation and Development) Act 1957 governs the Mineral Conservation and Development Regulations 1988. Apart from oil, natural gas, coal, lignite, storage sand, and specified minerals, all minerals are subject to these rules. The Atomic Energy Act of 1962 [44]specifies substances and

[42] Chhattisgarh: Measures to curb illegal mining not followed, says CAG report; asks government to increase monitoring, The Economic Times (Mar. 10, 2024), https://economictimes.indiatimes.com/news/india/chhattisgarh-measures-to-curb-illegal-mining-not-followed-says-cag-report-asks-government-to-increase-monitoring/articleshow/102020086.cms?from=mdr.
[43]Mukesh Kumar, Mineral Conservation and Development Rules, Tutorials Point, https://www.tutorialspoint.com/mineral-conservation-and-development-rules-1988 (6th March 2024)
[44] Atomic Energy Act, 1962, Atomic Energy Regulatory Board,

minor minerals.

This law takes environmental factors into account and mandates that all holders of mining leases or exploration permits must take all feasible precautions to safeguard the environment and lessen pollution when conducting metallurgical, mining, or exploring operations in the region. However, the real story is brought out by the assessment of the effects of mining operations on the environment was turned in by CAG[45]. According to the CAG's assessment, 12 out of the 28 mines did not adhere to state pollution control boards, and only 58% of the mandatory monitoring stations had been constructed for air pollution. Not only did one of the subsidiaries fail to maintain basic records on water pollution, but it also lacked annual internal objectives for biological reclamation.

Some miners even utilized the land without a Central Ground Water Authority No-Objection certificate. Sixteen units were running without proper environmental documentation out of which six of them lacked permission to operate, while one did not have permission to set up the mine. This is how the authorities are implementing it.

These violations are infringing the right to a clean environment and air as it was made clear in the CAG report assessment that air quality is not up to the mark and this not just infringing the right of mine workers but also the people who are living near the mining area but by taking the groundwater illegally the authorities are making people devoid of their right to water under article 21 of the constitution. The state as always is under the obligation to provide and protect the environment under Article 48-A[46]. DPSP being not enforceable in the courts does not lose the importance they are in the constitution to keep reminding the state and its authorities to make laws and work to achieve these goals as defined in the DPSP.

When we combine all of these infractions, we can see that the relevant authorities' negligence was the primary cause of these violations. It was also

---

https://www.aerb.gov.in/images/PDF/Atomic-Energy-Act-1962.pdf
(6th March, 2024).

[45]PRS INDIA, Assessment of Environment Impact due to mining activities and its mitigation in Coal India Limited https://prsindia.org/policy/report-summaries/assessment-environmental-impact-due-mining-activities-and-its-mitigation-coal-india (7th March, 2024).

[46] Constitution of India, Article 48-A

mentioned in the papers mentioned above that if authorities had been fully informed of the reality on the ground, these infractions would not have occurred.

**Does Government Facilitating Human Rights Violation**

It's not only about stakeholders or the contractors directly or indirectly connected with mining activities in India that leads to chaos and vulnerable situations in different regions of the country but the poor implementation of policies by the government has a big role to play in it. Entry 54 of Schedule 7, Union List specifies "Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest."[47], also Entry 23 of the State List[48] too specifies about regulation of mines and mineral development.

But contrary to this government has failed tremendously to execute policies regarding mining activities because of several reasons like corruption, inadequate execution, or dishonest intention. The way the government monitors the mining industry exhibits a peculiar blend of substantive inaction and procedural bloat. Government regulation is often seen by mining companies as being too bureaucratic and onerous. "The rules are so stringent that not a single soul thinks of being able to comply with all of them," asserted one Bangalore-based lawyer and activist.[49] However, the effectiveness of government regulation in deterring misuse and guaranteeing adherence to the law has been substantially shown. Certain safety measures are intentionally intended to be ineffective. Some are hindered by inadequate execution, limited capability, ambiguous political determination, and corruption.

In India, corruption is one of the biggest reasons facilitating illicit mining apart from poor policies and execution for the same. One such instance of corruption is in Jharkhand, Madhu Koda, the former chief minister of Jharkhand, was convicted of fraudulently guaranteeing a coal block in Jharkhand to a company located in Kolkata. The former chief secretary of Jharkhand, AK Basu, the former secretary of the coal ministry, HC Gupta, and the private company involved, Vini Iron and Steel Udyog Ltd., were also found guilty by the special court causing the exchequer to

[47] Constitution of India, Sch. 7, List I-Union List.
[48] Constitution of India, Sch. 7, List II-State List.
[49] B.T. Venkatesh, Interview by Human Rights Watch, Bangalore, May 16, 2011.

suffer large losses. The incident came into the limelight in 2012 and subsequently, protesters demanded accountability and organized large-scale demonstrations in response to the swindle, accusing the administration of corruption and favoritism in the distribution process.[50]

It's the onus on the government to look after certain provisions or look after the activities related to mining, and hence, looking at several cases of illicit mining that are breaching several constitutional rights and other rights, a panel investigating illicit mining was established by the Indian parliament in 2010 and was led by retired Supreme Court Justice M.B. Shah. Early in 2012, Shah presented his interim assessment, which concluded that: "There is enormous scale multi-state illegal mining of iron ore and manganese ore running into thousands of crore every year, having several pernicious and evil effects on the national economy, good governance, public functionaries, bureaucracy, public order, law, and order. It has encouraged huge corruption at all different levels in public life, mafia in society, and money power.… This must be stopped immediately and effectively." [51] The Shah Commission calculated that since ore was mined outside of mining lease regions, a sum of Rs. 35,000 crore may be recovered. Additionally, it calculated that even at a 30 million tonnes per year extraction rate from the known reserves of 577 million tonnes, the minerals would only last for 20 years, which would be unjust to future generations.

The other factor that strikes down the mining sector is the lack of governance and proper regulations by the concerned authorities. Goa's mining sector serves as a clear illustration of the more general patterns of regulatory breakdown. Goan anti-mining activists allege that while government institutions are beset by corruption, inefficiency, or incapacity, mine operators break the law.[52] According to S. Sridhar, a representative for the mining sector, 40% of all mining activities in Goa may not comply with at least some rules and regulations, and an additional 5% may be completely unlawful, occurring on the ground that miners are not authorized to

[50] Nidhi Sethi, Coal Scam: Ex-Jharkhand Chief Minister Madhu Koda Found Guilty Of Corruption, NDTV.COM, (3nd March, 2024), https://www.ndtv.com/india-news/coal-scam-former-jharkhand-chief-minister-madhu-koda-found-guilty-of-corruption-1787100.

[51] Shah Commission Report on Illegal Mining of Iron Ore & Manganese in Goa, Scribd, https://www.scribd.com/document/105288348/Shah-Commission-Report-on-Illegal-Mining-of-Iron-Ore-Manganese-in-Goa, (3rd March,2024).

[52] Roxanne Coutinho, Intergenerational Equity Case Study: Iron-Ore Mining in Goa, The Goenchi Mati Movement, (5th March, 2024), https://goenchimati.org/intergenerational-equity-case-study-iron-ore-mining-in-goa/.

operate on.[53] The above number shows the lack of proper governance on the part of the government, and we can say that the government does facilitate the violation of human rights not directly but somehow indirectly.

**Remedies And Possible Solutions**

The Mines and Minerals (Regulation and Development) Act, of 1957 was passed to regulate mines and the development of minerals under Union control.[54] The Act has been amended several times in response to changing circumstances or the need for changes to existing policies, but the laws that currently govern the mining industry in India are designed to be easily regulated and put into effect to ensure environmental protection, guarantee the protection of fundamental human rights, prevent corruption, and other goals. The existing structure is frequently little more than a rubber stamp and fails this test. The Indian government currently lacks an efficient system to guarantee that newly proposed mining ventures are not authorized based on inaccurate or purposefully fabricated data. These could be the possible solutions to minimize the detrimental effects:

- Environmental and Community Impact: Even though community impacts are assessed in Environmental Impact Assessment (EIA)[55] studies, in reports that are mainly concerned with environmental matters, this subject is occasionally relegated to a footnote. The Ministry of Environment and Forests[56] should amend the 2006 EIA Circular to mandate that EIA reports expressly identify the protection of human rights afforded by international law and discuss community impacts in greater length and detail. Alternatively, the government may mandate that, in addition to the EIA process, a separate impact assessment method concerning communities and human rights be conducted.

[53] Times of India, Goa News, https://timesofindia.indiatimes.com/city/goa/they-want-to-explain-this/articleshow/16415927.cms (5th March, 2024).
[54] STA Law Firm, India: Minerals and Mining Laws and Regulations (6th March, 2024), https://www.stalawfirm.com/en/blogs/view/india-minerals-and-mining-laws-and-regulations.html.
[55] Official Website of Ministry of Environment, Forest and Climate Change, Government of India, Introduction, (6th March, 2024), https://moef.gov.in/moef/division/environment-divisions/environmental-impact-assessment-eia/introduction/index.html.
[56] Website of Ministry of Environment and Forests, National Portal of India (6th March, 2024), https://www.india.gov.in/official-website-ministry-environment-and-forests-0.

- Implementation of Lokpal[57]: A slew of corruption scandals sparked a public outcry demanding the establishment of the Lokpal. The Republic of India is served by the Lokpal, an anti-corruption body. The mining industry is in disarray due to several cases of corruption, ranging from low-level to high-level, involving prominent figures as the case of corruption instance in Jharkhand by their Chief Minister, Madhu Kodha.[58] It entails passing the mining clearance bill illegally, which could result in environmental deterioration, an illegal intrusion that violates Article 300-A[59], and a violation of the right to life that violates Article 21[60].
- Whistleblower Protection: It is imperative to establish measures to protect those who come forward with information regarding environmental violations, corruption, or other unethical behavior in the mining sector. Whistleblower protection laws encourage people to come forward with information without fear of repercussions. The people in India usually fear reporting such instances because of the involvement of prominent figures or the proper investigation does not take place because of corruption or other measures. So, the Whistleblower Protection Act, 2011[61] should come in force.

- Public Reporting and Disclosure: Mining companies should be required to provide regular reports outlining their activities, including their financial standing, environmental effects, and social responsibility initiatives. This information should be easily accessible to the public to promote transparency and accountability.

The execution of the policies is paramount, the government should step forward to execute policies smoothly. The federal government should put in place a stricter system of control for mining projects. More specifically, since the Ministry of Environment and Forests[62] regional offices do much of that work, there ought to be a large increase in the resources at their disposal. These offices should have the staff

[57] LOKPAL (6th March, 2024), https://www.lokpal.gov.in/.
[58] Id.
[59] Id.
[60] Id.
[61] The Whistle Blowers Protection Bill, 2011, PRS Legislative Research, https://prsindia.org/billtrack/the-whistle-blowers-protection-bill-2011.
[62] Id.

and tools necessary to conduct regular on-site assessments, which would involve unannounced inspections. State governments had to increase the resources available to them to give pollution control boards and mining departments at the state level the authority to carry out their on-the-ground investigations and inspections.[63]

**Access To Justice**

With the number of increasing human rights violations, the government under the 2015 Mines and Mineral (Development and Regulation) Amendment Act 2021[64], specifies that the Special Courts will be established to handle mining-related cases. The Section 30-B[65] of the act, provides for the establishment of Special courts for speedy trial in cases related to mining and these courts will be established in the areas, as specified in the notification. These Special Courts have the power of the Court of Sessions as specified under Section 30-C[66] of the act. These special courts would probably address the mining cases more stringently and more effectively.

Furthermore, disputes about environmental non-compliance in any mining activity are adjudicated by the National Green Tribunal[67]. Its jurisdiction is mostly limited to environmental matters, including disagreements over mining activities that affect the environment. Although it may address issues related to environmental degradation caused by mining activities and may indirectly touch upon human rights concerns tied to environmental degradation, it typically does not have direct jurisdiction over human rights violations unless they are closely linked to environmental issues within its purview.

**Conclusion**

Mining in the coming years is being prepared as a sector that is going to create an impetus for the Indian Economy to become one of the best. However, the mining sector must untangle itself from the problems in which it is. The mining activities have been struggling against the problem of corruption, lack of policy implementation, being an environment degrader, and violator of fundamental rights of people as well

[63] Christopher Albin-Lackey, Out of Control, Human Rights Watch (2012), https://www.hrw.org/report/2012/06/14/out-control/mining-regulatory-failure-and-human-rights-india.
[64] PRS Legislative Research, The Mines and Minerals (Development and Regulation) Amendment Bill, 2015, PRS LEGISLATIVE RESEARCH, https://prsindia.org/billtrack/the-mines-and-minerals-development-and-regulation-amendment-bill-2015 (7th March, 2024).
[65] Mines and Mineral (Development and Regulation) Act, 2015, § 30-B, Acts of Parliament, 2015.
[66] Mines and Mineral (Development and Regulation) Act, 2015, § 30-C, Acts of Parliament, 2015.
[67] National Green Tribunal, https://www.greentribunal.gov.in/ (8th March, 2024).

as its workers. The mining sector has from time to time shown instances where the Apex Court and the other concerned authorities like the National Green Tribunal had to intervene and fix things right. Many mining scams have occurred from time to time and the allegation of corruption has come into the limelight the lack of implementation of policies and legislation. The legislation against illegal mining, against environmental degradation has been cited many times by the CAG reports and other private organizations.

The rights of workers have been violated and these violations have been in the form of the Right to Life under which the right to water, health, and clean environment fall, the Right to Property, the Right to fair wages, and the Right to Compensation. These violations are very critical as they may risk the life of a worker who works hard and contributes to the mining sector and the economy. With the establishment of the special courts that will handle mining-related cases, section 30-B of the Mines and Minerals Act calls for speedy trials. The reports of the mining companies being more accessible would put them under the responsibility of accountability and transparency.

The possible remedies to curb the same could be the introduction of Lokpal, public reporting, and disclosure, etc. The government somehow also, facilitates human rights violations along with stakeholders, but with the proper implementation and execution of the policies, this could be curbed out.

# STATUS OF WOMEN PARTICIPATION IN POLITICS IN INDIA

**Keerthana V***

**Anjana K****

***Abstract***

*Political empowerment is fundamentally facilitated by legislative representation, which makes it possible to take part in the making of laws. Legislative bodies are essential for generating discussion and debate about various aspects of governance as well as for holding the government to account. The level of gender equality in parliamentary politics is mostly determined by the proportion of women in the national parliament. India is the largest and one of the most resilient parliamentary democracies in the world with a female population of 662.9 million. As the movement for women's political emancipation gathers momentum, women's organisations and civil society must continue to help them assert their presence within the larger political and social landscape*.[1]

## Introduction

Women around the world at every socio-political level find themselves under-represented in parliament and far removed from decision-making levels. While the political playing field in each country has its particular characteristics, one feature remains common to all: it is uneven and not conducive to women's participation. Throughout the world, women face obstacles to their participation in politics. These barriers are to be found in prevailing social and economic regimes, as well as in existing political structures.[2]

India has a female population of 662.9 million and is the largest and one of the most resilient parliamentary democracies in the world. Legislative representation is fundamental to political empowerment, enabling participation in the law-making process. Legislatures play a vital role in raising debates and discussions on various aspects of governance and in exacting accountability from the government. Women's representation in the national parliament is a key indicator of the extent of gender equality in parliamentary politics.

* 1st year LLM Student, Shri Dharmasthala Manjunatheshwara Law College, Mangalore, Karnataka

** 1st year LLM Student, Shri Dharmasthala Manjunatheshwara Law College, Mangalore, Karnataka

[1] Priti Raj, Women in Politics, Clear IAS,2023,(last visited on June 8,2024,7:30PM)

[2] A. Thanikodi and M. Sugirtha, Status of women in politics, The Indian Journal of political science,(last visited on May,26,2024,11:33 AM)

**Early Participation**

India has a history of marginalisation and exploitation of women framed by patriarchal social structures and mindsets. Beginning in the 19th century, social reform movements succeeded in pushing for women's well-being and empowerment. The Indian freedom movement, starting with the Swadeshi in Bengal (1905-08) also witnessed the impressive participation of women, who organised political demonstrations and mobilised resources, as well as occupied leadership positions in those movements.

After India attained independence, its Constitution guaranteed equal status for men and women in all political, social and economic spheres. Part III of the Constitution guarantees the fundamental rights of men and women. The Directive Principles of State Policy ensure economic empowerment by providing for equal pay for equal work by both men and women, humane conditions of work, and even maternity relief.[3]

**Analysis**

With the Women's Reservation Bill being passed in Parliament last year, the debate on whether quota within political parties or in Parliament and State Assemblies may be the best route for increasing women's representation in politics seems to have come to an end. The Assembly elections in Rajasthan showed that the only way to increase women's political participation seems to be to provide them with reservation in Parliament and State Assemblies.

In the Rajasthan Assembly elections, everyone highlighted and criticised the ticket distribution to women by all political parties. But how did the women who contested perform? Rajasthan has 200 Assembly seats but polling was held in 199 seats following the death of Congress candidate Gurmeet Singh Kooner. The BJP fielded 20 women candidates of which nine managed to enter the Assembly. The success rate of women candidates of the BJP remained at 45%, which was much lower than the success rate of the party's male candidates — 60% (106 male candidates won out of the 179 who contested).[4]

**Present status of women's representation in politics**

Women constituted only 8% of the candidates in the first phase on April 19. This could change slightly by the end of the election cycle. In the 2019 Lok Sabha elections, women were

[3] Ambar Kumar Ghosh, women's representation in India's Parliament: Measuring progress, Analysing obstacles, ORF,(last visited on June 1,2024,10:38 AM)

[4]Vipul Anekant, Sanjay Kumar, How women can be represented in politics, The Hindu, (last visited on June 1, 2024, 10:44 PM)

only 9% of the candidates. And fewer were elected. The success rate of women candidates was a little over 10% in 2019. Also, although there were more women in the current Lok Sabha — 78 — than previously, they added up to only 14%. These low numbers contrast sharply with the increase in women voters. In 2019, their numbers were marginally more than that of men — 67.18% of women compared to 67.01% of men. In several States, this time there are no women candidates. In others, only a handful.

For instance, in Jammu and Kashmir and Ladakh, out of the six parliamentary seats, there is only one woman candidate, former chief minister Mehbooba Mufti. In Uttarakhand, of the five seats, there is one woman, a Bharatiya Janata Party (BJP) candidate who comes from an erstwhile royal family. In Punjab, so far, only two women have been selected. One is Praneet Kaur, who switched sides from the Congress to the BJP. Kaur is a four-time MP from Patiala and was earlier married to former Punjab chief minister Amarinder Singh, who left the Congress and joined the BJP in 2022. In the bigger States, more women are contesting, but their percentages are still low.

In Tamil Nadu, for instance, 76 women are contesting out of a total of 950 candidates for 39 seats. Although this is an increase from 2019, when 67 women contested, they add up to only 8% of the total. In 2019, only three of the 67 women who stood for elections won. In Uttar Pradesh, with 80 parliamentary seats, the first phase has seen only seven women contesting compared to 80 men. We will have to wait for the final figures from Bihar, which has 40 parliamentary seats. Rajasthan, with 25 Lok Sabha seats, has 10 women candidates, while Gujarat with 26 seats has so far got eight women contesting although this number could increase. In Kerala, out of 194 candidates contesting 20 seats, only 25 are women.[5]

**Conclusion**

Women in India participate in voting and run for public offices and political parties at lower levels than men. India ranks 20th from the bottom in terms of representation of women in Parliament. Women have held the posts of president and prime minister in India, as well as chief ministers of various states. The status of women in India has seen many ups and downs since ancient times. The status of women in India has seen many ups and downs since ancient times - from at par status in ancient history to being in veils (Parda System) during the Mediaeval period.

[5] Kalpana Sharma, General Elections 2024 | The missing women in Indian politics, The Hindu,2024,(last visited on June 8,2024,7:40PM)

In post-independent India, the status of women regained its strength and has been on the rise ever since. The number of women politicians is small compared to men. The majority of women are indifferent to politics; this is clear in their low participation in voting. India has a rich history of measuring the political participation of women since its independence.

Despite decades of struggle for equality in the widest sense, and loads of political rhetoric about 'Nari Shakti', Indian women continue to fight each step of the way for recognition and the rights guaranteed to every citizen. In the past, you could say this also about the late Jayalalithaa, whose entry into politics was facilitated by men. She emerged as a strong politician who could win multiple elections and served as chief minister of Tamil Nadu six times. At last, it can be said that If a woman can manage an entire house and children then surely a woman can use her power to manage an entire nation.

# THE RTI CONUNDRUM IN INDIA: NAVIGATING A BALANCE BETWEEN RIGHT TO INFORMATION OF VOTERS AND INFORMATIONAL PRIVACY OF POLITICAL PARTIES

**Neha Agarwal***

***Abstract***

*Democratic societies safeguard freedom of expression and the right to access information so that citizens can effectively govern themselves by having access to diverse viewpoints on matters of public interest. As 'we the people of India' are the ultimate decision-makers of public policy under the Constitution, preventing citizens from accessing information would also prevent them from viewing themselves as sovereign. To this end, the paper aims to explore the commitment of political parties towards free and fair elections, which is inherently linked to democratic transparency and fairness, encompassing unrestricted access to information. The current regulations governing political parties are either inadequate or riddled with loopholes, which parties tend to exploit. In the pursuit of these objectives, the paper utilizes the doctrinal research methodology, analyzing legal statutes and precedents related to the inclusion of political parties under the Right to Information Act, 2005 ('RTI Act') considering issues arising from non-disclosure through a comparative lens. Moreover, the unanimous support among political parties for their exclusion from the ambit of the RTI Act raises questions about their disregard for the order of the Central Information Commission (CIC) in 2013. This paper seeks to highlight the importance of transparency and accountability in the operations and finances of political parties in India and advocates for a more informed democracy, particularly in light of the pending Public Interest Ligation before the Supreme Court seeking a directive to mandate political parties under RTI Act as well as the decision of the court in the Electoral Bonds case.*

**Keywords: Right to Information of Voters, Informational Privacy of Political Parties, Democratic Transparency, Electoral Funding, Double Proportionality Test**

* Ph.D. Student , Faculty of Law, Osmania University, Hyderabad

*"Democracy is a faith in the spiritual possibilities of not a privileged few but of every human being."* [1]

**Context and Background: Need for Transparency in a Democracy**

In a real democracy, political parties shall transcend mere vote-gathering machines and instead embody vibrant, democratic entities that authentically represent and serve the interests of the people. RTI Act highlights the significance of an informed citizenry in sustaining democracy, highlighting transparency as indispensable for the seamless functioning of democratic governance. This extends beyond periodic voting and is instead a continuous process wherein the citizens not only elect representatives but also ensure accountability for their actions and inactions. To fulfill this role effectively the citizens must have access to information.

Preservation of free and fair elections necessitates the inclusion of political parties as Public Authority under the RTI Act. This measure would enable the disclosure of various critical aspects such as campaign expenditures, party assets, accumulated wealth, sources of funding, internal functioning, etc. thereby bringing crucial information into the public domain as 'sunlight is the best disinfectant'[2]. The Supreme Court's acknowledgment of the imperative role of the entire population in a true democracy is evident from its recent decision in the *Electoral Bonds* case[3], wherein the court interpreted the 'Right to Know' as inherent within Article 19 (1)(a).

**Role of Political Parties in a Democracy: Concerns of Transparency Deficit**

In a constitutional democracy, political parties are pivotal for mobilizing public opinion, contesting elections, and ultimately forming the government. They are integral to operationalizing the democratic state, as noted by Prof. Harold Laski, wherein he argues that political parties are effective means to translate popular decisions into political action and provide a tangible avenue for citizens to shape their political aspirations by electing a government aligned with their beliefs.[4] Political scientists have emphasized their role in citizen

[1] DR. SARVEPALLI RADHAKRISHNAN, https://www.sarvepalli.com/ (last visited Mar. 6, 2024).
[2] Dinesh Trivedi v. Union of India, (1997) 4 SCC 306.
[3] Association for Democratic Reforms (ADR) v. Union of India, 2024 INSC 113.
[4] HAROLD J. LASKI, GRAMMAR OF POLITICS 326 (4th ed. 1938).

integration, candidate recruitment, bridging government-civil society relations, policy formulation, legislative organization, and campaign structuring.

Recognizing their paramount significance, political parties are endowed with significant powers and privileges through both constitutional and statutory provisions, enabling them to faithfully represent their constituents. However, there is an urgent call for establishing a set of benchmarks encompassing financial transparency and internal party democracy to check the concerning decline in public confidence and trust in political parties. Furthermore, to counteract this trend and propel reform, CIC has taken proactive steps by recognizing them as 'public authorities' under the RTI Act.[5] However, to overturn the decision, the Parliament introduced the RTI (Amendment) Bill in 2013 to exempt political parties from the RTI ambit but the Bill lapsed with the dissolution of the House. Despite the reiteration of CIC's order in 2015[6] to bring them under the RTI Act, none of the national parties have complied. Further, they have boycotted subsequent show-cause notices leading to the reserving of the order by CIC and further allowing the decision to remain unchallenged.

## Legal Conundrums Surrounding Public Authorities under RTI Act and the Conflict of Fundamental Rights

### Decoding Public Authority vis-à-vis Instrumentality of State

'Public Authority' under Section-2(h) of the RTI Act encompasses a broader scope than the 'State' defined in Article 12 of the Constitution.[7] This signifies that an entity, while potentially not fulfilling the criteria for categorization as a State, nevertheless possesses the eligibility to be deemed a 'Public Authority'. While both are distinct, entities with significant governmental control are deemed instrumentalities of the State, whereas an entity need not be under the control of the government to fall within the scope of the RTI Act. The Supreme Court has outlined the parameters for defining a 'State', including substantial financial aid, government control, the performance of public functions, and entrustment of governmental activities.[8] On the other hand, the definition of 'public authority' is broader, encompassing not only governmental bodies but also explicitly including non-governmental organizations substantially financed by the

[5] Subhash Chandra Agarwal v. Indian National Congress and Others, (2013) CIC 8047.
[6] Subhash Chandra Agarwal v. Indian National Congress and Others, File. No. CIC/CC/C/2015/000182.
[7] The Right to Information Act, 2005, § 2(h), No. 22, Acts of the Parliament, 2005 (India).
[8] Ajay Hasia v. Khalid Mujib Sehravardi, AIR 1981 SC 487.

appropriate government without being directly constituted by them, as affirmed by the Supreme Court.[9] Thus, political parties can be classified as Public Authority even if they do not meet all the requisite criteria for designation as a State under Article 12.

Furthermore, political parties and their representatives have been actively defending against the 2013 order of CIC, seeking exemption from the RTI Act by arguing that they fall outside the scope of Section 2 (h). Although political parties do not satisfy the criteria outlined in clauses (a) to (d) of Section-2(h), clause (ii) explicitly brings them under the Act, as it states that it is sufficient to demonstrate substantial indirect financing from the appropriate government to be categorized as a Public Authority. The substantial financing of political parties from the government indirectly includes land allocations in Delhi and the capitals of the states, government accommodations in prime areas of Delhi at discounted rates, full exemption for their donations from the Income Tax Act, 1961, airtime on All India Radio and Doordarshan and electoral rolls free of cost. Numerous judicial rulings and CIC orders have affirmed that real estate allotment[10], subsidized rentals, and nominal rent[11] and tax exemptions[12] constitute 'indirect financing' under Section-2(h). Thus, 'Public Authority' is a superset of which 'State' is a subset and political parties fall under the former while they are exempt from the latter.

**The interplay between Right to Information and Effective Participation of Voters: Two Phases of Judicial Approach in India**

The Constitution of India under Article-19(1)(a) establishes the citizen's right to access information. In this regard, the rulings of the Supreme Court can be delineated into two distinct phases.[13] The first phase links the right to information with fundamental principles such as good governance, transparency, and accountability.[14] These judgments highlight the necessity for citizens to have access to information regarding state actions to effectively fulfill their responsibilities. This responsibility can only be adequately fulfilled when the government and political parties operate openly and are not shrouded in secrecy.

[9] Thalappam Service Cooperative Bank Ltd. v. State of Kerala, (2013) 16 SCC 82.
[10] The Sutlej Club v. State Information Commission, Civil Writ Petition No. 16750 of 2010.
[11] Board of Control for Cricket India v. Netaji Cricket Club, AIR 2005 SC 5921.
[12] Punjab Cricket Association, SAS Nagar (Mohali) v. State Information Commission, Punjab, Civil Writ Petition No. 16086 of 2008.
[13] ADR, *supra* note 3 at 54.
[14] S.P. Gupta v. Union of India, 1981 Supp. SCC 87.

In the second phase, the court broadened its perspective on the significance of the right to information, moving beyond its role in holding the government accountable. It acknowledged its intrinsic constitutional value, recognizing it not just as a 'means' for achieving an end, but as 'an end in itself'.[15] It involves discovering truth in a marketplace of ideas, which ultimately is instrumental in shaping opinions and fostering self-development at both individual and collective levels.[16] Additionally, a notable trend of this phase is the extension of the right beyond mere state affairs or the operation of public officials or public information, encompassing all forms of information crucial for enhancing participatory democracy in its various dimensions.

The court reiterated the two fundamental principles underpinning the nexus between the right to information and the right to vote: firstly, the process of forming an opinion about the candidate, and secondly, the act of expressing that choice by voting for a preferred candidate.[17] Access to relevant and crucial information to evaluate the candidate is therefore a prerequisite to making an informed decision when casting a vote.[18]

### Conflict between Right to Information of the Voter and Informational Privacy of Political Parties

The Supreme Court in its landmark privacy judgment emphasized that privacy encompasses more than personal choices and extends beyond direct state interference, serving as a crucial safeguard for exercising constitutionally protected freedoms.[19] It shields individuals from the influence of both state and non-state actors, directly and indirectly. Political parties, a result of the exercise of the Fundamental Right to Association under Part III, also enjoy informational privacy regarding their internal functioning, finances, strategies, plans, and other considerations on par with other individuals under Article 21. The 2013 CIC order potentially violates the right to informational privacy of political parties, as disclosure of information under the RTI Act could provide an undue advantage to their competitors and impede their internal operations and decision-making processes.

[15] Indian Express Newspapers v. Union of India, AIR 1986 SC 515.
[16] D.C. Saxena v. The Honorable Chief Justice of India, (1996) 5 SCC 216.
[17] People's Union for Civil Liberties (PUCL) v. Union of India & Anr., (2003) 4 SCC 399, at pp. 96.
[18] *Id.*
[19] Justice K.S. Puttaswamy v. Union of India (2017) 10 SCC 1.

This results in a clash between two fundamental rights: the right to information of voters and the right to informational privacy of political parties. When adjudicating conflicting rights, the courts initially ascertain if the Constitution prioritizes one over the other; failing that, they apply the double proportionality test to reconcile them.[20] The test involves identifying specific interests supporting each right rather than solely relying on doctrinal examination. Courts proceed to assess the suitability, necessity, and proportionality of the measures to determine if they sufficiently advance both rights while adopting the least restrictive means.[21] In the present conundrum, applying this test suggests that disclosing information relating to political parties with certain exemptions could strike an adequate balance between the two rights.

## Existing Approaches Governing Political Parties: Benefits From Disclosure Of Electoral Finances

### Evaluation of the Efficacy of the Extant Legislative Framework

The Parliamentary Standing Committee, in defense of the RTI (Amendment) Bill, 2013 highlighted the adequacy of the extant laws for ensuring transparency regarding the functioning of political parties and their candidates and for their exclusion from RTI. These provisions include:

(i) Requirement to publish contributions exceeding Rs. 20,000 on its website[22];

(ii) Mandate of elected candidates to declare their assets and liabilities[23];

(iii) Obligation for candidates to maintain records of their election expenditure, submit the accounts to the District Election Officer, and disqualification on failure to submit[24];

(iv) Inspecting candidate accounts for a nominal fee and imposition of penalties for filing false affidavits[25]; and

[20] ADR, *supra* note 3 at 104.
[21] *Id*. at 115.
[22] The Representation of People Act, 1951, § 29C, No. 43, Acts of the Parliament, 1951 (India);
[23] *Id*. at § 75A.
[24] *Id*. at § 77, 78, 10A.
[25] *Id*. at § 88, 125A.

(v) Mandate for Parliamentarians to declare assets and liabilities to the Ethics Committee of the House.

A perusal of the aforementioned provisions highlights that they primarily disclose the financial spending of individual candidates rather than political parties. Notably, there is no restriction on political parties regarding expenditure on a candidate under any extant law and they are also exempt from disclosing contributions received below Rs. 20,000 thereby providing them an opportunity for exploitation. Furthermore, it is pertinent to note that the disclosures under the Representation of People Act (RPA), 1951, and the Income Tax Act are minimal, made to the government and any member of the public does not have the right to seek such information or scrutinize the political parties. However, by bringing them under the RTI Act, an actionable right shall exist with every citizen to question the actions of a political party that currently lacks transparency and has significantly contributed to the criminalization of politics in India.

**Safeguards to Protect the Internal Functioning of Political Parties**

Political parties as the cornerstone of democracy are entitled to adequate protection, akin to other public authorities against frivolous or biased requests under RTI. Any concerns regarding the potential misuse of the disclosed information to the public, as highlighted by the Parliamentary Committee in the RTI (Amendment) Bill can be mitigated by the substantive safeguards provided in Section 8 of the RTI Act. Furthermore, the RTI Act contains provisions to exempt competitive information under Section-8(1)(d), ensuring fair and balanced access to information and allaying political parties' fear of such disclosures benefiting their competitors.

## Comparative Analysis of Disclosure Requirements by Political Parties in Other Democracies

The comparative analysis through the utilization of foreign law to gain deeper insights into our Constitution and laws has played a pivotal role in shaping the evolution of our legal system as they have drawn inspiration from various elements of foundational laws of other democracies. While political parties constitute a central pillar in these democracies, the extent of their disclosure requirements vary. The following jurisdictions are selected for comparison based on their relevance and role in the drafting of India's Basic Law.

i. In the UK, the Election Commission's website provides access to all reported financial data of political parties, encompassing their donations, loans, campaign expenditures, and statements of accounts, including invoices and receipts.[26]

ii. In the USA, the Federal Election Campaign Act requires the disclosure of all funding sources and expenditures of party committees and political action committees. It further entails the appointment of a treasurer, who is responsible for collecting these funds within a specified timeframe and submitting a report to the Federal Election Commission.[27]

iii. In Germany, the Political Parties Act, of 1967 mandates that political parties shall publicly account for their assets, sources of funds, major donors, and utilization. Such annual reports undergo auditing and are published as legislative documents after presentation to the German Parliament.[28]

iv. In Japan, the Political Fund Control Act, of 1948 imposes obligations on the political parties to annually disclose their incomes and expenses, along with internal audits to either the Minister of General Affairs or the Election Control Commission who in turn make these reports accessible to the public for free of cost.[29]

v. In Australia, similar to India, political parties are obliged to disclose annual returns with total receipts, donor names, and addresses for contributions exceeding a disclosure threshold which is currently set at AUD 16,300.[30] Efforts to lower this threshold are being considered to further enhance transparency in political party finances.

In light of the above analysis, it is evident that these thriving democracies have enacted legislation to subject political parties and their finances to public scrutiny, fostering transparency within their electoral environment. Using the comparative lens, this paper proposes that similar mandatory disclosure requirements be imposed on political parties in India as transparency will serve as a deterrent against arbitrary actions and corruption in governance.

---

[26] INTERNATIONAL IDEA, *Political Finance Data,* http://www.idea.int/politicalfinance/country.cfm?id=77 (last visited Feb. 2, 2024).

[27] FEDERAL ELECTION COMMISSION USA, Campaign Finance Statistics, https://www.fec.gov/ (last visited Feb 3, 2024).

[28] INTERNATIONAL IDEA, *Political Finance Data, http://www.idea.int/politicalfinance/country.cfm?id=61* (last visited Feb 4, 2024).

[29] INTERNATIONAL IDEA, *Political Finance Data,* http://www.idea.int/politicalfinance/country.cfm?id=114 (last visited Feb 5, 2024).

[30] AUSTRALIAN ELECTORAL COMMISSION, *Disclosure Threshold*, https://www.aec.gov.au/parties_and_representatives/public_funding/threshold.htm (last visited Feb 5, 2024)

**Suggestions and Recommendations Towards Electoral Reforms in India**

The need for financial transparency and accountability of political parties as a crucial step towards electoral reform has been advocated by the Law Commission in its 170th Report (1999), 244th Report (2014) and 255th Report (2015), Second Administrative Reforms Commission (2008), Electoral Reform Committees such as Goswami Committee (1990), Vohra Committee (1993) and Indrajit Gupta Committee (1998) and the National Commission to Review the Working of Constitution (2001). However, these recommendations were not followed up by necessary legislative measures. But as the core of overseeing political finances lies in disclosure, this study proposes the following suggestions to strengthen the democratic institution of political parties in India:

a) The Supreme Court should uphold the 2013 CIC order while disposing of the pending PIL by recognizing the registered national and state political parties as 'Public Authorities' under Section 2 (h)(ii) of the Act to maintain judicial propriety and uphold the Rule of Law. It shall direct them to appoint Public Information Officers to provide information, except for the exempted ones under Section 8, within a specified timeframe.
b) An additional exemption can be included under Section 8 of the RTI Act to exempt the disclosure of the decision-making process of political parties about their political strategy. This would allow disclosures relating to their democratic administration and finances, striking a balance between the 'right to information of the voters' and the 'right to informational privacy of political parties'.
c) Drawing inspiration from the jurisdictions evaluated in Part IV of this paper, India shall adopt similar disclosure requirements by enforcing CIC order in both letter and spirit.
d) Implementing mandatory *suo moto* disclosure by political parties, as stipulated by Section 4(1)(b) of the Act, has the potential to reduce the volume of RTI petitions. This shall be accompanied by maximizing the information available on their websites and conducting thorough follow-up studies on significant issues raised in RTI petitions, even after their initial response, which can be crucial for rebuilding trust.
e) The disclosure threshold of Rs. 20,000 under RPA concerning contributions to political parties shall be abolished and all contributions made to them shall be mandated through digital channels only. This would streamline their disclosure to the Election Commission during their annual audits.

## Conclusion

Political parties hold significant authority in governing the state and its vital organs. As the RTI Act applies to all branches of the government, it shall also extend to the entities that shape and govern the government itself. With public regard for political parties already dwindling and at an unprecedented low, subjecting them to the RTI Act represents a pivotal move towards fostering transparency and public oversight of politics and the purification of the electoral environment. With thousands of citizens empowered to act as vigilant monitors through RTI applications, accountability can be upheld without compromise. The inclusion of political parties enhances improved financial management and access to information about sources of funding, ultimately facilitating the selection of more qualified candidates. This can set in motion a positive feedback loop wherein political parties attract a better talent pool and funds, creating a virtuous cycle of trust between political parties and the citizenry.

# HUMAN RIGHTS AND TECH GIANTS: THE ROLE OF ARTIFICIAL INTELLIGENCE IN WIDENING BIASES AND DISCRIMINATION.

**Mahalakshmi. G. S***

***Abstract***

*Technological companies have invested in AI to make things easier, especially marketing, sales and hiring employees. However, Algorithmic bias and discrimination perpetuate a stereotype, wherein the Machine Learning Algorithm converts an individual's demographic data to provide a biased decision by taking into consideration the gender and race of a person, thus widening discrimination. AI has a prominent role in widening the already existing discrimination*

*when the right to equality or right to dignity and the right to employment is infringed on an individual, the non-discriminatory law comes into place. Further, industries, organisations and especially tech giants must deploy AI by paying due consideration to the implications of the results of AI that lacks human judgment.*

*Google Photos, which is an advanced recognition software categorized two black people as gorillas. Furthermore, Denial of employment is a violation of these international principles and it is a good bet to believe that AI does that without any hesitation. Owing to hurdles created by tech-giant in the digital world.it is imperative to uphold the much-cherished human rights in every odd circumstance. In this research paper we would arrive at a proper solution for various such problems.*

*Whether AI widen biases and discrimination in society? How does the use of AI by tech companies infringe on an individual's Human Rights? Whether there any regulatory mechanisms that can redress the dispute. The solutions to such hurdles need to implemented at national level to ensure the rights are not at all violated in whatsoever innovation comes our way.*

* 5th year, B.A. LL.B. (Hons.), Tamil Nadu National Law University, Tiruchirappalli.

## Introduction

With the ever-increasing use and access to Artificial Intelligence (AI), the repercussions it has on human rights are expanding as well. AI-driven technology is entering the everyday aspects of an individual life and making tasks easier, but is it always positive? Article 2 of the Universal Declaration on Human Rights (UDHR) and Article 2 of the International Covenant on Civil and Political Rights (ICCPR), both ensure that an individual is entitled to the right to freedom without discrimination. It is not new for an individual to be exposed to the phenomena of bias and discrimination that have been embedded in the roots of our societal structure.

At the cusp of the evolving technological change, AI has a prominent role in widening the already existing discrimination and AI has a very stereotypical role in perpetuating biases and discrimination, especially the Machine Learning (ML) Algorithms. Not just unemployment, decreased human dependency, and isolating people from participation in the community, AI has also gone to an extent to widen discrimination in society. The research paper analyses the usage of Artificial Intelligence by tech giants, which converts demographic data into a biased decision, creating human rights and ethical issues, universally.

In the current societal setting, it is important to understand that despite installing machine algorithms and AI to derive important decisions should be done in a very careful manner because when the information, operations, decisions and choices are left to machines how the data is interpreted will lead to affecting the rights of individuals, especially because the design in which these algorithms are created and the environment in which they operate have significant gaps that can have severe impact.[1]

In the 'Draft Ethics Guidelines of trustworthy AI', the European Commission has presented the potential risks that are associated with AI, despite the substantial advantages that it provides us with.[2] It is proven time and again that the machine algorithm does not instil in them the concept of 'morality' and ethical principles, however, considering the decisions made by the algorithm of ML (Machine learning) is what makes it extremely problematic.[3] This can

[1] Mittellstadt, Brent et al. (2017), "The Ethics of Algorithms: Mapping the Debate", 3 Big Data & Soc'y 2.
[2] The European Commission's High-Level Expert Group on Artificial Intelligence, Draft Ethics Guidelines for Trustworthy AI, in http://ec.europa.eu/digital-single-market/en/news/draft-ethics-guidelines-trustworthy-ai.
[3] Cataleta, Maria Stefania. "Humane Artificial Intelligence: The Fragility of Human Rights Facing AI." East-West Center, 2020. http://www.jstor.org/stable/resrep25514.

be witnessed in the filtering of resumes by Amazon. The team has been building a machine learning program since 2014 to review job applicants' resumes to mechanize and filter those suitable for the job titles. It was later scraped out from the mechanism considering that the algorithm filtered only men for the jobs, considering the demographic data.[4]

Since we delegate more autonomous decision-making power to the AI through algorithms to make our tasks easier, one must also ensure that it is guaranteed with proper responsibility and accountability.[5] Currently, many tech giants how shown how their algorithms are causing ethnic and moral wrongs that violate human rights, which will be elaborated on below. True some problems are associated with traditional human decision-making. However, they are important for fairer and informed decisions.[6] While there is plenty of documentation available to provide information on the idea that Artificial intelligence is a threat to an individual's right to equality, the research paper tries to elaborate on how tech giants like Google, Apple Inc., etc. are put in a place to adopt these AI and algorithms to reduce costs and capital, but in turn, violated the Humans Right to Equality by widening discrimination.

**Statement Of Problem**

Technological companies have invested in AI to make things easier, especially marketing, sales and hiring employees. However, Algorithmic bias and discrimination perpetuate a stereotype, wherein the Machine Learning Algorithm converts an individual's demographic data to provide a biased decision by taking into consideration the gender and race of a person, thus widening discrimination. This results in infringing an individual's Right to freedom from discrimination and right to equality.

**Research Objectives**

A. To analyse how AI widens biases and discrimination in society.
B. To examine how AI infringes on an individual's Human Rights.
C. To provide regulatory tools that might prevent and redress the dispute at hand.

[4] Jeffrey Dustin, Amazon scraps secret AI recruiting tool that showed bias against women, REUTERS (Oct. 11, 2018, 4:34 AM), https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G
[5] Vempati, Shashi Shekhar. "INDIA AND THE ARTIFICIAL INTELLIGENCE REVOLUTION." Carnegie Endowment for International Peace, 2016. http://www.jstor.org/stable/resrep12855.
[6] SANTOW, EDWARD. "Can Artificial Intelligence Be Trusted with Our Human Rights?" *AQ: Australian Quarterly* 91, no. 4 (2020): 10–17. https://www.jstor.org/stable/26931483.

**Research Questions**

I. Whether AI widen biases and discrimination in society?
II. How does the use of AI by tech companies infringe on an individual's Human Rights?
III. Whether there any regulatory mechanisms that can redress the dispute?

**Review Of Literature**

i. **Artificial Intelligence and Human Rights: Megan MacDuffee Metzger Eileen Donahoe**- The paper discusses about how the rapid adoption of artificial intelligence (AI) technologies and increased reliance upon AI by both governments and the private sector have led to rising concern about potential negative implications for human dignity, democratic accountability, and the bedrock principles of free societies and the core argument of the paper is how we need a global governance framework to address the wide range of societal challenges associated with AI, including threats to privacy, information access, and the right to equal protection and non-discrimination.

ii. **Governing Artificial Intelligence: upholding human rights & dignity: Mark Latonero**- This report draws the connections between AI and human rights, reframes recent AI-related controversies through a human rights lens and reviews current stakeholder efforts at the intersection of AI and human rights. The report looks to incorporate human rights into social and organizational contexts related to the development and governance of AI.

iii. **Artificial intelligence and human rights: a comprehensive study from Indian legal and policy perspective: Sheshadri Chatterjee, Sreenivasulu N.S**.- This paper has analysed different international and Indian laws on human rights issues and the impacts of these laws to protect the human rights of the individual, which could be under threat due to the advancement of AI technology. It also provides a comprehensive insight into the influence of AI on human rights issues and the existing laws in India and puts forth different policy initiatives by the Government of India to regulate AI by highlighting some of the key policy recommendations helpful to regulate AI.

**AI: Shaping Industries, Shifting Paradigms**

AI has the potential to create abundance by driving innovation, reducing reliance on manual force increasing productivity, communicating, and increasing connectivity that can reshape industries and shifting paradigms. AI also has the power to liberate human potential. However, such liberation should be cognizant of responsibility and accountable for the ethical violations it might cause. This can be ensured by only those who deploy AI to increase productiveness. AI is not only shifting paradigms of the technological industry but it is also reshaping these sectors. This is why the careful installation of algorithms must be ensured to protect individuals' rights. The data produced by AI are built on data produced from documented periods of flawed, racially biased decisions that are prone to predict inaccurate information.[7]

What is even scarier is how over-reliant on this data one can be. An example that would serve perfectly is the adoption of Facial Recognition technologies by the criminal justice systems of different states like China, Denmark, Hong Kong, etc., to identify suspects for predictive policing. Instead of mitigating and controlling the police work, they are enhancing the pre-existing discrimination which repeatedly shows black people as suspects making it a factor that the people from this race are a bigger threat, based on the unevaluated and biased data.

Such racial discrimination inherited by AI is a disgrace and violates an individual's right to equality and protection.[8] Narrowing down the implementation of ML algorithm by the tech-giants, the concepts of Facial Recognition and Predictive Analysis are elaborated below to provide insight into how the AI tools widen and perpetuate inequality.

**Facial Recognition**: Facial Recognition (FR) generally relies on the ML Algorithm which classifies subjects based on speed and scale. The so-called trained machines are fed a large dataset of labelled information, further which classifies and recognises certain things based on the characteristics associated with them. The computer will differentiate between a car and a

[7] Richardson, Rashida and Schultz, Jason and Crawford, Kate, Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice (February 13, 2019). 94 N.Y.U. L. REV. ONLINE 192 (2019), Available at SSRN: https://ssrn.com/abstract=3333423

[8] Now, Access. "Human rights in the age of artificial intelligence." *Access Now* (2018).

building. With that, it will differentiate the types of cars and types of buildings. And, the results usually depend on the quality of this training process. This essentially means that the results are more refined based on the number of images that are contained in the dataset, which the computer has access to.[9] But, too often, FR applications are trained on datasets that contain a disproportionate number of things.[10]

Google Photos, which is an advanced recognition software categorized two black people as gorillas.[11] This happened because the dataset was filled with a disproportionate number of white men and the applications provided relatively inaccurate results. AI learns to interpret the images based on the images in the dataset since it is accompanied by a label, which provides information. One can witness that humans tend to make bad decisions and what enables us to deviate from the pure path of reasoning are the base motivations dominated by sexism, racism, and ageism.[12]

In the same case, it was found that the results were because the dataset contained a large number of white men images, due to which the ML algorithm could not classify or identify the race of people.[13] Similarly, in an investigation by 'The Intercept' of the US military operations against the Taliban and A-Qaeda post the 9/11 attack, it was revealed that the armed drones that had killed nine out of 10 people were not the intended targets.[14] It is just a result of the machine's capabilities to differentiate between people, races and targets.

**Predictive Analysis**: Predictive analysis (PA) happens when the AI or ML Algorithm is trained to convert the available historical data to provide information that predicts future outcomes on trends and decipher the data to understand customer behaviour. This is one way where the manufacturing industries can anticipate market demands and optimize inventory and capital stocks to proactively produce for the right crowd and make reasoned decisions for the sake of

[9] Leslie, David. "Understanding bias in facial recognition technologies." *arXiv preprint arXiv:2010.07023* (2020).
[10] SANTOW, EDWARD. "Can Artificial Intelligence Be Trusted with Our Human Rights?" *AQ: Australian Quarterly* 91, no. 4 (2020): 10–17. https://www.jstor.org/stable/26931483.
[11] Alex Hern, Google's solution to accidental algorithm racism: ban gorillas, THE GUARDIAN (Jan. 12, 2018, 4:04 PM), https://www.theguardian.com/technology/2018/jan/12/google-racism-ban-gorilla-black-people
[12] Ansett Transport Industries (Operations) Pty Ltd v Wardley, 142 CLR 237.
[13] Palmiotto, Francesca, and Natalia Menéndez González. "Facial recognition technology, democracy and human rights." Computer Law & Security Review 50 (2023): 105857.
[14] Toby Walsh, *The one job that will disappear by 2062- the job of fighting wars*, THE PRINT (Apr. 26, 2020, 3:28 PM), https://theprint.in/pageturner/excerpt/job-will-disappear-by-2062-fighting-wars/409314/

staying ahead of the competition ensuring resource allocation and meeting or addressing the customer expectations effectively.[15]

In the article Amnesty International USA Considers Using Big Data to Predict Human Rights Violations by Mohana Ravindranath, it was established that the current interpretation of data as part of the predictive analysis is capable of reaching a crisis point that would affect the rights of individuals because it is not progressive and advanced to interpret data and simultaneously preserve confidentiality or sensitivity of the data acquired and consent for the use of data mining.[16]

As a sadder reality, while narrowing down AI and inequalities in the title of Predictive analysis, an example of lending and financial services by banks must be widely alluded to. Banks usually deploy ML algorithms and other AI tools to predict the decisions to make credit decisions and actively borrow money from people. Historically, the financial sector was riddled with biased opinions such as race, gender, sexual orientation, etc., and money was only lent to the members of the protected classes or people who were privileged enough to pay it back. This was based on human judgement. But the data from such human judgements is no easy fix when the lenders, investors, and banks are now finding that AI-based engines are exhibiting and predicting the results based on the historical data that was influenced by base ideas that human beings are slowly trying to drive away from.[17]

AI being fed on the biased credit decision data only perpetuates inequality and widens wealth gaps which will widen discrimination. To highlight the relevancy, amazon had to terminate its recruiting tool in 2018 after it was found to have predicted biased results favouring men. The AI was trained using data from a time when the technological industry was dominated by men. It only recommended and learnt that men were suitable for the job and eliminated resumes that highlighted words 'Female', 'women', and even 'women's chess club' since the historical data that the AI was fed was biased to even begin with.[18] Therefore, the predictive results were also biased.

---

[15] Nersessian, David. "The law and ethics of big data analytics: A new role for international human rights in the search for global standards." *Business Horizons* 61, no. 6 (2018): 845-854.

[16] See Mohana Ravindranath, Amnesty InternationalUSA Considers Using Big Data to Predict Human Rights Violations, WASH. POST (Nov. 22, 2013).

[17] Sian Townson, *AI Can Make Bank Loans More Fair*, HARVARD BUSINESS REVIEW, (Nov. 6, 2020), https://hbr.org/2020/11/ai-can-make-bank-loans-more-fair

[18] Bhavya Kaushal, *Being sensible with AI: Why tech companies need to be careful with artificial intelligence*, BUSINESS TODAY MAGAZINE, (Jan.8,2023),

**AI in the Hands of Tech Giants: Navigating Human Rights Implications**

When are at the cusp of the shift of this paradigm, the human future will be automated and will be transformed into one of robots and machines. AI when it is deployed by the Tech giants, it is used in the form of ML, NL, Data processing algorithms and much more. It was rightly pointed by Natasha E. Bajema rightly pointed out in the article 'Beware the Jabberwocky: The Artificial Monsters are Coming' that "the removal of human meddling through automation intends to increase the credibility of mutually assured destruction."[19] Though there are many advantages that the usage of AI, there are numerous disadvantages as well. This is narrowed in the research paper to the basic rights of an individual that are granted by international treaties.

We all have witnessed Apple Inc to be one of the predominant technological giants that play a pivotal role in the production of electoral gadgets. Their Unique selling point is user experience, intuitive user interfaces and innovative features that are extremely advanced. However, in 2017, people started claiming that the FR feature of Apple Inc. that they have been continuing to develop has acted based on race.

A man from Shanghai bought his wife a new gadget from Apple and was set to open with Face ID but it could be unlocked by her teenage son. The AI didn't have enough dataset to classify the different faces of people belonging to the Asian Countries. When it complained to customer service, Apple's Vice President Cynthia Hogan said that they have worked with different participants from around the world to include a representative group of people according to gender, age, ethnicity and other factors." But the results claim otherwise. It's a good contingency when the AI is not trained with a relevant data set even by Apple- the biggest tech giant.[20]

It is not just that when AI is being deployed by tech giants across various sectors varying from communication, information, and manufacturing, it is affecting people's right to employment. It was highlighted in the study conducted by Oxford academicians Carl Frey and Michael Osborne that people belonging to the lesser privileged class are at risk of losing their

https://www.businesstoday.in/magazine/technology/story/being-sensible-with-ai-why-tech-companies-need-to-be-careful-with-artificial-intelligence-358299-2022-12-30

[19] Cataleta, Maria Stefania. "Humane Artificial Intelligence: The Fragility of Human Rights Facing AI." East-West Center, 2020. http://www.jstor.org/stable/resrep25514.

[20] Sophie Curtis, *iPhone X racism row: Apple's Face ID fails to distinguish between Chinese users*, MIRROR, (Dec. 22, 2017, 12: 06. PM), https://www.mirror.co.uk/tech/apple-accused-racism-after-face-11735152

jobs because of future automation due to AI.[21] The reasoning behind this is that high-paying positions are where human judgements are required and those jobs are provided to those who have graduated from colleges and have the privilege to acquire knowledge and experiences. But what about those who couldn't afford to receive such education due to underlying discrimination and wealth games that also denied them their basic rights of survival? The right to work and protection against unemployment is guaranteed under Article 23 of UDHR and Article 6 of the ICESR.[22] [23] Denial of employment is a violation of these international principles and it is a good bet to believe that AI does that without any hesitation.

In 2017, Changying Precision Technology, a Chinese factory that produces mobile phones laid off 90% of its manual workforce to replace it with machines, which led to an increase in the production of 250% and dropped substantial defects by 8%, which is efficient for the company.[24] Lack of employment opportunities in the field of their expertise will lead to a pattern of attaining jobs merely for money, which will not be as productive as it could be.[25] This not only affects an individual's employment opportunities but also increases wealth gaps, which widens inequalities in society since opportunities will only be available at a decreased rate. This can be reflected when Adidas moved towards robot-only factories to increase productivity and efficiency due to its dependency and inclination towards AI, there has been a loss of jobs to the human workforce, which has a detrimental effect on low and middle-skilled workers, that results in job-polarisation.[26]

Therefore, the tech giants have replaced higher-order cognitive functions of humans with software that detects human emotions and facial expressions and processes language.[27] Every human right is interlinked. Somehow the violation of one right will lead to the violation of another right that governs the necessities of life. As of 2019, and according to the International Data Corporation (IDC), worldwide spending on AI and cognitive systems is set

[21] Frey, Carl Benedikt, and Michael A. Osborne. "The future of employment: How susceptible are jobs to computerisation?." *Technological forecasting and social change* 114 (2017): 254-280.
[22] Universal Declaration of Human Rights, art.23, 10 December 1948, United Nations, Declaration
[23] International Covenant on Economic, Social and Cultural Rights, art.6, 3 January 1976, United Nations, Treaty.
[24] Mihai Andrei, a *Chinese factory replaces 90% of human workers with robots. Production rises by 250%, defects drop by 80%*, ZMZ SCIENCE, (Feb. 3, 2017), https://www.zmescience.com/other/economics/china-factory-robots-03022017/
[25] Bajema, Natasha E. "Beware the Jabberwocky: The Artificial Intelligence Monsters Are Coming." Edited by Nicholas D. Wright. Artificial Intelligence, China, Russia, and the Global Order. Air University Press, 2019. http://www.jstor.org/stable/resrep19585.32.
[26]Mihai Andrei, *Adidas to move activity to robot-only factories*, ZMZ SCIENCE, (May. 26, 2016), https://www.zmescience.com/science/news-science/adidas-robot-factories-25052016/
[27] SHESTAKOFSKY, BENJAMIN. "MORE MACHINERY, LESS LABOR?" *Berkeley Journal of Sociology* 59 (2015): 86–91. http://www.jstor.org/stable/44713549.

to triple shortly. At this rate, decisions made by an AI system are going to present a wide variety of consequences to human rights, depending on what the AI intends to do and how it is being deployed by the Technological industries.[28]

Yet another example to elaborate how AI widens and deepens the existing wealth gaps and discrimination example is the use the AI or PA for targeted advertising online, where tech giants like Facebook and Google derive a good amount of revenue from online advertising. However, they can also have discriminatory features.[29] In 2013, when people searched for African-American-sounding names, google displayed advertisements that suggested that somebody had an arrest record even when the faces didn't match but for the white-sounding names, Google displayed fewer ads suggested fewer arrest records, which reflects the inherited racial biased data set or based on the people's surfing behaviours.[30]

All of these are examples of how the opaqueness of the AI systems makes it extremely harder for one to discover the discrimination and its cause.[31] People could be very unaware of their discrimination but AI's practices make it extremely violative of people's right against discrimination. The Dutch Data Protection Authority also found that Facebook enabled advertisers to target people based on sensitive characteristics to drive their target advertising. Facebook had features, where the advertisers could choose their target audiences by filtering out people from different races (black, Hispanic, and other ethnic affinities) and enabling job ads to be shown only to people belonging to a particular gender and age group.[32] Not just that, "Facebook in around 2013 labelled 73% of EU users with sensitive interests, such as Islam, homophobic or homosexual, etc."[33] All of this opens new ways for AI to unveil unfair differentiations which are essentially discrimination, that might escape current laws and

[28] Greiman, VA. "Human Rights and Artificial Intelligence: A Universal Challenge." *Journal of Information Warfare* 20, no. 1 (2021): 50–62. https://www.jstor.org/stable/27036518.
[29] Lin, Hsiao-Ying. "Standing on the Shoulders of AI Giants." *Computer* 56, no. 01 (2023): 97-101.
[30] Latanya Sweeney. 2013. Discrimination in Online Ad Delivery: Google ads, black names and white names, racial discrimination, and click advertising. Queue 11, 3 (March 2013), 10–29. https://doi.org/10.1145/2460276.2460278
[31] SHESTAKOFSKY, BENJAMIN. "MORE MACHINERY, LESS LABOR?" *Berkeley Journal of Sociology* 59 (2015): 86–91. http://www.jstor.org/stable/44713549.
[32] Julia Angwin, Facebook Lets Advertisers Exclude Users by Race, ProPublica (Oct. 28, 2016, I:00 PM), https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race
[33] Cabañas, José González, Ángel Cuevas, and Rubén Cuevas. "Facebook use of sensitive data for advertising in Europe." *arXiv preprint arXiv:1802.05030* (2018).

policies and it is mostly based on protected characteristics of an individual such as skin colour and religious beliefs.[34]

**Rectifying AI: Redressing Human Rights Violations by Tech Giants**

Currently, there are no codified laws, statutory rules or regulations of any such government-issued regulations that regulate AI, per se. Section 72A of the Information Technology Act set out provisions that protect personal data, rules and regulations framed thereunder.[35] Along with that, the NITI Aayog has issued seven basic principles that include safety, reliability, equality, non-discrimination, privacy, security, transparency, etc., that protect and safeguard the Public interest and promote innovation through increased trust and adoption. Very recently, MIETY- Ministry of Electronics and Information Technology instituted a committee to govern the regulation and administration of AI in the mainstream governing areas such as FR in administering justice.[36]

Many times, the Right to privacy was deemed a fundamental right by the Supreme Court, but AI violates such rights.[37] Not only the right to privacy but many other fundamental rights such as the right to live with dignity and the right to employment. The New Education policy also emphasises teaching coding to students as early as class VI, which serves India as a centre for cutting-edge AI technologies.[38] In these circumstances, it is important to ensure that the foundational basis of such technological developments is administered to ensure that they do not violate the ethical guidelines of an individual's rights.

Data Protection finds an important relevance in the Indian Context that acts as a legal tool to defend certain fundamental rights, including the right to equality that prevents non-discrimination. Data Protection laws are important to data subjects whose data is being processed. Firstly, Personal data should not be processed at the cost of fairness, transparency,

---

[34] Zuiderveen Borgesius, Frederik. "Discrimination, artificial intelligence, and algorithmic decision-making." *línea], Council of Europe* (2018).
[35] Information Technology Act, 2000, sec.72 (A), No. 21, Acts of Parliament, 2000 (India).
[36] Press Information Bureau Government of India Ministry of Electronics & IT, *Year End Review 2022: Ministry of Electronics and Information Technology (MeitY)*, PIB DELHI, (Dec. 15, 2022, 5: 29 PM), https://pib.gov.in/Pressreleaseshare.aspx?PRID=1883839
[37] The Wire Staff, *Right to Privacy a Fundamental Right, says Supreme Court in Unanimous Verdict*, THE WIRE, (Aug. 20, 2017), https://thewire.in/law/supreme-court-aadhaar-right-to-privacy
[38] The Quint staff, *New Education Policy: Students to learn coding from class 6*, THE QUINT, (Jul. 30, 2020, 10:05 AM), https://www.thequint.com/news/india/new-education-policy-students-to-learn-coding-from-class-6th-onwards

and consent of the subject. Data collected should only be used for the specified or mentioned tasks, essentially purpose limitation.

The collected data should be minimised and processed just for the purpose that the data collectors intended to attain. The data used should be sufficiently and accurately updated and shall not be retained for a longer period which makes the data subject to data breaches such as lack of confidentiality and integrity. Most importantly, the data controller should be responsible for compliance and accountability.

When we take into consideration, the other fundamental rights such as the right to equality and non-discrimination, the Supreme Court has ensured that the Right to equality is a part of the Basic structure doctrine of the constitution that cannot be breached or infringed by anyone under any circumstances. Discrimination has been prohibited in numerous treaties and conventions, including the Indian Constitution. AI can directly or indirectly cause discrimination that is mostly unintentional and is the result of the inappropriate data set that it is trained with. Non-discrimination focuses on the effect of the practices rather than the intent of the discriminator, which is why whether the discriminator had the intention to discriminate or not does not come into relevance.

However, when the right to equality or right to dignity and the right to employment is infringed on an individual, the non-discriminatory law comes into place. Further, industries, organisations and especially tech giants must deploy AI by paying due consideration to the implications of the results of AI that lacks human judgment. Instead, it must be AI has made numerous developments in different regimes by shifting paradigms and reshaping industries but it is high time to ensure that it does not be in place at the cost of individual rights.

**Conclusion**

AI and many forms of it when deployed by the tech giants are in a place to unintentionally affect the rights of individuals that puts in a place to infringe ethical principles that the law and legal field hold high. The research paper was a genuine effort to analyse how AI is being used by the tech giants to make their everyday mundane tasks easier and have an efficient production, without having to spend on the manual workforce. The society in the global community arises out of inherited discrimination and inequalities. When AI takes away opportunities from individuals and exhibits discrimination, it widens the wealth gaps and

follows the trial of historical inequalities, which is unethical. Therefore, data protection law must be strengthened and followed in a very stringent manner to ensure that the data set that AI is trained with, is used positively, and utilised efficiently keeping in mind the human rights violations that can do. Further, it should also consider the laws of non-discrimination to curtail the expansion of inequalities because of the development of AI.

# COPYRIGHTABILITY OF DISTINCTIVE SPORTS CELEBRATIONS

**Amruta Oke***

***Abstract***

*The intersection of sports and intellectual property law has given rise to intriguing questions regarding the copyrightability of distinctive sports celebrations. This article explores the complex legal landscape surrounding the protection of unique celebratory gestures, choreography, and expressions that have become iconic in the world of sports. Distinctive sports celebrations, from end-zone dances in football to victory rituals in soccer, often carry significant cultural and commercial value.*

*This article examines the criteria and challenges associated with obtaining copyright protection for these celebratory expressions, considering factors such as originality, fixedness, and the distinction between choreography and personal expression. Drawing on relevant case laws and legal precedents, this article delves into the evolving understanding of what constitutes copyrightable material in the context of sports celebrations. It also investigates the implications for athletes, teams, and the broader sports industry, including the potential for increased commercialization and the protection of athletes' intellectual property rights. In conclusion, this study underscores the evolving nature of intellectual property law in the realm of sports and raises critical questions about the copyrightability of distinctive sports celebrations.*

## Introduction

Copyright was one of the first intellectual properties to be awarded as protection. The main idea behind it was to protect the creative labour of authors. The author can exploit his work in whichever way he wants it to as he has the exclusive right to do so. The author can also assign or license his work. After the 'term of copyright' expires, the work falls into the public domain i.e., the public can use the work as per their whims and fancies. In Indian Jurisdiction, 'original literal, dramatic, musical, and artistic' works are protected whereas in derivative works, 'cinematographic films and sound recordings' are protected.[1] For copyright

* LLM, Hidayatullah National Law University, Raipur, Chhattisgarh.

[1] Section 13, Indian Copyright Act, 1957.

to subsist in a work, it should fall under the ambit of copyright, should be original and should also be fixated.

The copyright jurisprudence requires that the expression must be original, as was held in Fiest Publication's case[2]. It makes no difference if the idea is not original. The expression should not be a copy of some other work, although it could be 'inspired' or 'derived' from it. Inspired and derivative work should have some elements that make such work different from the original and stop it from coming under the area of 'copied work'. In Bleistein V. Donaldson Lithographing Co.[3], the Court emphasized the personal expression of an artist rather than creative or artistic merits. In Alfred Bell & Co. v. Catalda Fine Arts, I*nc.*[4], Court observed that,

"The test is valid when the author is trying to create some additions or advancement in another artist's work instead of working on something original of his own. The Bleistein test can be satisfied even if the author was attempting to perfectly reproduce another work, rather than create an original work of his or her own. If the item exhibits a "distinguishable variation" from another work, the law presumes that such a variation bears the imprint of the author's person, thereby entitling the work to copyright protection. Even if the variation is accidental, the copier is still the origin of that variation."

Apart from being an 'independent creation', the work should also contain some amount of creativity. This stand was taken in Fiest Publication's case by the US Supreme Court. The 'Sweat of the brow" doctrine values the fruits of labour, investment and skill of the author while the doctrine of "modicum of creativity" values the variation and creativity of the author. There is no expectation that the creativity should be high but even a minimum amount is sufficient to make the product stand out. This doctrine "sweat of the brow" was used in Walter v. Lane[5] and later in the case of Ladbroke (Football) Ltd. v. William Hill (Football) Ltd[6] where the Court said that "it is immaterial whether work is wise or foolish, accurate or inaccurate, or whether it has any literary merit." [7] This doctrine was rejected by Indian courts and the concept of "flavour of the minimum requirement of creativity" was introduced.

Copyright subsists in a work, the moment it is created. That is, unlike trademarks, patents or other Intellectual Properties, it doesn't have to be registered. Although, one of the

[2] Feist Publications v. Rural Telephone Service Co., 499 US 340.
[3] 188 U.S. 239 (1903)
[4] 191 F.2d 99 (2d Cir. 1951
[5] [1900] AC 539
[6] [1964] 1 WLR 273
[7] Eastern Book Company v. D.B. Modak, 2002 PTC 641

conditions to get copyright is that the work must be 'fixated'. Fixation in copyright law means recording. The mode of fixation does not matter, only that it should be in a tangible medium. The Copyright Act, of 1957 does not define fixation. For any material to qualify as work, it must be fixated. As Laura A. Heymann points out,

"Under U.S. copyright law, fixation is what creates both an author and a commodifiable subject, neither of which exists as a legal entity in copyright law before the act of fixation occurs. It transforms the creative process (and its subject) from a contextual, dynamic entity into an acontextual, static one, rendering the subject archived, searchable, and subject to further appropriation. Even in contexts in which there is no competing claim as to control, fixation still works to bind the fruits of creative effort, engendering distance between the author and audience. Fixation thus causes a kind of death in creativity even as it births new legal rights.[8] Fixation is what allows the subject to be commercialized and analyzed; it is what marks the transformation of to subject in the first place.[9]"

The interpretation clause of the Copyright Act, of 1957 makes it a necessity that for a work to be qualified as dramatic work, it should, inter alia, be fixed.[10] "Choreography" is the art of arranging or designing a ballet or stage dance in symbolic language. The requirement of fixation has been specifically provided for recitation, choreographic work, dumb show, scenic arrangement or acting. If these works are not "fixed" then they will be treated as merely performance having a lesser duration of protection under section 38.[11]

Further, "Choreography" which is the art of arranging or designing ballet or stage dance in symbolic language is a form of dramatic work. To qualify for copyright protection choreography must be reduced to writing usually in the form of some notation and notes.[12] The Delhi High Court in the case of Indian Institute of Inner Studies v. Charlotte Anderson[13], while placing reliance on 'Copinger & Skone James on Copyright

[8] Laura A. Heymann, How to Write a Life: Some Thoughts on Fixation and the Copyright/Privacy Divide, 51 Wm. & Mary L. Rev. 825 (2009), pg. 830. https://scholarship.law.wm.edu/wmlr/vol51/iss2/14
[9] Ibid.
[10] Section 2 (h), "dramatic work" includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting, form of which is fixed in writing or otherwise but does not include a cinematograph film;"
[11] Alka Chawla, Law of Copyright, pg. 50 https://advance-lexis-com.elibraryhnlu.remotexs.in/api/permalink/ee160771-acd7-49e1-a23f-08e259d532a4/?context=1523890
[12] Sreenivasulu NS: Law relating to Intellectual Property, 2nd ed, pg.
[13] MANU/DE/0084/2014

(Fourteenth Edition by Kevin Garnett M.A., Jonathan R. James, MA. LLB, Gillian Davies, PhD, 1999 Edition, London, Sweet & Maxwell' held that,

"The summary of the observations made by the learned author relating to the scope of the protection of dramatic work is that for a work to be called as dramatic work has to be capable of being physically performed or accompanied by action. The other requirement for a work to be called dramatic work is fixation of the matter in the form of writing or otherwise which means certainty of incidents as a predetermined plan. Where there exists a reasonable doubt as to complete certainty of the performance of the work in the manner conceived by the author or writer, in such cases, the work falls short of the requirement of fixation or certainty of the performance and therefore cannot be called as dramatic work. Such instances of doubtful nature of certainty include sports games, news presentations, aerobics and by necessary implication also include other exercises, daily routines, Yoga and Pranic Healing techniques."

**Distinctive Sports Celebrations as Works of Choreography**

The only subject matter under the Indian Copyright Act, into which sports celebrations can be fit is original dramatic work. Sports celebrations are different from sports moves. Sports moves are those moves that sportsmen make to make their play better. A particular game tactic developed to gain an edge over opponents is a sports move. An example of a sports move is the famous 'helicopter shot' by MS Dhoni. Getting copyright protection for sports moves gets backbreaking as these moves are struck by the 'doctrine of merger'. To put it simply, this doctrine states that in instances and works where an idea cannot be distinguished from its expression, copyright protection cannot be granted. The amalgamation of idea and expression negates the scope of copyrightability. In *MATTEL, Inc., and ORS. Vs. Jayant Agarwalla and others*[14], the Delhi High Court held that,

"In the realm of copyright law, the doctrine of merger postulates that were the idea and expression are inextricably connected, it would not be possible to distinguish between two. In other words, the expression should be such that it is the idea, and vice-versa, resulting in an inseparable merger of the two. Applying this doctrine courts have refused to protect the expression of an idea, which can be expressed only in a very limited manner, because doing so would confer monopoly on the idea itself."

[14] 2008 (153) DLT 548

Sports celebrations, on the other hand, are the celebratory actions made after winning or scoring a goal or achieving something in a game. Famous examples are when Sachin Tendulkar removes his helmet and looks towards the sky while holding the helmet and his bat perpendicular to the ground; when Chris Gayle breaks into the Gangnam style dance; Lionel Messi points his fingers at the sky; Ronaldo 'siiiiiuu' reaction and so on.

**International Perspective**

As per the Copyright Act of the US[15], "Copyright protection subsists in original works of authorship fixed in any tangible medium of expression, now known, or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

1. Literary works;
2. Musical works, including any accompanying words;
3. Dramatic works, including any accompanying music;
4. Pantomimes and Choreographic works;
5. Pictorial, Graphic, and Sculptural works;
6. Motion pictures and other audiovisual works;
7. Sound Recordings; and
8. Architectural works."

Any original work needs to be fixed in any tangible medium, only then it will be granted protection under the Copyright Act.

In the UK, ""dramatic work" includes a work of dance or mime; and Copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise; and references in this Part to the time at which such a work is made are to the time at which it is so recorded. It is immaterial whether the work is recorded by or with the permission of the author; and where it is not recorded by the author, nothing in that subsection affects the question whether copyright subsists in the record as distinct from the work recorded."[16] Fixation is a strict requirement in the UK laws. If the work is not recorded, then

[15] Section 102.
[16] Section 3, Copyright, Designs and Patents Act 1988.

copyright will not subsist in it. Thus, it can be said that fixation becomes one of the sine qua non of copyright protection.

In the context of sports celebrations, if these actions are considered as 'steps' of a choreographic work, then they must be fixated on some medium or the other to get copyright protection. The US Court in the case of *NBA v. Motorola*[17] held that,

*"Sports celebration moves are original, choreographed moves designed by an athlete to celebrate his or her athletic feats. Sports celebration moves, though generally related to sports moves, should, nevertheless, be considered an entirely different species of sports move for purposes of copyright protection analysis. They are creative, original, and unique moves that serve only as a tangential part of any game. Whereas, ordinary sports moves are standardized, commonly performed moves that serve a functional role in an athletic competition."*

Thus, fixation combined with a modicum of creativity could play an important role in securing protection.

**Indian Perspective**

The position regarding choreographic works in the Indian Copyright Act, 1957 is quite clear through sections 13 and 14, albeit 'choreographic works' are nowhere defined in it.

Cambridge Dictionary defines choreography as,
"The skill of combining movements into dances to be performed".[18] It is also defined as "the art of making dances, the gathering and organization of movement into order and pattern."[19] The legislation is an extension of the British-made laws in British India as well as the existing law of the UK.

Hence, fixation remains the main requirement of obtaining protection. [20] Sports celebrations consisting of a single step would be too insignificant to be protected as dance moves in dramatic works but elaborate moves consisting of a couple of steps and variations, if possibly fixated, could get protection. Moves are mirrors of their creative expression in moments of ecstasy. Athletes' sports celebration moves are often referred to as choreographies

[17] National Basketball Association v. Motorola, Inc., 105 F.3d 841, 846 (2d Cir. 1997)
[18] https://dictionary.cambridge.org/dictionary/english/choreography
[19] https://www.britannica.com/art/dance/Choreography
[20] V. K. Ahuja, Law relating Intellectual Property Rights, 2nd Ed, pg. 38.

or dances.[21] The Supreme Court has said that "a unique form of dance could only be copyrighted as a dramatic work if it was replicated in a literary format."[22]

**Commercializing Sports Celebrations as Trademarks**

The main aim behind securing Intellectual Property protection is to acquire inter alia commercial or economic rights. All Intellectual Properties grant owners these rights and grant the owners to transfer these rights further- colloquially known as assignment and licensing.

As per the copyright jurisprudence, the author is the first owner of the copyright.[23] When it comes to sports celebrations, each athlete is the first owner, since they create these moves on their own. It remains to explore whether one specific Intellectual Property awards better protection than the other: in this case, whether copyright offers better protection than trademark.

**Trademarks: Better Option for Commercializing**

Sports have become a part and parcel of people's lives. Some athletes are being remembered because of their unique celebrations. It can be found that a few choreographed STEPS may command the intrigue of the common public and have colossal commercial value but it may not contain that level of juristic or academic value. Hence, while debating whether celebratory moves should get protection, one must adopt a commercially beneficial approach.

Trademarking their celebratory moves is yet another way for sportspersons to capitalize on their brand value.[24] To be able to trademark a move, one must be able to prove that the move is so distinctive and one of a kind in nature that it can be associated with one specific person and not with numerous people or brands. Various athletes have trademarked their unique celebrations.[25] A motion mark can be registered for a specific move. The requirements of Graphical representation, distinctiveness and indications of source of origins must be fulfilled

[21] The Copyrightability of Sports Celebration Moves: Dance Fever or Just Plain Sick? Hennry M. Abromson, Pg. 22
[22] Academy of General Education, Manipal and Ors. v. B. Malini Mallya, MANU/SC/0146/2009
[23] Section 17, Indian Copyright Act, 1957.
[24] IN AN ERA OF NON-TRADITIONAL MARKS: THE POSSIBILITIES OF TRADEMARKING A SPORTSPERSONS' CELEBRATORY MOVE Yashwardhan Singh & Deeksha Singh, E-Journal of Academic Innovation and Research in Intellectual Property Assets (E-JAIRIPA) Vol. 1 (01), Dec 2020, pg. 220.
[25] Usain Bolt's lightning bolt pose; Gareth Bales' 11 of Hearts Jessie Lingard's jinx; Mo Farah's Mobot, etc.

for registration of a trademark. The ‘distinctiveness’ of celebrations is what makes it more appealable to society.

Copyright protects original expressions in works whereas trademark protects the business reputation and goodwill. Copyright grants protection for the life of the author + 60 years whereas trademark grants protection for 10 years and is renewable thereafter. Both types of IP have their pros, cons and complications for getting protection. Therefore, to debate whether copyright offers better protection than trademark would be futile. for getting hold of commercial monopoly, IP protection is a must; doesn't matter which one.

**Effects of Obtaining IP Protection for Celebrations**

The craze about sports and athletes makes people want to buy goods that can be associated with that sport. Cricket fans, sometimes, buy T-shirts like that of their favourite teams and flaunt them. Sometimes, a particular athlete's signature or photo is affixed on such goods which increases their demand and sale in the market. Getting intellectual property protection makes it easier to hold a commercial monopoly.

Celebratory moves can be added to goods and merchandise and fans would be inclined to buy them which would boost the sales. Further, once an athlete retires, he can have some financial backing from merchandising his celebrations. Fans are willing to spend huge entireties of cash on items related with their favourite teams and athletes, which is a once-in-a-lifetime opportunity for competitors to attain both notoriety and monetary security amid their generally short-lived playing careers.

Numerous components, such as the fast development of media coverage of sporting events, the developing focus by fans and the media on an "individual athlete's" on-field victory and charisma, and fans' readiness to spend on items related to their favoured and preferred teams. Competitors can take advantage of this inclination by pulling in media and attracting fan's attention to themselves by doing athletic celebration moves following a successful play. Competitors may advance themselves and boost their brands on the field while performing these moves.[26] This is a path that has the potential to transform the lives of athletes who have put in a lot of hard work over many years to reach the point where they can entertain audiences with their one-of-a-kind celebration movements while also building a brand for themselves in

[26] Laxmi, Copyrightability of Sports On-Field Celebration Moves, 6 (2) IJLMH Page 58 - 65 (2023), DOI: https://doij.org/10.10000/IJLMH.114362

the industry. Famous athletes can be exploited by newcomers if their unique celebrations are not protected.[27]

Negatively, if a particular move is protected by one athlete, then the other athlete will be prohibited from doing the same moves. Sometimes athletes tend to celebrate in similar ways to pay homage to the athlete who did the celebratory move. IP protection would make it difficult to perform the same moves as the author might institute a suit for infringement. Henry M. Abromson argues that "sports celebration moves taint the purity of sport".[28] Any IP protection is not just one right, but a bundle of other rights and awarding all rights might become a tedious task.

**Conclusion**

It is inherently difficult to prevent others from using a particular sport celebration if it has not been awarded protection under Intellectual property laws. The need to have a dramatic work written in literary format makes it a little difficult to fulfil statutory requirements for obtaining protection. These movements can be elucidated through words and with imagination they can be 'represented' which would help in making their registration easier. They can be described as a series of movements, performed one after the other, created and crafted by athletes as a medium of expressing their adrenaline rush after noteworthy performances on the field.

Once these moves are protected under IP legislation for their distinctiveness, these celebrations could be regarded as a profit-making and commercially benefitting feature unmistakably attributable to specific players who devise their distinct moves. When a win celebration becomes so well-known that it may be regarded as a recognisable trait of the athlete, a case can be made for trademarking the well-known victory celebrations. To reiterate, in modern copyright jurisprudence, protection completely depends on how the administration looks at these moves and their practical logic, particularly the authorities under the Copyright Act.

[27] Ibid, at 65.
[28] Supra 21 at Pg. 30

# IMPACT OF UNIFORM CIVIL CODE ON PERSONAL LAWS

**Kareena Mary John***

**Swapna Surendran Menon****

***Abstract***

*In contemporary India, distinct religious communities adhere to their respective sets of regulations: Hindus follow specific laws about marriage, inheritance, and other matters, which diverge from those observed by Muslims, Christians, and Parsis. The Uniform Civil Code (UCC) intends to alter this situation. Once passed into law, it would simplify rules concerning marriage, divorce, adoption, inheritance, succession, and guardianship. This means that laws like the Hindu Marriage Act (1955), the Hindu Succession Act (1956), and the Muslim Personal Law Application Act (1937) would essentially be replaced.*

*This scholarly investigation delves into the intricacies surrounding the implementation of the Uniform Civil Code (UCC) within the legal framework of India and its consequential effects on personal laws. The UCC stands as a legislative proposition aimed at supplanting the diverse personal laws dictated by various religions in India with a unified legal code applicable to all citizens regardless of their religious affiliations. The Uniform Civil Code (UCC) seeks to replace religious-specific personal laws with a unified legal framework applicable to all citizens. These personal laws pertain to matters like marriage, divorce, inheritance, adoption, and maintenance. The foundation of the UCC lies in Article 44 of the Indian Constitution, which is among the Directive Principles of State Policy. Article 44 of the Indian Constitution states, "The State shall endeavour to secure for the citizens a Uniform Civil Code throughout the territory of India".*

**Keywords**: **Uniform Civil Code, Personal laws, Constitution, Citizens, Religious**

## Introduction

Dr B.R Ambedkar was strongly in favour of a UCC and argued, "We have a uniform and complete Criminal Code operating throughout the country, which is contained in the Penal Code and the Criminal Procedure Code. This country has also practically a Civil Code, uniform in its content and applicable to the whole of the country. The only province the Civil Law has

* 3rd Year B. Com LL. B, Kristu Jayanti College of Law, Bengaluru, Karnataka

** 3rd Year B. Com LL. B, Kristu Jayanti College of Law, Bengaluru, Karnataka

not been able to invade so far is Marriage and Succession. It is this little corner which we have not been able to invade so far." [1]

The concept of a Uniform Civil Code (UCC) was initially proposed in the Constituent Assembly in 1947 to foster national unity and ensure consistency in legal application, thereby facilitating equitable dispensation of justice. Article 44 of the Constitution of India, under the Directive Principles of State Policy, mandates the state to strive towards establishing a UCC for all citizens across the nation. Despite over six decades having elapsed since this constitutional directive, India has yet to realize this objective, primarily due to a multitude of challenges and obstacles.

The Uniform Civil Code (UCC) aims to promote fairness and equality by abolishing discriminatory practices found in personal laws that are influenced by religion or community. Article 44 of the Directive Principles reflects the founders' aspiration for a contemporary, forward-thinking, and unified legal structure governing personal laws in India. It underscores the necessity of reconciling conflicting personal laws to uphold gender equality and social justice. Nevertheless, the framers also acknowledged the intricacies of the matter and the significance of honouring diverse religious and cultural traditions.

**Research Question**

I. What are the impacts of the Uniform Civil Code (UCC) on Personal Laws?
II. Does the Uniform Civil Code (UCC) violate the Fundamental Rights enshrined under Articles 25 and 26 of the Indian Constitution?

**Objectives**

A. To understand the impact of the Uniform Civil Code (UCC) on Personal Laws
B. To see whether the Uniform Civil Code (UCC) infringes on any Fundamental Rights

**Research Methodology**

For this study, authors have used descriptive research design and gathered data from secondary sources such as the internet, textbooks, research journals, articles, and documents related to the topic to understand different perspectives and insights. This method allowed

[1]2 B. Shiva Rao, The Framing of India's Constitution 550 (Universal Law Publishing Co. Pvt. Ltd 2012)

authors to access a wide range of information and opinions on the subject, and to analyse it thoroughly.

**Literature Review**

Shikha Goyal argues that the Uniform Civil Code (UCC) would end discrimination against women, strengthen secularism, and unify the nation. She suggests that the critics, who are primarily from minority communities, fear it infringes upon their religious freedoms. The debate continues, with the Uniform Civil Code seen as essential for achieving social reform and true secularism in India.[2]Moreover, Prof. Vageshwari Deswal mentions that the significance of the Uniform Civil Code lies in promoting gender equality, justice, and national integration. Judicial interventions in cases like Shah Bano (1985), Sarla Mudgal (1995), and John Vallamattom (2003) have underscored the need for the Uniform Civil Code to address inconsistencies and ensure uniformity in personal law.[3]

However, Krishn Kaushik says that Muslim theologians view the Uniform Civil Code as a threat to Islamic Law and practices such as polygamy. As India's largest minority, comprising over 24% of the population, many Muslims see the Uniform Civil Code as undermining the nation's diversity. Some tribal groups also oppose the Uniform Civil Code. The Uniform Civil Code is one of the three core promises made by the BJP during the election of 2019, also it is the only unfulfilled promise.[4]Likewise, Prof. Vasudha Dhaganmwar examines the social indications of the Uniform Civil Code, focusing on gender justice and minority rights. Her work highlights how different personal laws impact women's rights and the potential for the Uniform Civil Code to address gender inequalities while considering the concerns of religious minorities. She also criticises that personal laws often discriminate against women.[5]

Prof. Faizan Mustafa explores the future prospectus of a Uniform Civil Code in India. His work analyses the current legal framework, recent judicial trends, and the potential pathways for Uniform Civil Code implementation, considering the socio-political landscape.

[2] Shikha Goyal, What is UCC, Jagran Josh (February 2024) https://www.jagranjosh.com/general-knowledge-ucc
[3]Dr. Vagweshwari Deswal, UCC in India-Overview|Significance|Comparitave Analysis, Taxmann(May 2024)https://www.taxmann.com/post/blog/uniform-civil-code-ucc
[4] Krishn Kaushik, What is India's Civil Code and why does it anger Muslims, Reuters(February 2024)https://www.reuters.com/world/india-civil-code
[5] Dhagamavar, Law, Power and Justice: The Protection of Personal Rights in Indian Penal Code, Sage Publications (2006)

He also mentions that the recent judicial trends indicate a push towards uniformity in personal laws as well as the socio-political factors that will play a crucial role in UCC implementation.[6] Further, Dr. Ruma Pal delves into the intersection of secularism and pluralism in the context of the Uniform Civil Code. Her view examines how the Uniform Civil Code can be aligned with India's secular principles while respecting the country's pluralistic ethos. It discusses the balance between individual rights and community identity, the role of the judiciary, and the potential for legal reforms to achieve social justice without eroding the cultural diversity[7].

## Data Analysis

### Concept of the Uniform Civil Code

The Uniform Civil Code (UCC) is a proposed legal framework in India aimed at replacing personal laws based on religious customs with a common set of laws governing all citizens. The Uniform Civil Code covers marriage, divorce, inheritance, adoption, and maintenance, and its goal is to ensure equality, justice, national unity and secularism. The idea of a Uniform Civil Code was put forward by the framers of the Indian Constitution. It is enshrined in Article 44 of the Constitution of India, as one of the Directive Principles of State Policy, which states that 'the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India."

The concept was thus a part of the broader vision of nation-building and promoting equality and justice for all citizens, regardless of their religious or cultural background. The UCC remains a contentious yet crucial topic in India's legal and political disclosure. While it aims to promote equality and national unity, its implementation faces significant opposition from religious and tribal communities who fear it may infringe upon their cultural and religious identities. The debate over the UCC continues, highlighting the challenge of balancing secular laws with the diverse cultural fabric of India.

[6] Mustafa, Constitutional issues in personal laws in India", Oxford University Press (2018)
[7] Ruma Pal, "Secularism and the Constitution of India: A study in Secularism and Pluralism", Oxford University Press (2005)

**Significance of UCC**

The Uniform Civil Code (UCC) is considered to hold significant importance in India for the following reasons:

(a) *Equality and Justice*:

The UCC aims to ensure equality and justice for all citizens by providing a common set of laws governing personal matters such as marriage, divorce, inheritance, adoption, and maintenance. This promotes fairness and eliminates discrimination based on religion, gender or other factors.

(b) *National Unity*:

By replacing diverse personal laws with uniform legal frameworks, the Uniform Civil Code fosters national unity by promoting a sense of common identity and belonging among citizens, regardless of their religious or cultural background. It helps in integrating the diverse population of India under one legal system.

(c) *Secularism*:

India is a secular court, and the Uniform Civil Code upholds the secular principles enshrined in the constitution by separating religion from state matters. It ensures that laws are not based on their religious considerations but are instead secular and applicable to all citizens equally

(d) *Social reform*:

The Uniform Civil Code is seen as a tool for social reform, particularly in addressing regressive practices such as triple talaq, polygamy, and unequal inheritance rights, thereby advancing the rights of women and marginalized groups.

(e) *Legal Clarity and Certainty:*

A uniform legal framework simplifies legal processes and ensures clarity and certainty in matters related to personal law. It reduces confusion and ambiguity, making it easier for citizens to understand and navigate the legal system.

**Debates against UCC in India**

The Uniform Civil Code in India has been a subject of intense debate and criticism. Some of the key criticisms are as follows:

(a) *Threat to cultural and religious identity*:

Many religious and cultural groups argue that a Uniform Civil Code threatens their unique identities and practices, India's laws are deeply rooted in religious and cultural traditions, and a move towards uniformity is seen as an imposition that could erode this tradition. Communities fear that the UCC would undermine their religious autonomy and the freedom to practice personal laws as per their traditions. Also, the critics argue that a one-size-fits-all approach could lead to cultural homogenization.

*(b) Political motivations*

The push for the Uniform Civil Code is often viewed with suspicion, with critics suggesting that it is driven by political motives rather than genuine concern for equality or reform. Some argue that it is a tool used by political parties to garner votes and polarize communities. There are allegations that the political parties promote UCC to appeal to certain voter bases, often at the expense of minority communities.

(c) *Gender Justice Concerns:*

While propionates of Uniform Civil Code argue that it will promote gender justice by eliminating discriminatory practices in personal laws, some critics contend that this may not be the case. They argue that merely imposing a Uniform Civil Code without addressing underlying societal attitudes may not lead to real gender equality.

*(d) Legal and practical challenges:*

Implementing a Uniform Civil Code poses significant legal and practical challenges. Critics argue that India's existing legal framework is not equipped to handle the complexities of integrating diverse personal laws into a single code. The diversity and complexity of existing personal laws make unification a daunting task.

*(e) Lack of consensus:*

There is a lack of consensus among various stakeholders, including religious groups, legal experts, and the general public, on the necessity and form of UCC. Critics argue that pushing for a Uniform Civil Code without a broad-based agreement could lead to social unrest. Imposing the Uniform Civil Code without consensus might exacerbate social tensions and conflict.

**Related Case Laws**

I. *Mohd. Ahmed Khan v. Shah Bano Begum and Ors*.[8]

Shah Bano, a Muslim woman, sought maintenance from her husband after being divorced through the Islamic custom of triple talaq. The Supreme Court ruled in her favour, recognizing her right to maintenance under Section 125 of the Criminal Procedure Code, irrespective of her religion. Many Muslim organizations protested against the ruling, claiming that it infringed upon their religious liberties. Despite this opposition, the Indian government later enacted the Muslim Women (Protection of Rights on Divorce) Act in 1986. This law reversed the Supreme Court's decision and reinstated the authority of Muslim personal law in divorce matters.

II. *Mary Roy v. State of Kerala and Ors*.[9]

Mary Roy, a Christian woman from Kerala, contested the unfair rules of the Travancore Christian Succession Act, which favoured male heirs over female ones in matters of inheritance. The Supreme Court ruled in her favour, stating that discrimination based on gender in inheritance laws went against the principles of equality laid out in the Indian Constitution. This case established a significant precedent for promoting gender equality within personal laws. Furthermore, this landmark decision sparked broader conversations within society about the necessity of harmonizing diverse personal laws to uphold fundamental principles of equality and non-discrimination.

III. *Danial Latifi & Anr. v. Union Of India*[10]

In this case, concerns revolved around the maintenance of Muslim women following divorce. The Supreme Court held that Muslim women are entitled to seek maintenance beyond the iddat period under Section 125 of the Criminal Procedure Code though they have been divorced by their husbands under Muslim personal law.

Muslim organizations expressed dissent following the court's ruling, contending that it infringed upon their religious liberties. They maintained that the decision impinged upon their rights to adhere to their religious practices without interference from the state.

[8] Mohd. Ahmed Khan v. Shah Bano Begum and Ors,1985 AIR 945
[9] Mary Roy v. State of Kerala and Ors,1986 AIR 1011
[10] Danial Latifi & Anr. v. Union of India, AIR 2001 SUPREME COURT 3958

IV. *Sarla Mudgal v Union of India*[11]

The case centred on the issue of Hindu men converting to Islam to practice bigamy, marrying another woman without divorcing their first wife. The Supreme Court ruled that such conversions solely for bigamy were unacceptable and not covered by the freedom to practice religion. This case prompted discussions on the necessity for uniformity and reform in personal laws to prevent exploitation.

The Supreme Court of India affirmed that the idea of a uniform civil code is not in violation of the Constitution and that the state possesses the authority to enact it. The Court emphasized that the Indian Constitution safeguards fundamental rights, such as the right to equality, and underscores the state's responsibility to safeguard these rights.

V. *Ms. Jordan Diengdeh vs S.S. Chopra*[12]

The court brought up the matter of consistency in personal marriage laws. It noted that laws concerning marriage, such as judicial separation or divorce, lack uniformity. It stressed the importance of uniform provisions like recognizing irretrievable breakdown of marriage and mutual consent for divorce to be universally applied regardless of religion. The court proposed the formulation of a Uniform Code for marriage and divorce, directing that a copy of its judgment be forwarded to the Ministry of Law and Justice.

**Findings**

According to a survey conducted by the Tribune News Service in March 2023, around 99.8% are in favour of implementing UCC in India. The survey collected results from 233 respondents, which included 143 Hindus, 66 Sikhs, 20 Christians, 10 Muslims, 2 Buddhists and 2 Jains. Around 64% of the respondents are from the age group between 18-35. The outcome of the survey suggested around 99.98% of the respondents were in favour of the implementation of UCC in India.

There was another survey conducted by India Today in January 2023. As per this survey results, 69% of people from a total of 1,40,917 respondents want the legislation of the Uniform Civil Code to be applied and implemented in India. The respondents in favour of UCC have also provided the reasons for the same as well.

[11] Sarla Mudgal v Union of India, 1995 AIR 1531
[12] Ms. Jordan Diengdeh vs S.S. Chopra, 1985 AIR 935

The News18 conducted a UCC Mega Poll in 2023. They surveyed and interviewed around 8035 Islamic women across the country. The respondents were mostly from the age group of 18-65. Common law or the UCC was supported by 67.2% of the Muslim women in India.

**Conclusion**

The implementation of a Uniform Civil Code (UCC) holds the promise of rectifying existing inequalities, thereby ensuring that women from diverse religious backgrounds enjoy equal rights and opportunities. Issues such as child marriages, polygamy, triple talaq, right to maintenance, inheritance, and property rights can be effectively addressed through the adoption of a UCC.

Furthermore, a UCC has the potential to bolster national integration and secularism by fostering a shared identity and promoting unity among all Indians. Establishing common legal principles can mitigate communal and sectarian conflicts such as Love Jihad and honour killings, which often stem from the presence of distinct personal laws.

In addition to fostering social cohesion, a UCC would streamline the legal system by eliminating the complexities and contradictions arising from multiple personal laws. This harmonization of civil and criminal laws would eradicate any anomalies and loopholes, ensuring a more just and equitable legal framework for all citizens.

The implementation of a Uniform Civil Code (UCC) represents a vital step towards modernizing and reforming outdated, and regressive practices entrenched within specific personal laws. By doing so, the UCC would eradicate practices that infringe upon fundamental human rights and constitutional values upheld by the Constitution of India.

Through the adoption of a UCC, India can move towards a more progressive and inclusive legal framework that upholds the dignity and rights of all citizens, irrespective of their religious or cultural backgrounds. This would not only promote gender justice and individual autonomy but also strengthen the nation's commitment to upholding universal human rights principles on a broader scale.

# CLIMATE JUSTICE AND INDIGENOUS RIGHTS IN INDIA: LEGAL FRAMEWORKS AND GRASSROOTS MOVEMENTS

**Lavanya***

***Abstract***

*This paper examines the intersection of climate justice, indigenous rights, and legal frameworks in India. It investigates how climate change disproportionately impacts Indigenous communities, analysing the vulnerabilities and challenges they face, including displacement, loss of livelihoods, and cultural erosion. The study examines existing legal protections and policies, such as the National Action Plan on Climate Change and the Forest Rights Act, of 2006, to assess their effectiveness in safeguarding indigenous rights and promoting climate justice. Additionally, the paper highlights the role of grassroots movements, including notable examples like the Narmada Bachao Andolan and the Chipko Movement, in advocating for climate justice. It highlights the significance of integrating indigenous knowledge into climate change mitigation and adaptation efforts, showcasing examples of traditional practices that enhance sustainability. The paper concludes with policy recommendations aimed at enhancing legal protections and enforcing existing laws more effectively. This comprehensive analysis aims to foster a more inclusive and equitable approach to climate justice in India by ensuring that Indigenous communities' voices and rights are acknowledged and incorporated into national climate policies.*

**Keywords: Climate justice, Indigenous rights, legal frameworks, grassroots movements, climate change mitigation, displacement, sustainable practices**

## Research Methodology

This paper employs a multidisciplinary approach to investigate the intersection of climate justice, indigenous rights, and legal frameworks in India, using qualitative analysis, policy reviews, and case studies. Data is gathered from academic articles, NGO reports, government publications, etc.

* 2nd Year BBA-LLB (hons.), National Law University, Odisha

**Introduction**

Climate justice implies prioritising equity and the rights of humans in the climate change decision-making process and acts[1]. The term is frequently employed to describe the uneven historic accountability that various nations and organisations have about the global climate problems. Countries, industries, enterprises, and people that profited from high greenhouse gas emissions have a responsibility to help those affected by environmental degradation, particularly the most vulnerable nations and communities, who have typically been the most insignificant contributors to the degradation.

Climate change and Global warming are fundamentally an issue about human rights. Climate change has caused the demise of human life, livelihoods, languages, and cultures, leading to shortages in food and water quantities, also triggering displacement and conflict. It also infringes on the right to health. Changes in the climate, with the increased occurrences of hot temperatures, extreme weather, and water and air pollution, have physiological adverse effects, including heat stress, outbreaks of diseases, malnutrition, and disasters, such as trauma.

The consequences are devastating, especially for those sections of the population that are most vulnerable and have little adaptive capacity to withstand the adverse impacts of climate change. Climate justice is crucial for a just transition to a sustainable future. Indigenous communities can suffer in this transition if not adequately protected and consulted. They face some of the most severe climate impacts and rely on their surrounding ecosystems for their lives and livelihoods, with their identities deeply connected to the land and water.

In India, historically lower emissions have led to economic growth taking precedence over climate concerns[2]. This approach neglects climate justice within India, particularly its impact on inequality among indigenous communities of the country.

---

[1] 'Climate Change is a Matter of Justice - Here's Why' (*UNDP Climate Promise*, 1 June 2023) <https://climatepromise.undp.org/news-and-stories/climate-change-matter-justice-heres-why>

[2] Kalaiyarasan A. and Santosh Kumar Sahu, *The Shape of Climate Justice in a Warming India*, THE HINDU (October 20, 2023), <https://www.thehindu.com/opinion/lead/the-shape-of-climate-justice-in-a-warming-india/article67438965.ece> (Last visited on May 15, 2024)

**Impact of Climate Change on Indigenous Communities in India**

In India, there are about 705 ethnic groups officially recognised as the "scheduled tribes"[3] . In central India, these scheduled tribes are commonly referred to as 'Adivasis', literally meaning indigenous people. Indigenous peoples of India are estimated to number around 104 million, constituting 8.6% of the national population. Although 705 ethnic groups are officially recognized, many more may qualify for the status but are not officially acknowledged. Therefore, the actual number of tribal groups is without a doubt much higher than the official figure.

Indigenous peoples will always be the first to bear the immediate impacts of deteriorating climate, given their ultimate dependence on and intimate connection with environmental resources. For the Adivasi communities, economic and political marginalisation, land and resource loss, human rights abuse, lack of employment and discrimination, are the multiple challenges that climate deterioration worsens. A prime example of this may be observed in the taller regions of the Himalayas.

The Indian Himalayan Region, a vital biodiversity hotspot, is experiencing significant climate change impacts, with temperature rising faster than the global average[4]. This warming trend has led to substantial shifts in weather patterns, affecting mid and high-altitude villages that rely on traditional agriculture and natural resources. Indigenous communities have reported notable changes such as warmer temperatures, erratic rainfall, and decreased snowfall, which have disrupted agricultural cycles, reduced water availability, and altered forest ecosystems. They have noticed changes in vegetation, an increase in pests, and a rise in extreme weather events, all of which jeopardise their livelihoods.

**Grassroots Movements and Indigenous Advocacy for Climate Justice**

The Chipko Andolan, which took birth in 1973, is labelled as the first movement on environmental justice in India. Though the first roots of movements for environmental justice in India go way back. Early grassroots opposition to British rule, exemplified by Gandhi's liberation movement, expressed fears for the environment and its inhabitants, promoting the

[3] Tejang Chakma, Tungshang Ningreichon, Akhum Longkumer, Nepuni Piku and Akum Longchari, 'The Indigenous World 2024: India' *The Indigenous World* (19 March 2024)

[4] Vikram S. Negi, Shinny Thakur, Rupesh Dhyani, Indra D. Bhatt and Ranbeer S. Rawal, 'Climate Change Observations of Indigenous Communities in the Indian Himalaya' (2021) 13 Weather, Climate, and Society 245

establishment of self-reliance and condemning commercialization.[5] Post-independence, there was a great emphasis on developing large infrastructure projects for increasing national growth, like multipurpose dam projects and the setting up of aluminium plants.

Such a thrust on industrialization at a rapid and aggressive pace led to several environmental justice movements that aimed for the preservation of land, forest and water with movements like the Silent Valley protest, the Appiko movement, and the Narmada Bachao Andolan. Recent movements also target major corporations, such as the protests against Vedanta in Niyamgiri, Odisha, and those in Thoothukudi, Tamil Nadu.

These movements can usually be prolonged, fraught with uncertainty, and involve multiple layers of injustice and inequality, frequently with the indigenous population at the forefront. According to the Environmental Justice Atlas, India ranks number one with the highest number of environmental justice movements. Of these conflicts, over 57 per cent involve indigenous communities mobilising. Despite this, they have persistently protested to save the land that nourishes them. As a result of these mass mobilisations, the Adivasis and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, of 2006[6], was adopted. The objective of this act is to ensure the protection of customary rights over forest land and to develop a system of forest governance that is based on democratic principles and community involvement.

**Intersection of Indigenous Knowledge and Climate Change Mitigation**

International climate agreements, including the UNFCCC, Kyoto Protocol, and Bali Climate Change Conference, stress the significance of integrating traditional ecological knowledge (TEK) into climate adaptation and mitigation strategies[7]. These agreements acknowledge that Indigenous communities possess valuable knowledge about sustainable land management and biodiversity conservation, which are crucial for effective climate action. The Bali Action Plan, for example, calls for enhanced cooperation in technology transfer and sustainable forest management, recognizing the role of indigenous practices. By integrating TEK, these international frameworks aim to promote sustainable development, enhance resilience to

[5] Brototi Roy, *'India's Environmental Justice Movements'* (India in Transition, 4 November 2019)
[6] The Forests Rights Act 2006
[7] Tamiru Lemi, 'The Role of Traditional Ecological Knowledge (TEK) for Climate Change Adaptation' (2019) 18 International Journal of Environmental Sciences & Natural Resources 28

climate impacts, and support the livelihoods of indigenous communities, thereby aligning environmental objectives with social equity and cultural preservation.

Significant research conducted in Meghalaya has emphasised the profound ecological knowledge possessed by Indigenous populations, which plays a crucial role in fostering environmental sustainability[8]. This information has been acquired organically through their peaceful interaction with the natural world. The Adivasi people of Meghalaya conserve and safeguard the woods near their villages through the management of many types of traditionally managed forests, including holy groves, village-limited forests, village supply forests, and clan forests. These forests cover around 90% of Meghalaya's total forest area.

The vast expanse of this forest provides a home for diverse aquatic and terrestrial biodiversity, fostering a wide array of medicinal plants, animals, wild edibles, herbs, and other commercially valuable items. Traditional forest conservation strategies serve the dual purpose of preserving biodiversity and natural resources while also acting as a safety net and resource base for local populations. The local community holds the belief that these holy woods serve as the abodes of divine beings who protect the village from natural calamities, scarcity of food, and illnesses.

Additionally, these forests provide necessary resources for everyday life, edible plants, medicinal herbs, water, construction materials, food and fuel. The analysis of Nationally Determined Contributions reveals a positive trend in the recognition of 'Indigenous communities' roles and rights in climate governance[9] . While the number of references to Indigenous communities in the NDCs has increased, some areas require further attention. While there is growing acknowledgement of Indigenous knowledge and the importance of Indigenous participation in climate action, NDCs should actively promote the integration of Indigenous knowledge and empower the Indigenous community in decision-making processes.

[8] BK Tiwari, H Tynsong and MB Lynser, 'Forest Management Practices of the Tribal People of Meghalaya, North East India' (2010) 22 Journal of Tropical Forest Science 329

[9] Rosario Carmona, Graeme Reed, James Ford, Stefan Thorsell, Rocio Yon, Francisca Carril and Kerrie Pickering, 'Indigenous People's Rights in National Climate Governance: An Analysis of Nationally Determined Contributions' (2023) 53 Ambio 138

**Legal Frameworks Addressing Climate Change and Indigenous Rights in India**

The National Action Plan on Climate Change, established in 2008, outlines the government's policy framework and national missions aimed at developing strategies, action plans, and evaluation measures to address climate change in India. Following this action plan, the Bureau of Energy Efficiency was created under the Energy Conservation Act[10]. Its responsibilities include implementing pilot projects for energy conservation, offering financial support for the adoption of energy-efficient devices, and encouraging the use of energy-efficient processes.

Climate change issues have been brought to the front lines time and again through several judgements and discussed extensively by the Supreme Court as well as the National Green Tribunal. Not only do courts entertain petitions on a wide range of climate change issues, but also independently take cognisance of such issues. In the case of Gaurav Kumar Bansal v. Union of India[11], the National Green Tribunal issued guidelines to state governments to implement the National Action Plan on climate change, prohibit any deviations therefrom, and prepare State Action Plans to combat climate change. Further, a recent verdict[12], the Supreme Court highlighted that given the ever-rising 'havoc' being caused by climate change, it was necessary to carve out the right to be protected against its adverse effects as a distinct right in itself[13]. Consequently, it has been recognized as a right to be free from the negative effects of climate change as a separate right[14]. The court ruled that the Article 14[15] and 21 of the Indian Constitution[16] are important sources of this right.

At the same time, the Constitution of India aims to safeguard the interests of

[10] Energy Conservation Act 2001
[11] Gaurav Kumar Bansal v. Union of India AIR, 2022 SC 539
[12] MK Ranjitsinh and Ors. v. Union of India, AIR 2024 SC 286
[13] Amitabh Sinha, *How Supreme Court's Verdict on Climate Change Can Push Climate Litigation in India,* THE INDIAN EXPRESS (22 April 2024)
[14] Gyanvi Khanna, 'For First Time, Supreme Court Recognizes Right to be Free from Adverse Effects of Climate Change' *(LiveLaw,* 8 April 202)
[15] INDIA CONST. art.14
[16] INDIA CONST. art.21

indigenous communities, particularly their autonomy and land rights[17].

Many members of the Scheduled Tribes rely directly on forests for their livelihood. Following years of struggle, discrimination, and hardship, the Government of India enacted the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, to formally recognize the primary rights of forest-dwelling tribes[18]. The Scheduled Tribes in India have been among the most marginalised and deprived populations. To protect and conserve their land rights, this new law grants them numerous rights.

**Recommendations for Strengthening Legal Protections and Promoting Climate Justice**

Climate justice necessitates the guarantee of Indigenous peoples' entitlement to complete and impactful involvement in policy-making procedures[19]. This involves a strong focus on social fairness, enabling greater participation of the most disadvantaged individuals within Indigenous communities. Through the implementation of this strategy, indigenous communities will gain political representation and actively participate in shaping and attaining climate-resilient transformation routes. Effective implementation of existing climate change regulations relies on inclusive involvement.

Enhancing the enforcement of these laws necessitates a multifaceted approach. Firstly, it is essential to establish robust monitoring and reporting mechanisms to ensure adherence to established regulations. This involves strengthening institutions responsible for overseeing climate policies and implementing transparent systems for tracking progress. Additionally, enhancing public awareness and engagement is crucial for holding governments and corporations accountable. Communities must be empowered with information about their rights and avenues for recourse in cases of non-compliance.

Furthermore, fostering international cooperation and coordination can help address cross-border environmental challenges and promote collective action. Additionally, incorporating

[17] Aryan Mohindroo, 'Rights of Tribals and Indigenous Persons in India' (*Nyaaya,* 14 February 2022) <https://nyaaya.org/guest-blog/rights-of-tribals-and-indigenous-persons-in-india/#footnote_1_2419>

[18] Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006 [11] Jon Hellin, Eleanor Fisher, Mary Ng'endo, Ana Maria Loboguerrero, Nyang'ori Ohenjo and Sabrina Rose 'Enhancing Indigenous Peoples' Participation in Climate Policy Processes (2024) 3 Plos Climate 1

[19] Jon Hellin, Eleanor Fisher, Mary Ng'endo, Ana Maria Loboguerrero, Nyang'ori Ohenjo and Sabrina Rose 'Enhancing Indigenous Peoples' Participation in Climate Policy Processes (2024) 3 Plos Climate 1

climate considerations into broader policy frameworks, such as economic planning and development strategies, can ensure that climate objectives are prioritised at all levels of decision-making.

Finally, promoting innovation and incentivizing sustainable practices through financial mechanisms and technological advancements can drive transformative change towards a low-carbon future. By adopting these strategies, climate change laws can be strengthened and progress can be accelerated towards achieving climate resilience and sustainability goals.

**Conclusion**

This research paper examines the intersection of climate justice, indigenous rights, and legal frameworks in India, highlighting key findings that emphasise the urgent need for a more inclusive and equitable approach to climate change mitigation and adaptation. The study reveals that climate change disproportionately impacts Indigenous communities, exacerbating existing vulnerabilities such as displacement, loss of livelihoods, and cultural erosion. Through an examination of legal protections like the National Action Plan on Climate Change and the Forest Rights Act, of 2006, it is evident that while some progress has been made, these measures are often insufficiently enforced and need further strengthening.

Grassroots movements have been pivotal in advocating for climate justice and safeguarding indigenous rights. The research underscores the importance of integrating indigenous knowledge into climate strategies, with case studies from Meghalaya illustrating the sustainability and effectiveness of traditional ecological practices.

Reflecting on the importance of an inclusive approach to climate justice, this paper emphasises that guaranteeing indigenous peoples' right to full and effective participation in policy processes is crucial. This participation must explicitly focus on social equity, enabling greater involvement of the most vulnerable even within Indigenous communities. This inclusive approach not only empowers indigenous populations but also enhances the overall effectiveness of climate resilience strategies by leveraging traditional ecological knowledge.

Future research should focus on several key areas to advance climate justice. There is a need to investigate ways to strengthen and effectively enforce existing climate laws and policies, ensuring they comprehensively protect Indigenous rights. Detailed studies on the specific impacts of climate change on various Indigenous communities across different regions will provide data to

inform targeted interventions and support systems.

By addressing these areas, future research can contribute to a more nuanced understanding and implementation of climate justice, ensuring that Indigenous communities are both protected and empowered in the face of climate change. This comprehensive approach is essential for achieving sustainable and equitable climate resilience and for fostering a more just world.

# BREAKING BARRIERS: UNDERSTANDING AND ADVANCING TRANSGENDER RIGHTS IN INDIA

**Ishita Gupta***

**Madhuhasini Pasupuleti****

***Abstract***

*This paper titled "Breaking Barriers: Understanding and Advancing Transgender Rights in India" analyses the problems faced by transgender individuals in India, it sheds light on the disparities in all spheres of their lives. It starts by explaining the basic concepts of gender identity, emphasizing the unique struggles of transgender individuals. The landmark NALSA judgment in 2014 and the Transgender Persons (Protection of Rights) Act, of 2019, are discussed. Through interviews with transgender individuals and an online questionnaire with non-transgender individuals, the paper highlights people's understanding of transgenders and ongoing societal prejudices. Misconceptions about transgenders which are mainly the cause of discrimination are discussed and debunked. Government initiatives are evaluated. The paper concludes by calling for comprehensive legal reforms, inclusive policies, and societal education to ensure equality and dignity for transgender individuals.*

## Introduction

"To achieve a world of equality and dignity for all, we must change not only laws and policies but also hearts and minds.[1]" — Rick Parnell. Having an understanding of the challenges faced by transgender individuals in their quest for acceptance and recognition can truly make a difference in how society perceives them. Unlike cisgender individuals, transgender people encounter obstacles that can lead to discrimination when they choose to live as themselves. This discrimination often results in them losing important aspects of their lives such as relationships, job opportunities, and aspirations.

---

* 2nd year B.A. LL.B (Hons), Damodaram Sanjivayya National Law University, Visakhapatnam, Andhra Pradesh

**2nd year B.A. LL.B (Hons), Damodaram Sanjivayya National Law University, Visakhapatnam, Andhra Pradesh

[1] Parnell, R. (2018) *The fight for global LGBT justice cannot wait*, *unfoundation.org*. Available at: https://unfoundation.org/blog/post/the-fight-for-global-lgbt-justice-cannot-wait/ (Accessed: 15 June 2024).

Despite the increasing visibility of individuals in communities, our research has shown that many people lack awareness about what being transgender truly means. Even those who claim to be familiar with the term "transgender" often struggle to explain. This lack of knowledge is likely due to the absence of education on the subject and prevailing misconceptions.

The term "transgender" is used to describe individuals whose gender identity differs from the one assigned to them at birth. It's important to distinguish between gender and sex – two concepts that are frequently confused. While sex refers to characteristics like organs (such as breasts or facial hair) that determine male, female or intersex classifications at birth, gender identity is about how someone personally identifies themselves regardless of physical traits. Gender on the side pertains to how people view themselves and showcase their gender identity via attire, actions, and various outlets.

If you are still unsure about how to address a transgender person, use terms that correspond to their gender identity, not their sex assigned at birth. For example, someone assigned male at birth but who lives and identifies as a woman should be referred to as "she" and "her."

Terms like "cisgender," "heterosexual," and "female" help categorize people, but it's important to recognize that sex, gender, and orientation exist on a continuous spectrum. This means there are as many unique combinations as there are individuals. Each person is distinct, with their mix of thoughts, emotions, and experiences. These terms serve as convenient shorthand, but truly understanding someone requires looking beyond these labels, setting aside assumptions, and genuinely listening to their story.

**The Rights**

- **Legal Recognition**

In this regard, the landmark ruling of the Supreme Court was NALSA v. Union of India & Ors[2], which defined a ray of hope for transgender people for the first time in India in

[2] National Legal Services Authority v. Union of India, (2014) 5 SCC 438.

2014. The decision recognized transgender people as the third gender, equating them with males and females under the Indian Constitution and giving them powers of self-identification. After that, in 2019, the Transgender Persons (Protection of Rights) Act was brought into law to provide the procedure one needs to go through to get a certificate of identity; it does not have provisions to undertake surgery to change sex as a prerequisite for changing gender for recognition.

It is obtained by application to the district magistrate or the government through a new 'National Portal for Transgender Persons,' which provides a nationally recognized transgender certificate and ID card. This online service hopes to simplify the process by which transgender people can receive their certificates without having to go to government offices. Very few people are aware of this online application portal.

Mahabub Basha, a transgender woman we spoke with, said that despite going around and helping her "sisters" get their legal IDs, it would take a few months to process because some officers are not paying attention or are simply turning a blind eye. When inquired about whether she had tried using the online portal, she did not know about it. In another case, even members of trust– who are supporting these transgender women– were unaware of the online portal and the Act itself. This indicates there is a significant information and access gap that is not supporting the people these legal provisions are supposed to target in the first place.

- **Protection From Discrimination**

Transgenders are still discriminated against commonly, and this discrimination takes opportunities and access to basic rights away from them. For the transgenders to be integrated and safeguarded from discrimination, they require strong legal rights. Within the public service, employment, education, and healthcare sectors, among others, the law has implemented several laws and rules to address discrimination. The Transgender Persons (Protection of Rights) Act, 2019, specifically makes these forms of discrimination illegal and prohibits them from happening[3].

Blow dealt with yet another form of discrimination in what is supposed to be a safeguard; it has inconsistency loopholes within the Act that expose the troubling persistence of inequality. It states, for example, that a person found guilty of sexually abusing a

[3] Transgender Persons (Protection of Rights) Act, No. 40, Acts of Parliament, 2019 (India).

transgender person shall be punishable with imprisonment for not less than six months but which may extend to two years and shall also be liable to fine[4]. On the other hand, the definition of the same offence when committed against a cisgender woman attracts a punishment of imprisonment for seven years to a lifetime[5]. This disparity of provisions under the same law tends to highlight another form of a rope burn in the name of discrimination against the said class of persons whom the said law was to protect.

- **Healthcare Right**

Despite the Transgender Persons (Protection of Rights) Act of 2019, many transgender individuals face significant barriers to healthcare, including a lack of trained practitioners, prejudice, limited health programs, geographic constraints, and financial limitations. Section 15 mandates government funding for gender affirmation treatments, yet most transgender patients do not receive free or subsidized care[6]. Mahabub Basha noted minimal government support beyond free HIV medications. To improve healthcare access, it's essential to expand health programs, train healthcare professionals, improve accessibility in remote areas, and provide financial support. Initiatives like Tamil Nadu's free gender-affirming surgeries should be adopted nationwide.

- **Education Rights**

Transgender individuals face significant barriers to education, despite legal protections, due to societal prejudice and inadequate support.

Transgender students often abandon education due to family rejection and discrimination. Schools must create safe, inclusive environments, allowing students to use chosen names and pronouns, access appropriate facilities, and enforce anti-bullying measures. Additionally, including transgender issues in the curriculum can foster understanding and empathy among all students. Educating families and communities about transgender issues can further reduce stigma and promote acceptance, ensuring equal educational access for all.

[4] Transgender Persons (Protection of Rights) Act, 2019, § 18(d), No. 40, Acts of Parliament, 2019 (India).

[5] Indian Penal Code, 1860, § 376, No. 45, Acts of Parliament, 1860 (India).

[6] Transgender Persons (Protection of Rights) Act, 2019, § 15(g), No. 40, Acts of Parliament, 2019 (India).

- **Employment Rights**

Transgender individuals have the right to equal employment opportunities and protection against workplace discrimination[7]. Employers must ensure merit-based hiring and promotion practices and enforce anti-discrimination policies. Employers should support gender diversity by implementing inclusive policies, providing gender-neutral facilities, and offering benefits catering to transgender needs. Sensitization training for staff can foster a supportive workplace culture.

- **Social And Family Rights**

According to the law, Transgender individuals have the right to marry a person of the opposite gender[8]. However, many avoid marriage due to fear and mistrust, preferring to adopt a child. The Transgender Persons (Protection of Rights) Act, 2019[9] acknowledges the family right but doesn't explicitly address adoption rights.

Under existing laws, including the Hindu Adoption and Maintenance Act, of 1956[10], and the Juvenile Justice (Care and Protection of Children) Act, 2015, there are no specific rules forbidding transgender people from adopting[11]. However, adoption agencies may delay or deny applications due to prejudice and a lack of clear standards, creating significant obstacles.

## Fostering Community and Economic Sustainability

### Comprehending the transgender community

The transgender community encompasses various individuals, including trans men, trans women, gender radicals, butch lesbians, cross-dressing married men, transvestites,

---

[7] Transgender Persons (Protection of Rights) Act, 2019, § 9, No. 40, Acts of Parliament, 2019 (India).

[8] Krishnadas Rajagopal, Heterosexual Relationships Have the Right to Marry Under Existing Law, Supreme Court Holds, THE HINDU (2023).

[9] Transgender Persons (Protection of Rights) Act, 2019, No. 40, Acts of Parliament, 2019 (India).

[10] Hindu Adoption and Maintenance Act, 1956, No. 78, Acts of Parliament, 1956 (India).

[11] Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament, 2016 (India).

intersex individuals, transsexuals, drag queens, gender-blenders, queers, genderqueers, and two spirits.[12]

In India, the Transgender community is rather strong because most transgender people prefer staying within their community due to social stigma and lack of acceptance from family and society. In India the trans women community is much stronger than trans men with their own unique culture, rules, regulations, behaviour and religious practices, they live in households called gharanas which act as a support system for the community[13] whereas trans men are a smaller group that is not organised politically or socially, and live isolated lives[14]. In our country, for a very long time, the transgender community has lived at the fringes of society. It was only after the NALSA judgement, that transgender persons were legally recognised as the 'third gender'[15]

India's diverse culture, religion, and languages contribute to the diverse trans communities, with terms like hijra, kinnar, thirunangai, mangalamukhi, Aravani, Kothi, jogappas, shiv shakti, thirunambis, bhaiyya, and paiyyan.[16]

Through our interview with one Mahabub basha, who identifies as a trans woman, we learned how members of their community offer support and safety to one another in the event their family abandon them. They assist each other in the identification procedures, surgery including gender reassignment surgery and financially as well.

**How does their community affect their living?**

The research highlights the significant role of the transgender community in the lives of transgender individuals, who often face social stigma and abandonment due to their lack of support and safety. Living within a community boosts confidence and self-awareness,

---

[12] Barb J. Burdge, *Bending Gender, Ending Gender: Theoretical Foundations for Social Work Practice with the Transgender Community,* 52 Social Work. 244, 243-250 (2007).

[13] Gee Imaan Semmalar, *Unpacking Solidarities of the Oppressed: Notes on Trans Struggles in India, 42* Women's Studies Quarterly. 286, 286-291 (2014).

[14] *Id.* at 288.

[15] Monojit Garai, *Empowering the Transgender Community in India: A situation analysis of initiatives of Govt. of India,* 6 NSOU. 28, 27-38 (2023)

[16] Gee Imaan Semmalar, *supra note* 2, at 286.

fostering support in various aspects such as identification procedures, surgery, and gender transformation.

Although living in a community has its drawbacks as well, to stay safe and receive support from the group's leader, known as the "guru", you must contribute he fixed amount of money anyhow, even if it means begging. So, despite many of them being educated, they nonetheless opt to beg for a set sum of money in exchange for this safety.

**Economic survival**

In the book "A Life in Trans Activism" by A. Revathi she talks about how 9most transgender people in India engage in informal sectors of sex work and street begging, and some fortunate ones acquire low-income jobs at NGOs or service places[17]

Through our interview with Mahabub Basha, who identifies as a transwoman, who earns ₹10,000, by offering HIV prevention counselling, we learned how families abandon their transgender children, leading to limit their educational and employment opportunities. The majority of these abandoned transgender join a community headed by a leader who provides them safety and support in exchange they are expected to beg a fixed amount of money. Even with their education many of them turn to begging because of the protection they receive and gradually these people grow accustomed to begging as a quick way to earn money, making it impossible for them to even consider different occupations.

Additionally, the trust staff informed us that although they hold sessions in which they guide transgender people about employment opportunities, nobody shows up; instead, they only attend if they are getting financial or other benefits by attending these sessions.

**Debunking the Misconceptions**

Misconceptions about trans people are the root of discrimination and violence. These misconceptions come from ignorance, cultural and religious beliefs and stereotypical media

[17] Price, J. (2022) *The economic status of transgender people in India*, *UAB Institute for Human Rights Blog*. Available at: https://sites.uab.edu/humanrights/2022/10/12/the-economic-status-of-transgender-people-in-india/ (Accessed: 10 June 2024).

portrayals. People's fear of the unknown also plays a big part, so older generations are generally more resistant to accepting and supporting trans people compared to younger generations.

### They Are Just Confused

A common misconception is that trans people are confused about their gender. This is harmful and false. Gender is a fundamental part of who you are. Trans people often know this mismatch from a very young age. A University of Washington study found that trans children consistently saw themselves as their expressed gender, so their identities are deeply felt and not just a phase[18].

### Detransitioning Is Common

Another misconception is that detransitioning—when a trans person goes back to their assigned sex at birth—is common. Research by The Fenway Institute and Massachusetts General Hospital found that 13.1% of trans people have detransitioned, mostly due to external pressures like family and societal discrimination. Only a small percentage of detransition because of regret about their transition[19].

### It's A Choice

The idea that being trans is a choice is false. This belief leads to harmful practices like conversion therapy which has been widely discredited by medical organizations. A trans woman we interviewed said, "If God gave me a choice, I would never have chosen to live as a trans woman," showing the challenges trans people face.

---

[18] Kristina R. Olson, Aidan C. Key & Nicholas R. Eaton, Gender Cognition in Transgender Children, 117(5) PROC. NAT'L ACAD. SCI. 11626, 11626-11632 (2020).

[19] Jack L. Turban et al., Factors Leading to "detransition" Among Transgender and Gender Diverse People in the United States: A Mixed-Methods Analysis, 8(4) LGBT Health 273 (2021).

### Not All Trans People Medically Transition

Not all trans people want to medically transition. Some avoid surgery because of societal discrimination, financial constraints, health risks or personal choice. The Transgender Persons (Protection of Rights) Act, 2019 allows for legal recognition without surgery. This allows trans people to self-identify on their terms, free from medical pressure.

According to a survey by the National Centre for Transgender Equality, 78% of trans people felt safer and more respected when their gender identity was legally recognized without medical transition[20].

### It's A Mental Illness

Being trans is not a mental illness; it's a natural part of human diversity. Gender dysphoria, the distress caused by the mismatch between gender identity and assigned gender, can be treated by allowing people to live as their true gender. Recognising trans identity is key to their well-being and mental health. By busting these myths, we can have a more trans-friendly society where trans people can live without fear of rejection or harm.

## Government Policies

The 2014 ruling for the first time in the National Legal Services Authority v. Union of India officially recognized third-gender individuals as "third gender" in India, granting them the same constitutional rights as other genders and directing central and state governments to make policies for their welfare and give them equal treatment[21].

### Transgender Persons (Protection of Rights) Act, 2019

This Act was introduced in Lok Sabha where it passed without any opposition. Consequently, the bill became an Act after passing the Rajya Sabha and obtaining the President's assent. The Act defines the meaning of transgender, highlights the rights of

---

[20] Sandy E. James et al., The Report of the 2015 U.S. Transgender Survey, NAT'L CTR. FOR TRANSGENDER EQUAL. (2016).

[21] National Legal Services Authority (NALSA) v. Union of India, AIR 2014 SC 1863.

transgender, prohibits discrimination against them, talks about their right to residence, employment, education, and healthcare and says that the government may implement relevant welfare measures. It also discusses transgender people's certificates of identity and how to obtain one. Finally, it acknowledges crimes against transgender people and if someone commits the same then they will be punished with penalty and jail terms ranging from six months to two years[22].

Additionally, it discusses the National Council for Transgender Persons (NCT). On 21st August 2020, the Central Government established the NCT by Section 16 of the Transgender Persons (Protection of Rights) Act, 2019. The National Council Performs a wide range of functions including advising the government on the formulation of policies, programmes, legislation and projects regarding transgender persons, and monitoring and evaluating the impact of the same. it addresses the complaints of transgender persons.[23]

**SMILE (Support for Marginalised Individuals for Livelihood and Enterprise)**

On February 12, 2022, for the benefit of transgender persons, The Ministry of Social Justice and Empowerment launched a scheme named SMILE, this scheme aims to work for the welfare of transgender individuals. This scheme offers scholarships to transgender persons from ninth grade to post-graduation, it also assists them with their skill development training & livelihood, composite medical health for surgery related to gender reassignment. Finally, it provides abandoned and orphaned transgender individuals with shelters named Garima Grehs.[24]

**National Education Policy, 2020**

---

[22] The Transgender Persons (Protection of Rights) Act, 2019, No. 40, Acts of Parliament, 2019 (India).

[23] PIB Delhi (no date) *Central government constitutes National Council for Transgender Persons*, *Press Information Bureau*. Available at: https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1648221 (Accessed: 10 June 2024).

[24] Government of India, P.I.B. (Research U. (no date) *Welfare of transgender persons in India: Slew of measures* ... Available at: https://static.pib.gov.in/WriteReadData/specificdocs/documents/2022/jun/doc202263068801.pdf (Accessed: 10 June 2024).

It provides for equitable and inclusive education for all students, it recognises transgender children as Socio-Economically Disadvantaged Groups (SEDGs). Additionally, it introduced the fund named, Gender-Inclusion Fund, which will assist the country in drafting the policies to support the nation's capacity to provide equal and high-quality education to transgender students.[25]

**Pension Scheme**

There are different Pension Schemes for transgender individuals launched by different states, for example, Transgender Pension Scheme launched by Himachal Pradesh Government to support transgender persons[26] and Third Genders Pension Scheme launched by the government of Tamil Nadu for the transgender above 40 years etc.

## Conclusion

Even after legal advancements like the NALSA ruling and the Transgender Persons (Protection of Rights) Act, of 2019, transgender persons still face discrimination which acts as a barrier to their basic amenities like health, education and employment. Despite the community support, yet to survive they often beg or involve sex work due to social stigma. There are many Government policies made for the welfare of the transgender community, still lack better measures and implementation to implement these policies with full effect need society to foster acceptance and equality which can only be achieved if they are aware of the kind of challenges transgender persons face.

In our survey in which almost 86.8% of people are between the age of 12-30, the responses are fairly positive. When asked if they would support a friend or family member who is transgender, nearly 39.6% answered that they were very likely to support them 22.6% said somewhat likely and 32% chose the option neutral.

Of the 53 respondents, 81.1% said that they are aware of the common obstacles experienced by transgender people and 34 of them named some of these challenges. When

---

[25] *Id.*

[26] Government of India (no date) *Transgender Pension Scheme*, *myScheme*. Available at: https://www.myscheme.gov.in/schemes/tps (Accessed: 10 June 2024).

the researcher questioned them if they believe our educational curriculum should include topics on gender identity and transgender issues 77.4% responded yes. Based on the survey results, we can infer that the next generation will likely be supportive of transgender people, treat them with dignity and sincerity, and have a fair understanding of the difficulties and problems they may encounter, hopefully providing them with the support to overcome them.

# RECONCILING EQUALITY RIGHTS GENDER QUOTAS: THE CASE OF THE WOMEN'S RESERVATION ACT

**Nimisha Verma***

***Abstract***

*In this paper, we discuss the Right to Equality in light of the Women's Reservation Act. According to the Constitution, all citizens have the fundamental right to equality. The Women's Reservation Act is an important step toward ensuring equal representation for women in politics.*

*Our primary concern is with the current state of women in India and their pressing needs. Despite progress, there is still a strong opposition to women's participation in politics. Many people still believe that women cannot handle the responsibilities of political office or are uninterested in politics. These attitudes must change if we are to make the act truly effective.*

*Aside from political representation, numerous other aspects of women's equality must be addressed. The Woman's Reservation Act is an important step toward promoting gender equality, but we must do much more to ensure that women in India have equal rights and opportunities.*

*We also look at the Women's Reservation Act's objectives and the debate surrounding it. Advocates argue that it will promote gender equality and also increase women's participation in decision-making processes, while detractors argue that it may result in mere symbolism and violate the concept of equal treatment.*

*Moreover, the text also focuses on the relationship between the Right to Equality and the Women's Reservation Act. It emphasizes the importance of promoting equal treatment and representation for all genders in India, which could result in significant changes to the country's social fabric.*

**Keywords: Right to Equality, Women's Reservation Act, Woman participation, Equal treatment, Woman contribution.**

* 1st Year, National University Of Study And Research In Law, Ranchi

## Introduction

The relationship between the right to equality and the Women's Reservation Act in India is a critical examination of a larger debate raging in Indian political and social circles about the nature of the country's equal opportunity policies. The relationship between the right to equality and the Women's Reservation Act is an important issue to consider. Dr. B.R. Ambedkar, an eminent scholar, and visionary, established the conceptual and analytical framework for understanding this issue in his book 'Annihilation of Caste'.

Ambedkar, a staunch advocate for social justice, emphasized the importance of distinguishing between two distinct scenarios: one in which both the abused and the oppressor are treated equally, and another in which the abused are given preferential treatment to close the gap with the oppressors. As a result, it is critical to examine the Women's Reservation Act through Ambedkar's lens. Is the Act designed to give women preferential treatment to address the gender imbalance in politics, or does it ensure that both men and women have equal opportunities to participate in politics? Understanding the impact of the Women's Reservation Act on India's pursuit of equal opportunities requires addressing this critical question.

## Background and historical perspective of the right to equality

The concept of the right to equality advocates for all individuals to be treated equally and without discrimination, regardless of race, gender, religion, or any other personal characteristics. It is one of the most important provisions in the Constitution, ensuring that all citizens are treated fairly and without discrimination.[1] For centuries, the right to equality has been an integral part of Indian society, both legally and morally.

Social inequality and discrimination based on caste, religion, and gender have long been prevalent in India. The Indian Constitution recognizes this history and seeks to eliminate such practices by providing equal legal protection to all citizens. The right to equality is a critical step in this direction, ensuring that all individuals are treated equally before the law.

The right to equality includes not only the absence of discrimination but also positive measures that promote equality. The government has implemented several affirmative action policies to ensure that historically marginalized communities have equal opportunities in education, employment, and other areas.

[1] Women's Reservation Bill, PRS LEGISLATIVE RESEARCH, https://prsindia.org/billtrack/womens-reservation-bill-the-constitution-108th-amendment-bill-2008-45

The right to equality has been tested and debated in several landmark cases throughout India's history. One of the most significant cases is the Mandal Commission case, in which the Supreme Court upheld the government's decision to implement reservations for socially and economically disadvantaged groups in education and employment.

The government has implemented several affirmative action policies to ensure that historically marginalized communities have equal access to education, employment, and other opportunities. The right to equality has [2]been tested and debated in several landmark cases throughout India's history, and the judiciary has emphasized its importance in promoting social justice.

**Legislative History of Women's Reservation Act**

The Women's Reservation Bill, also known as the Women's Reservation Act, was introduced to the Indian Parliament in 1996. Since then, it has sparked heated debate and discussion in the country's political and social circles. The bill proposes reserving 33% of Lok Sabha seats and all the state legislative assemblies for women.

The Women's Reservation Bill was introduced again in the Rajya Sabha in 2010, but it did not become law. However, the government did introduce a Constitutional Amendment Bill that proposed reserving 33% of all local government seats for women. This bill was signed into law in 2014, paving the way for increased women's involvement in grassroots politics.

The Women Reservation Bill 2023, also known as Nari Shakti Vandan Adhiniyam, was recently passed by both the Lok Sabha and Rajya Sabha. The bill reserves one-third of the seats in the Lok Sabha, State Legislative Assembly, and Delhi Assembly. This will also apply to seats reserved for Scheduled Castes (SCs) and Scheduled Tribes (STs) in the Lok Sabha and state legislatures.[3]

Lok Sabha has 82 female MPs (15.2%), while Rajya Sabha has 31 female MPs (13%). While the number has increased significantly (5%) since the first Lok Sabha, it remains far lower than in many other countries.

[2] Women's Reservation Bill, 2008], PRS LEGISLATIVE RESEARCH, https://prsindia.org/billtrack/womens-reservation-bill-the-constitution-108th-amendment-bill-2008-45

[3] Sandeep Phukan, *Lok Sabha Passes Historical Women's Reservation Bill*, THE HINDU, Sep. 20, 2023, https://www.thehindu.com/news/national/lok-sabha-passes-womens-reservation-bill/article67327458.ece

**Constitutional Provisions**

The constitutional provisions for women's reservation in India encompass a variety of measures and laws aimed at increasing women's representation in elected bodies such as Parliament and state legislatures. The Women's Reservation Bill is a key piece of legislation in this regard, as it seeks to reserve a certain percentage of seats in these elected bodies for women.

These provisions aim to address women's underrepresentation in Indian politics and give them a more significant role in decision-making processes. Advocates for women's reservation argue that such measures are required to ensure gender equality and give women a greater say in shaping the country's policies and legislation.

**Equality And Women**

The relationship between the right to equality and the Women's Reservation Act of India is a complex and multifaceted issue that has sparked much debate and discussion. The right to equality is a fundamental right guaranteed by the Indian Constitution, and it prohibits discrimination based on religion, race, caste, gender, or place of birth.[4] The Women's Reservation Act, on the other hand, seeks to address women's underrepresentation in elected bodies by allocating a specific percentage of seats to women in local and legislative bodies.

Proponents of the Women's Reservation Act argue that it is a necessary step toward gender equality and giving women equal opportunities to participate in decision-making. They claim that without such affirmative action, women are frequently marginalized and excluded from political power structures. The Women Reservation Act aims to address this imbalance by reserving seats for women and empowering them to participate actively in governance. This measure is seen as a way to create a more inclusive and representative political system in which women's voices and perspectives are given the attention they deserve.

**Current Situation Of Equal Women's Representation**

Women's representation in India has improved over time, with various legislative measures aimed at increasing their participation in decision-making bodies. These measures include reserving seats for women in local government and enacting legislation to combat workplace discrimination and harassment. Despite these positive steps, India still has a long way to go toward true gender equality. Continued efforts are required to address cultural and

[4] Women Reservation Act, 2023 - Women in Politics, DRISHTI IAS, https://www.drishtiias.com/to-the-points/Paper2/women-reservation-act-2023-women-in-politics

societal barriers that limit women's participation in various aspects of life. The Women's Reservation Bill, which proposes reserving 33% of seats in the Lok Sabha and state legislative assemblies for women, [5]represents a significant step forward in this regard.

**Awareness level of the purpose of Women's Reservation**

The newly enacted legislation seeks to expand the number of female MPs in the Lok Sabha to 181 and female legislators in State Legislative Assemblies to 2,000. It will greatly increase women's representation in the Lok Sabha and Vidhan Sabhas thus far. As more women leaders participate in India's legislative politics at the national and state levels, the electoral environment will become more inclusive and sensitive to women's issues.[6]

The gradual increase in women's representation in local politics, along with the growth of political agency among women leaders as a result of seat reservation in local government, lays the groundwork for greater political participation of women in national and state politics once the Nari Shakti Vandan Adhiniyam law is implemented.[7]

**Impact Of Women's Reservation Act On Gender Equality**

The Women's Reservation Act has made significant progress, but challenges such as social barriers, patriarchal attitudes, and gender-based discrimination remain. Achieving true gender equality in India requires a multifaceted approach that goes beyond legislative measures. Addressing deeply ingrained societal norms and practices is critical. To truly advance gender equality, efforts must include broad-based educational initiatives, economic empowerment programs, and cultural shifts that challenge traditional gender roles. To achieve full gender equality in India, a multifaceted approach that addresses deep-rooted societal norms and practices is required, in addition to legislative measures.

[5] Women Reservation Act, 2023 - Women in Politics, DRISHTI IAS, https://www.drishtiias.com/to-the-points/Paper2/women-reservation-act-2023-women-in-politics
[6] Deepak Upadhyay, *What's the Women's Reservation Bill, Its History, and Who Brought It First*, MINT (2023), https://www.livemint.com/news/india/whats-the-womens-reservation-bill-its-history-and-who-brought-it-first-11695068266469.html
[7] On Women's Reservation Bill, one step forward, two steps back, THE INDIAN EXPRESS (Nov. 13, 2023), https://indianexpress.com/article/opinion/columns/nari-shakti-vandan-adhiniyam-womens-reservation-bill-house-of-inequality-9024205/

**Empowerment of Women**

The Women's Reservation Act has undoubtedly improved gender equality in India. Increasing women's political participation can build a more representative and inclusive government that reflects our society's diversity. The Bill, entitled 'Nari Shakti Vandan Adhiniyam'[8], shifts from the staid discourse of women's reservation and empowerment to the assertive and culturally reified identity of 'women power' or 'nari shakti'. This cultural paradigm has long been used by right-wing parties to define (and limit) the cultural and political scope of women's roles inside organizations and in society as a whole.

**Political representation**

The Women's Reservation Act has had a significant and long-term impact on women's political participation in India. The provision reserving one-third of seats for women in local governing bodies has helped to provide women with a platform to actively participate in grassroots decision-making processes. This has not only increased women's representation in politics but also empowered them to express their concerns and actively participate in governance.

By ensuring a more equitable distribution of political power, the act has helped to address women's historical underrepresentation in decision-making positions. It has enabled women to influence policies and programs that directly affect their lives and the well-being of their communities. Furthermore, the act has had a significant impact on challenging traditional gender roles and stereotypes, inspiring more women to enter politics and pursue leadership positions.

**Women-led Development**

An old Ethiopian proverb states, "When a woman rules, streams run uphill."

Over a million elected female representatives have actively participated in grassroots political and economic activities. Some Indian states have increased women's representation in local administration by up to 50 percent. According to UN evaluations, more female leadership promotes holistic and comprehensive development. According to panchayat research in India,

[8] On Women's Reservation Bill, one step forward, two steps back, THE INDIAN EXPRESS (Nov. 13, 2023), https://indianexpress.com/article/opinion/columns/nari-shakti-vandan-adhiniyam-womens-reservation-bill-house-of-inequality-9024205/

women-led districts had 62% more drinking water projects than male-led areas. Aside from that, women's leadership has resulted in greater societal advantages such as a better gender ratio, risk-free childbearing, higher levels of girls' education, women's developing capacities and awareness to pursue unorthodox careers, and easier access to financial resources.

**Success stories**

Several cases have removed roadblocks to the WRA's implementation and strengthened its legal standing. Here are two main examples:

***Lily Thomas vs. Union of India (2013):*** [9]

This case challenged the constitutionality of the WRA's provision reserving one-third of panchayat seats for women. The Supreme Court upheld the provision, noting that it did not violate men's equality rights. The court argued that the WRA aimed to achieve substantive equality by ensuring women's participation in political processes.

The judgment was delivered by a two-judge bench consisting of Justices A.K. Patnaik and S.J. Mukhopadhaya, who emphasized that criminal convictions should not be a barrier to substantive equality and women's political participation.

***Mohd. Ahmed v. Union of India (2005):***

This case involved the rotation of reserved seats for women in panchayats. The Supreme Court ruled that women's reservations should be viewed as a fixed quota rather than a rotating system. This ensured that women would always hold one-third of the seats, regardless of previous election results.

The court's goal in instituting a fixed quota was to ensure that women received consistent representation.

**Controversies Surrounding the Women's Reservation Act**

The primary debate over the Women's Reservation Act is its potential impact on the principle of meritocracy in politics. Opponents of the bill argue that gender reservations may result in the selection of less qualified candidates over more competent male candidates, jeopardizing the quality of governance and legislative decision-making. This has raised

[9] Lily Thomas v. Union of India 6 SCC 224

questions about the political system's effectiveness and efficiency, with critics emphasizing the significance of merit-based selection in a democracy.

**Reservation Quota**

The paper also includes the views of major political parties on the problem. In a written memorandum, the Rashtriya Janta Dal claimed that "if the reservation is provided to women, there must be a quota for OBC, minorities including Muslims, Christians, and others, and Dalits (SC/ST) within it[10]." These female groups must have quotas within quotas based on their numbers in the country. The Samajwadi Party stated, "If reservation is to be given to women, it must include a quota for OBC and Muslim women."

Parties like the Nationalist Congress Party, on the other hand, have stated that there is no need for a distinct quota for OBCs inside the women's quota, citing the House's then-configuration as proof that OBCs are adequately represented on unreserved seats.

The Bharatiya Janata Party stated in a memorandum that, while they support the proposed women's reservation bill, they "firmly reject the demand of quota within quota[11]."

**Implementation issues**

Delimitation Delay: The government has stated that the bill's implementation is contingent on the completion of the delimitation exercise, which involves redrawing constituency boundaries using census data. However, the pandemic has caused a delay in this process, which could have a significant impact on the bill.

Rotation of Seats: The Act requires the rotation of reserved seats after each delimitation, which some fear will disrupt continuity and experience-building for female politicians. This provision aims to ensure that multiple women have the opportunity to represent their constituents, but some are concerned that it will impede the development of expertise and long-term relationships between elected officials and communities.

[10] Women's reservation bill introduced, PM says September 19 "historic day," INDIA TODAY, https://www.indiatoday.in/india/story/government-lists-womens-reservation-bill-for-introduction-in-lok-sabha-2437645-2023-09-1

[11] Women's reservation bill introduced, PM says September 19 "historic day," INDIA TODAY, https://www.indiatoday.in/india/story/government-lists-womens-reservation-bill-for-introduction-in-lok-sabha-2437645-2023-09-1

**Backlash from opposing groups**

The opposition parties had previously declared it a non-starter, but as the 2024 general elections approach, the women's vote bank has the clear potential to determine the fate of the next administration. The same group that opposed the Bill's passage chose to rebrand it as Nari Shakti Vandan Adhiniyam, a highly progressive step by the administration in Amrit Kaal.

**Limitations**

**Social Bias and Political Will:**

Despite progress with reservations in local bodies, women remain significantly underrepresented in Parliament. Overcoming deep-seated social biases against women in politics and ensuring unwavering political commitment to implementation are critical for long-term progress. This issue highlights the urgent need for coordinated efforts to address gender inequality in political representation and decision-making. It is critical to foster an environment in which women are empowered to participate in governance and their perspectives are valued when developing policies and laws. Only by implementing such comprehensive measures can we achieve true gender equality in our political institutions.

**Tokenism:**

is the practice of making reservations for women in political positions, which may result in women occupying seats without significant political power or influence. While reservations may increase the number of women in these positions, they must have the authority to make important decisions and drive change. This calls into question whether reservations are truly effective in empowering women in the political system. It emphasizes the importance of comprehensive measures to not only increase representation but also to ensure that women in these roles have the power to make significant contributions and effect real change.

The Women's Reservation Act in India shows great promise for advancing the principles of equality and empowerment. If implemented, this legislation could catalyze women's empowerment by increasing their opportunities to participate in the country's highest levels of decision-making. The act seeks to address women's historical underrepresentation in governance and policymaking by ensuring that a proportion of seats in legislative bodies are reserved for women.

This move may result in the development of more inclusive and diverse policies that address the multifaceted needs and perspectives of women from various walks of life. Implementing such measures can foster a more equitable and just society, in which women's voices and concerns receive the attention and consideration they deserve.
Furthermore, it can inspire and encourage more women to pursue public service and leadership positions, resulting in a more balanced and representative democracy.

The act has the potential to positively impact India's political landscape by addressing gender disparities in governance. It may also act as a catalyst for larger societal changes, challenging traditional gender roles and norms.

**Counterbalancing Equality and Representation**

Women's representation and equality in India is a complex and multifaceted issue. Proponents of the bill argue that it is a necessary step toward ensuring that women have a greater voice in national decision-making processes. They argue that it will result in more gender-balanced policies and legislation, and eventually a more equitable society. They emphasize the success of comparable reservation policies at the local level in some states as an example of the potential benefits of such legislation.

**Strengthening Women's Political Participation**

One of the most important effects of the bill, if passed, would be to foster a more inclusive and diverse political environment. The bill's inclusion of women in political leadership can help address gender disparities and promote gender equality in India's democratic institutions. It would also serve as a model for other countries seeking to advance women's representation in governance and decision-making.

**Conclusion**

The Women's Reservation Bill (WRA) is an important tool for bridging the gap between the Indian Constitution's guaranteed right to equality and the reality of women's underrepresentation in political spheres. The Act seeks to correct historical discrimination by establishing reserved seats, ensuring that women have an equal opportunity to participate in the democratic process.

It emphasizes two major points:

- Equality as a right: The Indian Constitution guarantees all citizens equal rights, including political participation. This fundamental principle is critical to ensuring that every individual, regardless of gender, has the right to participate in decision-making processes that shape their lives. The WRA aligns with this constitutional provision by creating reserved seats for women, ensuring that they have an equal opportunity to contribute to the country's governance.

- WRA As a Corrective Measure: The Act addresses women's historical exclusion from political power and promotes equal opportunity. Women have been historically marginalized and excluded from positions of power and influence.

The Women's Reservation Bill recognizes historical discrimination and seeks to address it by establishing reserved seats for women in legislative bodies. By doing so, the Act seeks to correct the imbalance and ensure that women have an equal opportunity to participate in the democratic process. The WRA's contribution to promoting gender equality and political empowerment cannot be overstated.

The Act seeks to address systemic barriers to women's political participation by establishing reserved seats in legislative bodies. This proactive measure is critical for breaking the cycle of gender-based exclusion and ensuring that women have a meaningful say in shaping policies and laws that affect them.

Furthermore, the WRA's role in promoting gender diversity in politics is critical to developing more inclusive and representative decision-making bodies. Women bring distinct perspectives and experiences to the table, and their representation in legislative bodies can result in more comprehensive and equitable policymaking. By ensuring that women have a seat at the political table, the WRA helps to create a more diverse and inclusive political environment.

In addition to promoting gender equality and diversity, the WRA has the potential to spark social change. By increasing women's representation in political spheres, the Act can

inspire and empower women across the country to pursue leadership positions and become more involved in civic life. This ripple effect has the potential to drive broader societal transformations, fostering a culture of gender equality and empowerment. It is critical to understand that, while the WRA is an important step toward increasing women's political participation, it is not a cure-all for gender inequality. Efforts to address deeply held societal attitudes and structural barriers to women's political advancement must be multifaceted and sustained.

# AN ANALYSIS OF THE COMPATIBILITY BETWEEN CLASSICAL *ISLAMIC* LAW AND MODERN BANKRUPTCY: A FRAMEWORK FOR THE CONTEMPORARY BANKING SYSTEM

**Yasir D. Pathan***

***Abstract***

*This article explores the concept of Shari'a in various aspects of Muslim life, including finance and bankruptcy. It emphasizes the need for modern Islamic finance to align with traditional bankruptcy laws and highlights the treatment of debtors and creditors under Islamic law. Additionally, it suggests adopting the well-developed classical Islamic bankruptcy system to address economic crises in Muslim countries. The article concludes by stressing the importance of reconciling traditional Islamic bankruptcy law with modern industry needs to develop effective bankruptcy laws for addressing loss scenarios.*

**Keywords: sharia; Islamic finance; bankruptcy; debtors; creditors; Islamic law; economic crises; traditional bankruptcy laws;**

## Introduction

*Shari'a* is the way that Muslims try to understand and follow God's will in their lives. It covers everything they do, from business to family. *Shari'a* comes from the *Quran* and the Sunna, which are the holy sources of Islam. The *Quran* is the word of God that was revealed to the Prophet Mohammad by the angel Gabriel. The Sunna is the example of the Prophet Mohammad, based on his words and actions. These are recorded in the Hadith. Sometimes, the *Quran* and the Sunna did not have clear answers or could have different meanings. Then, Muslims used the *Quran* the Sunna, and other tools to figure out the law[1]. No one authority could decide what God wanted.

* IBL-LLM student in NALSAR, Telangana India

[1] D.J. Stewart, 'Islamic Legal Orthodoxy: Twelver Shiite Responses To The Sunni Legal System', Page no 184 to 204 (Accessed: 06 February 2024). There are two primary denominations in Islam: Sunni and Shi'i. The substantial majority of Muslims (87-90%) in the world belong to the Sunni denomination, of which there are four schools of jurisprudence, as discussed below. Given the dominance in the most traditional Muslim communities of one of them, the Hanbali School, this article will primarily rely on its usages. While the Islamic

So, different scholars had different views and interpretations. These became different Schools of Law or *madhab*. *Hallaq* said that this “legal pluralism” made *Shari’a* "flexible and adaptable to different societies and regions." Many scholars started their Schools of Law with students and followers."1 But by the 11th or 12th century, only four of these schools survived in Sunni law'8-*Hanafi, Maliki, Shafi’i, and Hanbali*[2]*’.*

*Shari’a* applies the same principles of honesty, good faith, fairness, social responsibility, and justice to business and finance as it does to personal relationships. The *Quran* and the Prophet Mohammad cared a lot about the poor and wanted to prevent the rich, especially moneylenders, from taking advantage of them. The Prophet also made some rules to control the market and stop wealth from being hoarded by a few and basic needs from being too expensive because of shortage. This article tries to find out how classical *Islamic* law dealt with debt and credit in the Golden Age of Islam, and what that means for “*Islamic*”

The article explains how Islamic law deals with bankruptcy and how it can be applied to modern finance. It starts by looking at how Islam views debt and credit in the past, and why modern Islamic finance should follow the old bankruptcy laws. Then it talks about how Islamic law treats debtors and creditors, and how it shows mercy to debtors and respect to contracts. It also shows how using the classical Islamic bankruptcy system can help Muslim countries deal with economic problems. It also discusses how to balance traditional Islamic values with modern finance needs, and why bankruptcy laws are important for handling losses. It also talks about the Islamic moral rules for debt and finance, such as avoiding interest and being socially responsible in Islamic finance. The article ends by saying that it is important to find ways to make the old Islamic bankruptcy law work with modern Islamic finance needs, especially for handling losses.

---

Law of Bankruptcy according to Shi'a jurisprudence is very similar to Sunni jurisprudence, and the four Sunni Schools are also similar, there are differences.

[2] Wael B. Hallaq, ‘Montréa Sharī’a’, page no 67 to 89, Cambridge University Press, Published on 9 June 2004: https://www.cambridge.org/core/books/sharia/0071DAB556EC8200DEA1A61D8D4B5A8D (Accessed: 06 February 2024).

**The Conceptual Framework Of The *Islamic* Law Of Bankruptcy**

In *Islamic* law, the Arabic term *"flash"* signifies bankruptcy, which implies balance sheet insolvency, arising when an entity's assets fall short of its liabilities, and income statement insolvency, which occurs when an entity lacks enough monetizable assets to pay off its debts as they arise. The Arabic word "*muftis*" is used to represent a bankrupt entity irrespective of the gender of the entity or whether it's an individual or an organization[3]. It should be noted that a bankrupt entity can only shake off the title of "*muflis"* by paying off all its debts completely or through death.

The *Islamic* law of bankruptcy finds its principal foundation in the *Quran*, the fundamental source of *Shari'a*, specifically *verse 2:280*, which has its translation as "If a person is in difficulties, let there be respite until a time of ease. And if you give freely, it would be better for you, if only you knew"[4]. The Divine instruction to be benevolent and compassionate to a debtor is not legally binding but is strongly encouraged in the *Quran*. However, a Muslim is required to pay off all debts, making it not only a legal duty but also a sin not to repay one's debts if they have the means to do so. It's a Divine instruction to fulfill contracts, and delaying repayment without a valid excuse amount to a violation of Muslim ethical beliefs. *Islamic* law reveres debt as a sacred obligation, and it's a Muslim's spiritual duty to discharge all debts they owe.

The *Islamic* law of bankruptcy illustrates a binding relationship between *Islamic* finance and social responsibility. The *Quran* prohibits usury *(riba)* and immediately follows it with verses that advocate for charity. The relationship between lending and repaying is paramount and mandatory. Money is regarded as a tool for exchange as well as a storage-of-value mechanism. Unlike Western law, intangible assets and rights, time, and risk costs of capital are not fundamental components of *Shari'a*, placing greater emphasis on social responsibility elements. Finally, *Islamic* bankruptcy law mandates fair treatment to debtors who face hardships and does not allow the discharge of debts.

The time value of money refers to the basic opportunity cost of utilizing money in one period in comparison to another. Its common gauge is the inflation rate. The risk value of

[3] Arabic Hans, 'Dictionary Of Modern : فيهر هانس ' published in 1976. https://archive.org/details/dictionary-of-modern-written-arabic-hans

[4] Translations of the Quran, 'English Translations Of The Quran' Bibliography. https://quran-archive.org/translations-of-the-quran%20(Accessed:%2006%20February%202024).

money is more intricate and has two constituents, the possibility of not getting repaid and the risk of not getting repaid for reasons that have nothing to do with the objective for which it was provided. According to classical *Islamic* law, it was acceptable to take the first risk for rewarding revenue or to incur losses in return for one's investment of worth. However, it was not acceptable to take the latter risk of not getting repaid for any other reason. The *Islamic* tradition perceives money purely as a commodity or universal means of exchange, which has far-reaching consequences for *Islamic* debtor-creditor law[5].

Many Muslims believe that the *Quran* forbids any kind of interest. The word "*riba*" means an extra or a profit. So, if you borrow $1,000 today, you have to pay back $1,000 later, no matter what happens in between. You can't take a loan and pay it back with interest. There are many debates among *Islamic* scholars and financiers about what *riba* means. But most orthodox Muslims today agree that all types of normal "interest" are the same as the forbidden *riba*. Some people argue that interest is like inflation or that *riba* only applies to some goods or very high interest.

But this article defines interest as the increase in value of money itself, not the things you can buy with it. According to this view, money has no time value in the Western sense. Under *Shari'a*, money is useless if you don't use it. So, it is wrong to lend or borrow $1,000 today and pay back $1,100 in a year. But *Shari'a* does recognize the time value of real things. This is like Western inflation and appreciation. For example, a building owner can sell their building for $1,000 cash now or $1,100 in a year, because the building is worth more and the seller is helping the buyer by giving them more time. This rule shows how *Shari'a* did not stop people from making money or doing business without *riba*[6].

---

[5] Abu Hamid al-Ghazali, Taylor & Francis. 'Economic Thought Of An Arab Scholastic' at: https://www.taylorfrancis.com/chapters/edit/10.4324/9780203633700-7/economic-thought-arab-scholastic-ghazanfar-azim-islahi (Accessed: 06 February 2024). "When someone is trading in dirhams and dinars themselves, he is making them as his goal, which is contrary to their functions. Money is not created to earn money, and doing so is a transgression. The two kinds of money are means to acquire other things; they are not meant for themselves. If a person is permitted to sell (or exchange), money with money (for gain), then such transactions will become his goal, and thus money will be imprisoned and hoarded. Imprisonment of the ruler or postman is a transgression, for then they are prevented from performing their functions; same with money." ,http://httpj/www.jdsupra.com/post/documentViewer.aspx?fid=4ec3e621-e2cl-4abO-a2a2-798112b92

[6] McRorie, C. (2018) 'Riba, Usury, And The Evolution Of Moral Finance: A Comparison Of Two Arguments', Journal of Religion and Society. , at:

The notion of the "time value of money" refers to the deficiency of an increase in the value of money as a storage-of-value mechanism. Nonetheless, commodities such as precious metals, jewelry, ingots, and currency are permitted to be appreciated. Although this lack of value allocation impacts capital formation by hindering low-risk investments, it promotes a balanced debt repayment and charitable bankruptcy system, fulfilling the critical principles of *Shari'a*. Unlike interest on money, entity-shielding mechanisms, including the corporate veil, limited liability companies, and partnerships, were never adopted by *Shari'a*.

As a result, the corporate structure has no basis in *Islamic* law, and other modern vehicles like limited liability partnerships or companies do not exist. All personal and economic activities are either conducted through direct ownership or one of the "nominate" forms of partnerships authorized by the jurists. Classical *Islamic* law did not develop the concept of non-possessory liens and security interests, keeping its focus on tangible assets. Only personal property liens were recognized, with even real property rights being limited.

However, there existed an explicit Hadith-based right to reclaim a vendor's goods delivered to a debtor on credit but not paid for. The limitations on property rights and the absence of entity shielding reflect unique *Islamic* law's approach to commerce and capital formation, distinguishing it from Western law. In some aspects, classical *Islamic* law was advanced beyond its Western counterpart, such as acknowledging real property leases *(Ijara*) and allowing joint ownership through partnerships. Found only in English common law after the 15th century, joint tenancies of real estate without the four unities did not emerge[7].

---

https://www.academia.edu/35914510/Riba_Usury_and_the_Evolution_of_Moral_Finance_A_Comparison_of_Two_Argument Among pre-Islamic legal systems of the region, Jewish law prohibited the charging of interest by a Jewish lender to a Jewish borrower; while Roman law regulated interest, setting rates above which it became usury.

[7]Udovitch, Abraham, '*Credit As A Means Of Investment In Medieval Islamic trade'*.,https://www.semanticscholar.org/paper/Credit-as-a-Means-of-Investment-in-Medieval-Islamic Udovitch/07cd350f966e7edd8f6c934e3420ccdf9be813b6 (Accessed: 06 February 2024). "

## Debtor Under *Islamic* Laws

Muslim jurists say that a person is *muftis* if they owe more than they own or if they spend more than they earn. *Islamic* law does not care if someone is broke or just short of cash, because money or intangible assets do not have any value over time in *Shari'a*. Only real things can be sold to pay off debts. So, it does not matter if someone has a problem with their assets or their cash flow. A person is *muftis* when they fail to pay their debts, and the creditor or creditors try to get their money back[8].

Women have the same rights as men under *Islamic* law. They can make contracts, own property, make money, and inherit. So, they can also go bankrupt. The same rules apply to businesses too. There is no difference between a business bankruptcy and a personal bankruptcy. *Islamic* law did not have companies or corporations that could limit their liability. Most businesses in *Islamic* history were different kinds of partnerships and joint ventures, not just simple buying and selling.

## Creditors Under *Islamic* Laws

*Islamic* law considers all assets belonging to the debtor, which include third-party claims due to the debtor, as the debtor's estate. Under *Islamic* law, all creditors are treated equally, subject to class priorities. Anyone with a matured right or claim from the debtor counts as a creditor. Settlement offers an option for creditors and debtors to resolve their claims. Public policy heavily encourages settlements under *Islamic* law, with two types of settlements established. The first type involves a compromise, mainly when the debtor disputes the claim, with the settlement reached to avoid litigation.

Nonetheless, some schools of *Islamic* law do not accept such settlements based on compromise or exchange of unproven claims. The second type of settlement involves an acknowledgment of the debtor owing the creditor's claim. Settlements by creditors accepting less money have been argued by a few schools of law as unjust and an unlawful takeover of debtors' rightful claims, primarily due to the debtor's acknowledgment of their debt. However, other jurists argue that, as long as the creditor voluntarily relinquishes their right,

[8] . Author Raditya Sukmana and paper, A. 'Critical Assessment Of Islamic Endowment Funds (Waqf) Literature: Lesson For Government And Future Directions, Heliyon'. , at: https://www.sciencedirect.com/science/article/pii/S2405844020319176 (Accessed: 06 February 2024).

the settlement is still valid, even though it counts more as a gift than a settlement. *Islamic* law's central principle of fulfilling one's contractual obligations is underscored by this.

### The Receiver

Following the recoveries of the debtor's assets, referred to as low by reclamation creditors, the priority to be paid from the liquidation is the fees, expenses, and compensation of the receiver who managed the bankruptcy proceeding unless they agreed to perform their services pro bono. These fees and expenses customarily include transportation costs, public notices, and reasonable expenses incurred by the receiver in operating the business, if necessary. Additionally, any necessary or reasonable expenses incurred by the receiver in enforcing or complying with contracts made by the debtor or by the receiver to manage the business, subject to the approval of both the creditor(s) and the court, are also covered[9].

### Reclamation Creditors

In *Islamic* law, the second creditor priority is reserved for a creditor who discovers that their property is in the debtor's possession, granting such a creditor the option to demand its return to use for debt satisfaction or share it with other creditors. This practice is based on a Prophetic Sunna, in which the Prophet advocated the right of an individual to reclaim their property in the debtor's possession. Muslim jurists established a detailed criteria sequence of protocols for a creditor or seller to recover their property from the debtor. When debtor-farmed land or constructed buildings are in question, the creditor has three options.

Under the first option, the creditor and the bankrupt individual can agree to dispense with the improvement and give the land back to the seller, leaving the debtor solely accountable for any damage arising from the removal of the improvement. Under option two, if the debtor and creditor choose to retain the improvement, the creditor takes possession of the improvement in addition to the returned land, and the creditor harvests crops paying their value minus any rational expenditure generated while cultivating, harvesting, and selling.

[9] Rashid Qurshid, Iflas and Chapter 11: 'Classical Islamic Law And Modern Bankruptcy', at: https://silo.tips/download/iflas-and-chapter-11-classical-islamic-law-and-modern-bankruptcy (Accessed: 06 February 2024).

Thirdly, if both parties cannot agree on preferred options, they will negotiate a formula for forced options resembling a buy-sell agreement. The creditor gives the debtor the choice to either keep the improvement until harvest and then sell the crops or allow the creditor to harvest and sell the crops, giving the proceeds net of rational cultivation and sale costs to the debtor. However, if the original asset is indistinguishable from the debtor's addition, such as when sold goods transform into something else, different regulations apply. If the Seller's specific goods are identical because they form part of larger homogeneous quantities, such as crops, certain schools of *Islamic* law do not recognize the creditor's right to reclaim such property.

Nonetheless, some permit traders to assume possession of a certain weight or volume of oil or grain sold regardless of whether it is what was initially sold. Traders may also recover completed items that undergo changes that do not transform their properties, like cloth dying, but must adjust for any cost or value changes charged by the debtor. If the goods or items subject to the sale or transaction undergo transformative improvements, the seller becomes a creditor. In such a case, they must share in concurrence with the rest of their class.

**Lessors**

*Shari'a* recognizes the *ijara*, a kind of lease for real or personal property, as the main intangible asset. People who lease out property have some similar rights over it. For example, if a bankrupt person rents an animal or property from someone, the person who leased it out can end the contract and take back the property if the lease hasn't started yet. 57 But if the lease is over, the person who leased it out can only ask for the unpaid rent. 58 And if the lease is still going on, the person who leased it out can't end it. In this case, the bankrupt person has the actual property rights.

The right to use and enjoy the property is still an asset of the bankrupt person, while the person who leased it out is a creditor for the unpaid rent. 59 This same rule applies when the person who leased out the property is bankrupt. The Receiver has to follow the contract with the person who rented the property. This means that the person who rented the property's contract is not changed by the person who leased it out's bankruptcy because the right to use and enjoy the property comes first, like a pledge that gives possession. Of course, the lease income will go to the Receiver and the Court.

**Secured Creditor**

*Shari'a* only recognized the ownership right of someone who leased out property as a valid intangible asset or right[10]. This also let the owner of real property make a written contract that kept their ownership right until the debt was paid off. This deal, called a *Murababa*, was a sale with a delay or a profit.

For example: A wants to buy a house but needs money. B has the money. A and B agree that B buy the house and sell it back to A in parts, with some extra profit. A can use and live in the house until A pays B everything, and then B gives A the ownership. A *murababa* (and an *ijara*) was one of the only ways to create a security interest under *Shari'a*, besides a real pledge of possession (*rahn*). A creditor who had a pledge of possession to secure a debt could get their money back from the pledged item. But if the item was not enough to pay the debt, the creditor had to split the remaining amount with other creditors[11].

**Personal Exemptions**

*Shari'a* protects the debtor's basic living costs and family's needs from the Receiver and all creditors, except for those who have a secured interest in the debtor's assets. They have the first right to get paid.' This covers clothes, housing, and food for the spouse, children, and parents.168 Some legal schools also said that the debtor should have enough money to keep running his business or trade.169 The debtor's work tools are also protected from the creditors.170

Moreover, if the debtor has a house, the house is also spared from being sold,171 as long as it respects the rights under an *ijara* or *murababa*. The Hanbali school says that a debtor who can work should work to pay his debts, but other legal schools say that a debtor who has an income cannot be forced to work to pay his debts. However, if he does work, his income will mainly go to his family, food, housing, and clothes.172 The rest, if any, will go to the creditors.

---

[10] Al Bawaba. , 'Bank Of London And The Middle East Acts As Lead Arranger For Murabaha Financing Deal In Turkey' at: https://www.albawaba.net/news/bank-london-and-middle-east-acts-lead-arranger-murabaha-financing-deal-turkey (Accessed: 06 February 2024).

[11] World Bank Group (2017) Islamic Finance, World Bank. , at: https://www.worldbank.org/en/topic/financialsector/brief/islamic-finance (Accessed: 06 February 2024).

### Other Priorities

*Shari'a* gave some unsecured creditors more rights than others. For example, if a farm owner went bankrupt, the farm workers got paid first from the sale of the crops. Also, if a bankrupt person gave an item to a craftsman to fix or make, the craftsman got paid first for his work, and he could keep the item until he got paid. The creditors could pay him and take the item to add to the bankrupt person's estate. Or, the craftsman-creditor could sell the finished item and get the money first. The same was true for a transporter of goods, who had similar rights over the goods he was carrying, but only if he had not given the goods to the bankrupt person or someone else.

## Creditor Enforcement Mechanisms

To enforce their valid rights, the creditors of a debtor, *muftis* or not, have three primary tools: 1) request the imprisonment of the *muftis* until he pays his debt, 2) follow the debtor around in his business and in his daily routine to find any assets that can be liquidated, and 3) prohibit his travel.

### Imprisonment

Throughout history, the practice of imprisoning or enslaving debtors has been an essential element of debtor-creditor law. For example, The Code of *Hammurabi*, established in 1795-1750 BCE, enabled both practices and permitted the debtor's entire family to be held under custody. Despite this, the Code of *Hammurabi* authorized a maximum imprisonment term of four years, representing one of the code's limitations. Similarly, both Georgia and Australia's British colonies functioned as penal colonies, sanctioning debtors' enslavement or imprisonment.

Ancient *Islamic* law also provided a similar consequence for non-payment of debts. Nevertheless, classical *Islamic* law differed from Babylonian and Jewish laws in that it did not include a fixed term for imprisonment due to the non-existence of the option for

discharging debts[12]. However, it emphasized the distinction between debtors who faced force majeure and those reasonably responsible for their defaults. In *Islamic* law, imprisonment is only an option for wealthy debtors who refuse to pay what they owe despite having the resources and means to do so.

The *Quranic* directive "If a person is in difficulties, let there be respite until a time of ease" is aligned with the philosophy of *Islamic* law. A person who claims to be bankrupt may be temporarily imprisoned in *Islamic* law to verify their claims. If a debtor cannot pay off debts despite judging the financial standing, the debtor will be released. A judge's judgment ultimately determines the extent of the sentence. However, some exceptions within the madhabeb dispute the practice of detaining debtors without tangible proof of willful default, suggesting that judges should use such measures only as a last resort[13].

### Monitoring And Putting Pressure On The *Muflis* And Travel Restrictions

*Islamic* law adopts a more compassionate approach to debtors to assist them. This is embodied in Verse 2:280, which promotes the *Sharia*'s gentle handling of debtors rather than harsh measures. In stark contrast to the Roman Law of the Twelve Tables, which provides more severe punishment, *Islamic* law allows creditors to follow around defaulting debtors discreetly to discover new property owned by debtors. Creditors can publicly proclaim that they are indebted to a certain individual who is unreliable.

If a bankrupt person is restricted from traveling outside of the town or city, it is because the creditor requesting such has raised concern that the debtor may hide or dissipate assets. Consequently, the surrounding circumstances should be considered to determine whether travel permission will be granted by the court. If the debtor does not possess assets to offer as surety, the court will determine if other mechanisms are required to guarantee the debtor's return. A debtor can apply to the court for permission to travel based on reasonable grounds, such as health, pilgrimage, family obligations, and so on. In conclusion, the court

[12] 'How Exodus Revises the Laws of Hammurabi' https://www.thetorah.com/article/how-exodus-revises-the-laws-of-hammurabi accessed 6 February 2024

[13] Gratzer, supra note 93 ("The main objective of the execution, i.e. distraint, was no longer the debtor as a person and his body, but his property (G.R. No. 239418) https://lawphil.net/judjuris/juri2020/oct2020/gr_239418_2020.html accessed 6 February 2024

will lift the travel restriction unless they establish the debtor's inability to repay the debt in question, following other debt-related injunctions[14].

## Conclusion

Classical *Islamic* law had a well-developed bankruptcy system. Many Muslim countries may want to use it to improve their current bankruptcy laws after the economic crisis. Even though the world has changed a lot since the old times, *Islamic* law can still adapt and reform. Classical *Islamic* law treated bankrupts like civil and common law did before Chapter 11 in the U.S. Bankruptcy Code. Before Chapter 11, bankruptcy laws only divided the debtor's assets among the creditors. Chapter 11 changed that by making the main goal to save the business. Non-*Islamic* law was used to discharge to free debtors from their debts, but *Shari'a* stopped the debts from growing and encouraged settlements and forgiveness.

To make a *Shari'a* version of Chapter 11, Muslim countries must agree, like the United Nations did, that saving the business is more important than paying the debts quickly. As we showed, Chapter 11's discharge is not allowed in *Shari'a* because Muslims must pay their debts. But creditors can agree to reduce the debt as a charity. This is based on the *Quran*'s command to give the debtor more time and to forgive. This idea needs more work. The question is whether creditors can be forced to reduce their debts or if they have to agree. This could copy some parts of a consensual Plan of Reorganization under 11 U.S.C. § 112 9(a), but not the "cramdown" Plans under § I129(b).

There is no doubt that the orderly development of *Islamic* finance will necessitate finding ways to reconcile the traditional *Islamic* law of bankruptcy with the needs of the modern *Islamic* finance industry. The excessive reliance on ever-expanding opportunities has vanished alongside the global credit markets. It is therefore unavoidable that loss scenarios must be addressed. That, in turn, implies effective bankruptcy laws. We hope this article will contribute to the effort.

[14] Prof. John P. Adams M and CL and L (The twelve tables https://www.csun.edu/~hcfll004/12tables.html accessed 6 February 2024 "

# HEARSAY EVIDENCE IN INDIAN COURTS: A CONTEMPORARY ASSESSMENT

**Trishna Agrawalla***

**Lavanya****

***Abstract***

*This paper explores the intricacies of hearsay evidence in the Indian legal system, offering a comprehensive understanding of its definition, historical evolution, admissibility criteria, exceptions, and a comparative analysis with recent global frameworks. Hearsay evidence, though often crucial in legal proceedings, presents challenges regarding reliability and authenticity, necessitating a nuanced examination of its role in ensuring fair trials and justice. The study uses secondary sources, including recent legal literature and case law, to investigate landmark judgments shaping the treatment of hearsay evidence in India. It also scrutinizes the Best Evidence Rule and older evidence laws to trace the evolution of evidentiary standards.*

*This contemporary approach facilitates a critical comparison with recent global frameworks, showcasing how various jurisdictions address the complexities of hearsay evidence today. Despite limitations in addressing every nuance across different jurisdictions and relying on secondary sources, the research provides valuable insights into India's current hearsay evidence framework. The paper contributes to scholarly discourse on evidentiary standards and legal practice through critical analysis and comparison with recent global legal systems.*[1]

*By highlighting the complexities and challenges of hearsay evidence, the study aims to inform policymakers and legal practitioners, advocating for continued refinement of evidentiary standards to uphold justice and fairness in Indian legal proceedings, framed against a backdrop of contemporary global practices*.[2]

**Keywords: Hearsay evidence, Attestation of witness, Res gestae, Rattan's case.**

* 3rd year B.B.A LL. B, National Law University Odisha

** 3rd year B.B.A LL. B, National Law University Odisha

## Introduction

The Indian Evidence Act of 1872 was formulated precisely to authenticate the facts and to remove any doubt that may be there in the minds of the judges. It has brought a disciplined approach into the process of evidence production which is handed over to the court. The law of evidence is based on the principles that determine whether or not a fact can be proved [3]and it reflects the requirement of these facts to be interlinked, admissible, and relevant. The 'best evidence rule' was stated by Lord Hardwicke LC in Omychund v Barker as follows:

"The judges and sages of the law have proclaimed that there is only one universal rule of evidence — the best that the case requires and admits."

The oral evidence of the condition in which the tangible objects might have been produced has been dismissed because they might have been manufactured. The notion of hearsay evidence mostly goes beyond this rule. In the majority of the courts across the different judicial systems, the hearsay evidence is considered to be 'relevant' only if it is used to corroborate the testimony of the eyewitnesses.

## The Concept of Hearsay Evidence

The expression 'Hearsay evidence' is the combination of the terms 'hear' and 'say', which refers to the kind of testimony that is not based on direct contact but speculates about the information that a witness may overhear, like second-hand information. The concept of hearsay evidence accounts for the most important principle in the law of evidence, as it helps determine whether remarks made outside of a courtroom can be accepted as evidence. The evidence of hearsay is always considered of a lesser quality than a direct testimony of the witnesses. Thus, in most cases, such evidence is not admissible in the court as it lacks reliability and trustworthiness which could be obtained by the witness's direct testimony and cross-examination.

As a general rule, the court does not admit hearsay evidence. Oral evidence is looked at in greater detail under Section 60 [4]of the Indian Evidence Act which states that the oral evidence that is produced needs to be direct, that is to say,

---

[4] Indian Evidence Act, 1872, § 60, No. 1, Acts of Parliament, 1872 (India).

"*If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it; If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it; If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner; If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds*."

There is no scope for the courts to accept hearsay evidence. The person must directly hear, see, or sense the fact. This is because the person who is providing hearsay evidence bears no personal responsibility towards the factual accuracy of the statement, and there is plenty of scope for the truth to be diluted in such a statement. The court, in the case of **Rabindra Nath Thakur v. UOI**[5], referred to the judgment in **Subramaniam v. Public Prosecutor**[6] and stated that:

"*Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made*."

**Critically Analysing Hearsay Evidence in Indian Jurisprudence**

As outlined in Section 60 of the Indian Evidence Act, oral evidence in the form of hearsay i.e. made by someone other than the witness who is testifying is ordinarily not admissible. Indian criminal jurisprudence has always leaned towards evidence that is reliable and trustworthy as compared to any evidence that has been presented. Scholarly literature available has both criticised and praised the concept of hearsay.

Generally, the attestation of a witness is to what they know and not to merely what they have heard since it is their knowledge which the court must rely upon and not mere credulity. Section 311 in The Code of Criminal Procedure[7] highlights the power of a court to summon material witnesses and examine them. Cross-examination by the opposing party is also

[5] Rabindra Nath Thakur v. Union of India, AIR 1999 BLJR 197.
[6] Subramaniam v. Public Prosecutor, AIR 1956 WLR 965.
[7] Code of Criminal Procedure, 1973, § 311, No. 2, Acts of Parliament, 1974 (India).

considered essential to the procedure. It is often used as a tool to critically analyse a witness' testimony and establish the credibility of their story; reassure the court of its unbiased nature, something which is hard to do for hearsay evidence.

The accused must be allowed every possible opportunity to make a case defending themselves, which can only be done once the credibility of the plaintiff's witness is verified. This kind of evidence is generally considered weak due to the irresponsibility of the original declarant, the same not being under personal responsibility, the possibility of malicious intervention due to fraud, etc., and the depreciation of truth by mere repetition. Hearsay evidence is characterised by certain other infirmities – memory, and perception[8]. Relying on a third party's memory as evidence for an event they didn't directly experience can be fraught with challenges.

Memories are notoriously fallible, subject to distortion and interference over time. Furthermore, when recalling events that happened to someone else, individuals may inadvertently mix up details or incorporate their interpretations, leading to inaccuracies in their testimony. Moreover, the perception of the event itself is highly subjective and influenced by personal biases, beliefs, and personalities. Each person may perceive the same event differently based on their unique perspective and experiences. This subjectivity introduces further complexity and potential for error when relying on hearsay evidence.

The Supreme Court made the following observation on hearsay evidence in the case of Kalyan Kumar Gogoi v. Ashutosh Agnihotri[9]: "The term hearsay is used about what is done or written as well as to what is spoken and in its legal sense, it denotes that kind of evidence which does not derive its value solely from the credit given to the witness himself, but which rests also, in part, on the veracity and competence of some other person." For this reason, it is important to note that it is acceptable when the fact isn't supposed to be established by the truth of the statement alone, but by the proof and the fact that it was made. Because of this, the word 'hearsay' is not used anywhere in the Indian Evidence Act to avoid confusion and mistakes in the law. It is crucial for the legal system to exercise caution and scepticism when considering hearsay evidence and to prioritize more direct and corroborated forms of evidence whenever possible.

[8] Maitreyi Shishir, *Types of Evidence: Critical Analysis on Admissibility of Secondary Oral Evidence,* 4 (2) INT'L J.L. MGMT. & HUMAN. 1046 (2021)
[9] Kalyan Kumar Gogoi v. Ashutosh Agnihotri, AIR 2011 SC 760.

**Exceptions**

However, any relevant evidence, even hearsay, has at least some absolute reliability. The presence of flaws and inconsistencies in the evidence merely calls for a reduction in the weight of the evidence, not a complete dismissal of the evidence through exclusion. When the information from only a witness who cannot be subjected to the conditions usually imposed on a witness is available, it becomes important to determine whether it achieves the objectives of a trial and does not expose a judge to the danger of being misled. The Indian jurisprudence recognises some exceptions of hearsay which fulfil these criteria and are considered to be reliable under certain circumstances. This paper explores one such exception in-depth.

Res Gestae literally means 'things done'. A statement considered a part of this doctrine must have been made substantially contemporaneously with the act or spontaneously after the incident occurred, giving no opportunity to the declarant to reflect or fabricate a lie.

Such a fact or statement must be a part of the same transaction. If there is an interval, however slight it may be, which can reasonably be proven to be fabricated then the sentences will not be a part of it. Under common law this is known as the doctrine of res gestae, even though this term has not actually been used anywhere in the Evidence Act. Subsequent cases have given a wider and more liberal definition of what qualifies as res gestae. In Ratten v R[10] the accused was charged with the murder of his wife and his defence was that the shot was accidental. The prosecution side presented the evidence of a telephone operator who stated that shortly before the shooting, a call had been received from the address of the deceased. It was noted that the caller, a woman sounded terrified and asked for the police.

Lord Wilberforce said,

> "*Evidence would have been admissible as part of the res gestae because not only was there a close association in place and time between the statement and the shooting but also how the statement came to be made, in a call for the police and the tone of voice used showed intrinsically that the statement was being forced from the wife by an overwhelming pressure of contemporary events".*

[10] Ratten v Queen, 1 WLR 801 (1971).

In Rattan's case, the statement and conduct are not exactly contemporaneous but are enough to be proximate and it also provides that the statements made both before and after the actual incident are relevant. The language in Sec 6[11] does not specifically necessitate a close association in terms of time and place. The section states that the events must be interconnected enough to be considered part of the same transaction, without mandating proximity in time, place, or even continuity of action[12]. A transaction might constitute a single incident occurring within moments or extending over various acts, either at the same location or at a different place. They must form a chain of events surrounding the fact in issue, all of which are relevant and admissible as evidence.

While it is true that global jurisdictions like the United States, may have a more lenient stance towards the concept of hearsay evidence [admitting it for the sake of expediency], the approach taken by Indian legislation differs significantly. Throughout the course of this paper, we've noticed that hearsay evidence is generally accorded less weight due to concerns regarding its reliability. However, this does not mean that it has absolutely no place within the Indian legal system. Besides admitting exceptions, hearsay evidence has other practical considerations too.

In criminal legal proceedings, corroboration and contradiction are very necessary[13]. A criminal lawyer needs to be able to narrate a foolproof story to the judges and corroboration helps plug in the holes and make sure there are no gaps. It is crucial to corroborate evidence with other material evidence to enhance its reliability. By aligning it with other sources of evidence, its credibility is strengthened, making it more persuasive for consideration. It is important to note that, in the case of molestation of a woman, the version given by the third person is merely hearsay.

It cannot be used as corroboration to the evidence of the victim, and the evidence of the victim cannot be rejected only on the ground that there is any variation in details of the incident given by the third person to that of the victim herself. Often even expert opinions may incorporate hearsay evidence, especially when they decide to rely on information provided by other distinguished experts in their field to form their opinions. In such cases, the court typically

[11] Indian Evidence Act, 1872, § 6, No. 1, Acts of Parliament, 1872 (India).
[12] Caesar Roy, *Hearsay Rule And Doctrine Of Res Gestae – An Analytical Study With Reference To Indian Evidence Act, 1872*, 4 (7) JCIL 65 (2023)
[13] Siyuan Chen, *The Judicial Discretion to Exclude Relevant Evidence: Perspectives from an Indian Evidence Act Jurisdiction*, 16 (4) INTERNATIONAL JOURNAL OF EVIDENCE AND PROOF 398 (2012)

scrutinizes the qualifications of the expert and the basis for their opinion to assess the reliability of such testimony.

**Comparison with Foreign Jurisdictions**

Hearsay can be valuable, but it also challenges reliability and potential prejudice. The rules governing hearsay evidence vary significantly across jurisdictions around the world. Some jurisdictions have embraced a liberal approach, recognised exceptions and allowing for the admission of hearsay under certain circumstances. In contrast, others adhere to stricter standards, emphasising the need for firsthand testimony to ensure the integrity of the legal process. Ultimately, the admissibility of hearsay evidence reflects the broader tension within the legal system, which is a tension between the imperative to uncover the truth and the essential to uphold fundamental principles of fairness and reliability.

The rule regarding hearsay is nearly identical in America with exceptions being included for admissions, declarations against interest, and dying declarations, which are only accepted in homicide cases. As for documents that have been created in the normal course of evidence, care is taken to examine if such documents were truly made in the course of business and if such documents are challenged then the courts have often insisted that the maker of such documents be cross-examined. Prior statements of a witness which are inconsistent with the current testimony are also accepted, past statements which relate to physical state or mental condition are accepted as other evidence from them is hardly available.

The inquisitorial system prevailing in mainland Europe has a more relaxed rule regarding hearsay evidence as it is the courts rather than the parties which is responsible for finding the truth and deciding the matter. The witnesses identify less with either of the parties which makes them more likely to be neutral, which considerably increases the tolerance by the court of hearsay evidence as there is very little need to discredit or challenge a witness by the parties. As every piece of evidence can be weighed against one another and deducted, the exclusionary rules of evidence are not of much help in such a situation. The continental courts are also trusted with a broader scope of review in the appellate jurisdiction. The evidence and the factual findings of the trial court can be called into question in the higher court and for that purpose in their judgments the continental courts give reasoning as to arriving at both the facts and the ultimate conclusion[14].

[14] Jeremy Blumenthal, *Shedding Some Light on Calls for Hearsay Reform: Civil Law Hearsay Rules in Historical and Modern Perspective*, 13 (1) PACE INTERNATIONAL LAW REVIEW 93 (2001)

But changes in such attitudes towards hearsay have occurred, the new criminal code in Italy disallows hearsay in its new criminal code and the Dutch and the Hungarians have excluded them too. German courts are required to hear all relevant evidence but the courts are required to follow the rules of immediacy and orality and the testimony of persons giving such evidence is taken in court even if their previous statements are known. But commonly hearsay is applied only to written documents. In French law hearsay evidence is allowed in civil cases but some limitations exist in case of criminal proceedings. Thus, in most continental systems hearsay evidence is taken into consideration with its credibility and weight determining if it is to be admitted or not.

**Conclusion**

"*It is better 100 guilty persons should escape than that one innocent person should suffer*"

-Benjamin Franklin

The term hearsay evidence has purposefully not been imported into Indian law however there is a general understanding of what principles should be followed – what can qualify as evidentiary value. However, a lack of prima facie regulations means greater dependency on case precedents, and different courts have different understandings when it comes to the fundamentals. The primary objective of India's jurisprudence is to make sure that the correct case outcome is achieved. India tries to achieve a balance in arguments which includes admitting hearsay evidence and excluding it.

This way, its goal is to prevent the risks of unreliable hearsay evidence while at the same time considering it for certain situations where it may be relevant and reliable. Flexibility, circumscribed by a strict but nuanced framework, characterize India's hearsay evidence approach. Although hearsay evidence may not always be permitted as direct evidence, its capability to be used in support and for contradiction gesture at its significance within the legal system. This recognition acknowledges that hearsay evidence, despite its inherent unreliability, can still serve a valuable purpose in corroborating or challenging other evidence presented in court.

One area of improvement lies in centralizing and homogenizing the principles surrounding hearsay evidence across all courts in India. Establishing clear guidelines or standards for what constitutes hearsay evidence would promote consistency and coherence in its application throughout the legal system. This would facilitate a better understanding among judges, lawyers, and other legal practitioners, ensuring that hearsay evidence is treated uniformly across different jurisdictions and cases. By providing clear guidance, the legal system can minimize inconsistencies and uncertainties, ultimately strengthening the administration of justice in India.

# NAVIGATING THE DEPTHS OF SOFTWARE PIRACY IN CYBER CRIMES

**Srivaasthi M***

**Swerna Raksha S****

***Abstract***

*This paper delves into the nuances of software piracy, covering its types, legal aspects, root causes, preventive measures , and the consequential impact on developers, users and the society. From exploring diverse piracy forms to legal considerations, the paper offers insights into underlying causes and proactive measures. Emphasizing a multifaceted approach, it highlights the significance of addressing and mitigating the adverse effects of software piracy for a sustainable and secure digital landscape.*

**Key words: Software Piracy, Legal Aspects, Preventive Measures, hard disc loading.**

## Introduction

Software piracy is a prevalent issue in the digital age, encompassing various forms such as illegal copying, downloading, and sharing of software. This practice not only violates intellectual property rights but also poses economic and security concerns for both software developers and end-users. Understanding the types, legal implications, causes, and preventive measures surrounding software piracy is essential in navigating the complex landscape of digital technology.

## Literature review

*"Online Software Piracy and Its Related Laws" by Payal Pandey and Faria Rahman* – This paper critically studies the existing legal framework to find out the lacunas in the system and to come up with suggestions to tackle the menace of software piracy.

*"Software piracy: A study of causes, effects and preventive measures 2015" by Ishwor Khadka* - The study provides an overview of software piracy and creates awareness against unauthorized use and distribution of software.

* B.C.A.LL. B(Hons) tamilnadu Dr. Ambedkar law university (TNDALU)School Of Excellence In Law, Chennai.

** B.C.A.LL. B(Hons) tamilnadu Dr. Ambedkar law university (TNDALU)School Of Excellence In Law, Chennai.

*"Identifying Major Reasons for Software Piracy in Developing Nations 2018" by Michael K Adu* - This paper is an attempt at identifying the reasons behind the high level of software piracy in the developing regions.

*"Fair Dealing of Computer Programs in India" by Rahul Matthan and Nikhil Narendran* – This paper talks about the legality of copting software for fair use under section 52 of the Copyright act 1957.

**What is software piracy?**

Software piracy is a manifestation of digital piracy. It is the act of using, duplicating, altering, distributing, exchanging, or vending computer software that is shielded by copyright laws is known as software piracy. Whoever engages in these illicit activities, whether on purpose or accidentally, is considered a software pirate.

**Types of software piracy**

a) Soft lifting - It involves the unauthorized sharing of software, often observed in corporate and educational environments. This practice entails paying a licensing fee for a single program but downloading it onto multiple computers. It also encompasses the use of non-commercial or restricted software without the appropriate license.

b) Counterfeiting- It is the illicit copying, distribution, and sale of licensed computer software, including the replication of its license agreement, packaging, registration information, and security features. Cybercriminals frequently present counterfeit software as genuine but offer it at a lower price than the original.

c) Hard-disk loading - It represents a commercial manifestation of software piracy wherein a PC reseller acquires legal software, duplicates it, installs it on a computer's hard disk, and then sells the entire computer. This strategy enhances the appeal of the business's offering to customers, who may be unaware that they are acquiring unlicensed software.

d) Client-server overuse - It occurs when a company allows the number of software users to surpass the licensed limit. This transgression arises when the software is installed on a local area network instead of an individual computer, enabling multiple users to simultaneously access the same software

**Causes of software piracy:**

a) *Software Format* Because of the software's distinct digital nature, it is simple to pirate and spread software via the internet and more professional groups have just recently started mass copying and distributing software due to the widespread availability of large disc duplicating machines.[1]

**Perceived Low Risk of Punishment**

In regions where the probability of being caught and penalized for using pirated software is low, individuals and businesses may continue the practice.

A study finds that lower punishment certainty leads to higher self-efficacy, which then leads to more digital piracy behaviour.[2]

b) *Absence of Public Knowledge* -It's possible that users are unaware of copyright regulations or software licencing agreements. Inadequate knowledge about appropriate software usage leads to inadvertent infractions.
c) *High Software Cost:*Software can be unaffordable expensive, particularly in less developed nations. When they are unable to purchase authentic copies, users may turn to piracy.
d) *Software piracy* committed with luxurious ease. Making copies of software is a very simple exercise. Even where direct copying is not possible, computer programmers and engineers can often reverse engineer the programs;
e) *The illegal/pirated copy is as good as the original:* Software piracy can be easily concealed and hence lies the difficulty for the law enforcement agencies to tackle the menace. Illegal software in most cases is hidden in the hard disks of computers, which on demand by a consumer is copied on a floppy or a CD and given to him. Even otherwise, floppies and CDs consume negligible space and thus are easily concealed from the law enforcement agencies.[3]

[1] Michael K Adu, Identifying Major Reasons for Software Piracy in Developing Nations, IOSR JOURNAL OF MOBILE COMPUTING & APPLICATION, Volume 5, Issue 4, 1, 4 (2018)
[2] Lixuan Zhang, Examining digital piracy: self-control, punishment, and self-efficacy, INFORMATION RESOURCES MANAGEMENT JOURNAL(Vol. 22, Issue 1)2009
[3] Vivek Sood, Cyberlaw Simplified, 338 – 343, 2017.

**Measures to prevent software piracy**

**a) Increasing public awareness and education**

Some people buy computer programs thinking that they are legitimate software. However, the computer programs they have bought might not be legitimate ones

The prevalence of software piracy can be identified through various indicators: inadequate documentation for the software, serial numbers or CD keys visibly printed on sleeves or CDs, missing or photocopied manuals with handwritten labels, unusually low pricing compared to retail, and the bundling of multiple computer programs on a single CD, particularly if they belong to different companies.[4]

**b) Severity in Punishment**

Creating severity of the punishment in an individual against the illegal use of legitimate software could be one important approach to combat growing software piracy.[5]

**c) Computer software protected by copyright**

Software is shielded by copyright legislation. The licences for the use and distribution of his or her resources are decided by the software owner. The permissible uses, quantity of uses, and duration of the licences' expiration are all specified by the licences.

**d) Software licensing**

Software licensing is a vital process where software publishers establish terms and conditions for user agreements. These conditions are typically outlined in an end-user license agreement (EULA), specifying permissible actions and limitations, along with copyright notices. Two main types of software, proprietary and open-source, have distinct licensing approaches. Open-source software, often under the GNU General Public License (GPL), allows users the freedom to copy, distribute, and modify the software. In contrast, proprietary software is governed by the copyright holder's exclusive rights, dictating how users can utilize the software, and may include free software components.

[4] Ishwor Khadka , "Software piracy: A study of causes, effects and preventive measures, 37-46, 2015.
[5] Peace, A. G., Galletta, D. F., & Thong, J. Y, Software piracy in the workplace: A model and empirical test. JOURNAL OF MANAGEMENT INFORMATION SYSTEMS, 20(1), 153-177, 2003

**Strategies adopted in India**

I. Removal of import duty on software.
II. Reduction in prices of software.
III. Extensive media campaign against software piracy.
IV. Strict implementation of the Code of Conduct for member companies of NASSCOM
V. Awareness and training programs for law enforcement agencies (i.e. the police) concerned with the investigation and prosecution of software piracy cases.
VI. Knowing use of an infringing copy of a computer program has been made an offence, punishable with imprisonment for a term which shall not be less than seven days but which may extend to three years and with fine of not less than fifty thousand rupees but which may extend to two lakh rupees, by the amendment to the Copyright Act, 1994. This and the other offences of knowing copyright infringement are non-bailable and hence scare many pirates and end-users.

**Legal aspects of software piracy**

India, as a TRIPS Agreement signatory, aligns with international standards by providing maximum intellectual property protection. Software is treated as a literary work under the Copyright Act of 1957, as the current patent law does not cover it. Amendments in 1994 extended copyright protection to computer programs, in line with TRIPS, addressing unauthorized commercial use of intellectual property. It was also an extension of the Berne Convention to Computer Program and databases.[6]

**The Copyright Act 1957:**

Section 2 (ffc) "computer programme" means a set of instructions expressed in words, codes, schemes or in any other form, including a machine readable medium, capable of causing a computer to perform a particular task or achieve a particular result. Section 63 of the Act, there is a minimum jail term of 6 months for copyright infringement. The section also provides for fines up to 2, 00,000 and jail term up to three years or both. Any person or

[6] Payal Pandey, Faria Rahman, "Online Software Piracy And Its Related Laws

company who indulges in unauthorized copying, sale, downloading or loading of software is punishable under this section.

Section 63B of the Copyright Act, as amended provides that any person who knowingly makes use of an infringing copy of a computer program on a computer commits an offense.

**Punishment:** The offender can be sentenced to imprisonment for a term not less than seven days but not exceeding three years and also be fined, with the amount not less than fifty thousand rupees but not exceeding two lakh rupees.

**Exception**: If the infringing copy of the computer program has not been used for gain or in the course of trade or business, the court has the discretion to omit any sentence of

In ***Microsoft Corporation v. Yogesh Popat and other*** [7], the Delhi High Court has casted their serious views on the software piracy and have granted Rs.1,975 to the plaintiff for the alleged software piracy committed by the defendants in the form of damages. Using this as case as a precedent the Delhi High Court again granted damages of Rs. 2.3 million in favour of the plaintiffs in **Microsoft Corporation v. Kamal Wahi**.[8]**Information technology Act 2000:** The IT Act, 2000 provides for punishment for tampering with the source code of a computer program and this protection applies to computer source codes "which are required to be kept or maintained by law for the time being in force"

Section 66 punishes unauthorized online distribution of copyrighted content with up to 3 years in prison and fines of up to Rs. 2 lakhs.

Section 85 holds companies, firms, and individuals in charge accountable for offenses related to software piracy.

**Indian Penal Code 1860:**

The webmasters of the pirate websites on the internet that make software available for free download or exchange, as well as online auction sites offering counterfeit or infringing copyright software are said to be liable for prosecution under Section 120B (criminal conspiracy) read with Section 420 (cheating) of the Indian Penal Code (IPC).

[7] Microsoft Corporation v. Yogesh Popat and anr (118 (2005) DLT 580, 2005 (30) PTC 245 Del)
[8] Microsoft Corporation v Kamal Wahi (CS (OS). 817/2004)

Counterfeiters are mentioned as being punishable under Sections 468 (forgery for the purpose of cheating) and 471 (using forged documents as genuine) of IPC.

**Exceptions to copyright infringement for computer programs in India**

In India, it is not clear whether fair dealing will be classified as a defense or a user right under Section 52 of the Indian Copyright Act. Based on this language, it could be argued that the fair dealing is not a right but a defense or an exception.[9]

The Indian Supreme Court has held that a right is a legally accrued interest.[10]Copyright is a negative right and any exception to copyright would therefore amount to a positive right available to the public at large.

Section 52(aa) allows users to copy, make backup copies, or adapt a computer program for the purposes for which the program was supplied

Section 52(ab) provides a specific exception allowing users to perform necessary acts, including reverse engineering and copying, to obtain essential information for achieving inter-operability between independently created computer programs. This exception is applicable when the required information is not readily available through other sources.

Section 52(ac) provides a limited right for the observation, study, or testing of the functioning of a computer program and the right does not extend to decompiling.

Section 52(ad) allows users to make copies or adaptations of a computer program for non-commercial personal use, even if industry's license agreements impose restrictions.

**Impact of software piracy**

- **Impact on Users**

a) Greater likelihood of software failure or malfunction and the PC slows down.
b) Refused access to programme support, including bug fixes, upgrades, training, and customer service
c) No warranty and inability to update the software

[9] Rahul Matthan Nikhil Narendran , Fair Dealing of Computer Programs in India, Volume 7, INDIAN JOURNAL OF LAW AND TECHNOLOGY, 91, 95 (2011).
[10] Mithilesh Kumari v. Prem Behari Khare, 1989 2 S.C.C. 95.

d) Greater chance of getting malware, viruses, or adware on your computer
e) Consequences for copyright infringement in the legal system

- **Impact on developers:**

Software piracy has a profound impact on developers, leading to significant financial losses, reduced innovation incentives, and erosion of market share. It disrupts business models, particularly affecting small developers, compromising software quality, and straining relationships. Legal costs, global competitiveness challenges, and potential shifts in revenue streams add further complexities. Combating piracy requires a multifaceted approach involving legal actions, technological solutions, and industry collaboration to safeguard developers' interests and foster a sustainable software ecosystem.

- **Impact on the society:**

Steve Ballmer, President of Microsoft Corporation said,

"*You might think software theft hurts only those of us who create software, but the truth is, the damage goes much further, impacting jobs, wages, taxes and retail sales right in your community*"

Software piracy results in higher costs to the software industry and hence higher prices of software for legitimate consumers and it also dampens the spirit to innovate and invest in the development of new software.

A Microsoft sweep of PC test purchasing revealed that more than four in five (83%) brand new PCs in targeted countries in Asia are loaded with pirated software. The PC samples selected were purchased from retailers that offered PCs at much lower cost and free software bundles to lure customers. In many cases, these retailers also sold pirated software at their store.[11]

[11] Microsoft PC Test Purchase Sweep, news. Microsoft, Om,( December 19, 2023, 4.23 pm) https://news.microsoft.com/

**Suggestions**

Section 52(aa) of the Copyright Act 1957 allows certain actions with computer programs, and the interpretation of the purposes for which the program was supplied is crucial.

IT Act basically gives protection only for source code of computer programs of government agencies and the source code of computer programs or private users still stand unprotected.

While the existing laws surrounding software piracy provide a solid foundation, their effectiveness hinges on accurate interpretation and enforcement. Emphasizing the need for precise interpretation, it's evident that current provisions may be somewhat limited. Enhancing and expanding these legal frameworks is crucial for addressing the evolving challenges posed by software piracy in the digital age.

**Conclusion**

In summary, the terrain of software piracy necessitates a sophisticated comprehension of its many facets. While the laws already in place provide a framework, their interpretation and provisions require close examination. The fight against piracy necessitates teamwork and includes proactive steps, increased awareness, and legal improvements. Users and developers both have important responsibilities to play in creating a safe digital environment. We can all work together to strengthen the digital sphere and lessen the negative effects of software piracy on creativity and innovation by promoting a culture of compliance, adopting technical solutions, and pushing for more robust regulatory frameworks.

# EDUCATIONAL LOANS

**Navya UK***

***Abstract***

*Public and private banks are faced with a growing problem — an increase in non-repayments on education loans. This is making them wary of lending new education loans without collateral surety. A bank loan is when a bank offers to lend money to consumers for a certain period. As a condition of the ban loan, the borrower will need to pay a certain amount of interest per month or year. Bank interest rates are influenced by the Central Bank's base rate. This base rate is the rate at which commercial banks must borrow from the Central Bank Therefore loan rates can rise, even if base rates stay the same.*

*An education loan is a sum of money borrowed to finance post-secondary education or higher education-related expenses. Education loans are intended to cover the cost of tuition, books, supplies, and living expenses while the borrower is in the process of pursuing a degree. Payments are often deferred while students are in college and, depending on the lender, sometimes they are deferred for an additional six-month period after earning a degree. This period is sometimes referred to as a "grace period" By giving these types of loans banks will help in the development of the economy besides earning interest and profit.*

**Keywords: Banking sectors, Study Loans, Borrowers, legal prospects, and case laws.**

## Introduction

A bank is a financial institution authorized to provide services to customers who want to save, borrow, or accrue more money. A bank's most common work is accepting deposits and providing loans to their customers. Banks are like an intermediary that manages and enables a connected chain of interrelated financial activities. When a customer deposits his money into a bank account, the bank takes the money and uses it to provide loans to other people. Those borrowers then pay back the loan to the bank with interest over a fixed time, as they repay the loan amount banks pay a fraction of the paid interest to its account holders for allowing them to use the deposited money for the issued loans. The practice of seeking and issuing loans has

* 1st Year LL.B, Shri Dharmasthala Manjunatheshwara Law College Law College Mangalore, Karnataka

been in practice for millennia for example streaming from ancient Mesopotamian grain traders and transactions.

Banking is often at the forefront of modern technological advancement. For example, ATMs were developed in the ’60s to help depositors access their funds after hours. And recently electronic payment systems have revolutionized modern commerce with the help of the internet.

Quality education is of prime importance to any individual, and students go the extra mile to achieve that. However, the cost of education is on the rise lately, and opting for an education loan seems to be the single best solution. An education loan is a loan that students apply for to meet the financial requirements to complete their course. Many banks and non-banking financial companies in India offer education loans at competitive rates to help educate the upcoming innovators and leaders.

The scheme attempts to remove only the financial handicap of otherwise meritorious students. The court said that it is open to banks to refuse a loan if the student lacks merit. The Scheme envisages recovery of the loan after completion of studies and after the student takes up employment. Thus, the prescription of a minimum percentage of marks for students admitted to the Management quota is to ensure that student has employment potential. If the student has employment potential, then the loan may not become a non-performing asset. However, a student who is not meritorious may become a non-performing asset for both his parents and the bank. Thus, no direction warranted to be issued to the bank to grant a loan to the petitioner in violation of the policy framed by the Indian Banks, Association to fix cut-off marks as 60 per cent, for those who secured admins eligible for grant of under Management quota, to be an educational loan.[1]

**Literature review**

**Khanwalker** Sandeep M, (2019) Education Loan in India. The present paper analyses the reasons for high default and suggests some steps for Banks & FIs to obviate such slippages. The reasons for education loan accounts becoming sticky for recovery are varied and significant for the study. It has been observed that both internal and external factors are responsible for education loan accounts becoming difficult to recover. It has been found in the

[1] A. Kasinathan v Canara Bank, 2011 SCC OnLine Mad 2389: (2012) 1 CTC 582. Circular No 83 of 2011 was issued by Canara Bank in pursuance of the Scheme.

study that each NPA / irregular account needs to be studied and analysed for its reasons and accordingly, a suitable action plan for recovery should be prepared by the banks.[2]

**Kandela** Ramesh (2019) "Bad Loans of Public Sector in India" In the contemporary era, the Indian banking system has suffered from the accumulation of substantial non-performing assets (NPAs), especially in the public sector banks (PSBs). This article examines the financial determinants of bad loans in Indian PSBs with the help of panel data regression analysis. A panel dataset of 21 Indian PSBs for eight years from 2010 to 2017 is used for the study.

For analysis, net non-performing assets (NNPAs) as a dependent variable and financial indicators as an independent variable are used. Using the random effect model, it is found that credit–deposit ratio, loan maturity, and return on assets have a negative relationship with NNPAs. These factors have an association with a lower level of NPAs. Operating expenses and capital adequacy ratio have an insignificant effect on NNPAs. On the other hand, factors such as priority sector loans, collateral values, and non-interest income have a positive impact on NNPAs. These factors are an indication of a higher level of bad loans and are adding to the accumulation of NPAs in PSBs.

**Agrawal Bilas Ram, Dr Goyal Merdu,** "Non-performing assets of banks: A literature review" NPA's are one of the major parameters of assessing the health of banks and performance in the equity market. The Covid-19 pandemic has further worsened the NPA position of banks. The paper presents a review of more than 100 papers to know the difficulties faced by small and marginal farmers in repaying their loans, particularly in agriculture. In this study, the focus is on the research paper published in recent years to establish knowledge on the topic and to identify the areas for future research

**Chaudhury, et..al. (2012)** found in their study titled "The practice of CSR in the banking sector in India" that only two banks namely J&K Bank and Union Bank of India follow a system of prefixed budget for pursuing CSR activities i.e. 1% of profit after tax. While SIDBI spent 19% of its net profit in 2008¬09 on CSR activities which is a landmark in the history of CSR funding in the banking sector of the country. It was also observed that both the bank PNB and SBI spend a huge amount for pursuing CSR activities yearly but they did not have any targeted fixed amount for doing the same expenditure. Further, priority sector lending, micro-

[2] Sandeep M. Khanwalker, Education Loan in India - A Review, International Journal of Banking, Risk and Insurance Volume 7 Issue 1, 2019

financing, MSME financing and projects on environment excellence etc are common to all financial and banking institutions.[3]

**Need for the study**

Many researchers have researched education loans and bad loans but there are very few studies made regarding the recovery of education loans from a banker's point of view.

**Objectives**

- To know the difficulties faced by the banker while recovering an education loan and its legal consequences
- To suggest the measures for the recovery of education loan

**Methodology**

The data has been collected from both primary and secondary data. Primary data has been collected by sending questionnaires in Google form to the bankers. Secondary Literature was also collected through various websites, journals, and books.

**Conceptual Framework**

The borrower's rights will not be compromised as mandated by the RBI. In the case of a breach of loan repayment, it is not considered a criminal offence. However, lenders may seek recourse through civil court to recover the unpaid amount. If a loan remains unpaid for over 180 days, the lender may take legal action against the borrower under Section 138 of the Negotiable Instruments Act of 1881.

Under certain circumstances, borrowers may be unable to repay their loans without any fraudulent intent. In such cases, the lender may modify the repayment terms to ensure

[3]Suman Kalyan Chaudhury Practices of Corporate Social Responsibility (CSR) In Banking Sector In India: An Assessment Vol4 (2012) 2012-03-10

repayment without considering it cheating. However, if a borrower intentionally defrauds the lender at the time of entering into the loan agreement, criminal charges may be filed.

According to the RBI, a "wilful defaulter" is someone who fails to repay despite having the capacity to do so, diverts loan funds, or disposes of collateral without informing the lender. Legal action can be taken against anyone who engages in any of these activities.[4]

**Case Laws**

Some of the cases were held in courts regarding the defaulters of education loans such cases are as follows

- *Arya K.R vs The Assistant General Manager:*

The petitioner claims that she belongs to the Scheduled Caste community. She had passed the Higher Secondary course and applied for admission to the B.Sc. Nursing Course at Nirmala College of Nursing, Anantapur, Andhra Pradesh. Based on some tests conducted by the said college, the petitioner was admitted to the B.Sc. Nursing course for the academic year 2013-'14. The petitioner applied for an educational loan to SBT, Peermade Branch, Idukki.

The bank, by a letter dated 8.10.2014 communicated to the petitioner that since she got admission under the Management Quota to undergo a B.Sc. Nursing course at Nirmala College of Nursing, Anantapur and has not obtained the minimum stipulated marks in the qualifying subjects, she was not eligible for educational loan. The petitioner filed the above writ petition challenging Exts.P6 and P7 and to quash the same to the extent it requires 60% minimum marks in aggregate for qualifying subjects. The following prayers have been made by the petitioner in the above writ petition: -

"i) Call for records about Exhibits P6 and P7 and quash the same to the extent, which requires 60% of minimum mark in aggregate for qualifying subjects by issuing a writ of certiorari;

ii) Issue a writ of mandamus or appropriate writ, order or direction, directing the 2nd respondent to disburse the educational loan amount to the petitioner within a time frame manner, professional and nontechnical courses, irrespective of the common entrance test."

[4] Abhinav Raj Legal Action Against Education Loan Defaulters In India We Make Scholars- supported by IT Ministry, Govt. of India. Published: 11 May, 2023 | Updated: 01 Apr, 2024

We fully endorse the view taken by the learned Single Judge in the aforesaid case. There cannot be any dispute to the directive principles, which are introduced in Article 46 and the responsibility is on the State to frame its policies to promote the educational and economic interests of the weaker sections of the people, particularly, Scheduled Caste/Scheduled Tribe.

Given the foregoing discussions, all the writ petitions are dismissed. We, however, leave it open for the Government of India/RBI/IBA/concerned banks, who implement the Educational Loan Scheme to consider whether SC/ST W.P.(C) Nos.17271, 17272, 17313 & 20420 of 2015 candidates, any reduction of marks can be granted from the requirement of percentage of marks in the qualifying examination as provided for general category, in so far as the admission under the management quota is concerned. The parties shall also bear their costs.[5]

- *Nidhin Francis v. State of Kerala* on 28 January 2022

Dated this the 28th day of January, 2022 This writ petition is filed by the petitioner seeking to quash Ext. P4 notice issued by the Circle Office of the Punjab National Bank, Kozhikode dated 09.01.2018 whereby the Bank has directed the petitioner to repay the educational loan advanced to the petitioner after adjusting the payments effected by the petitioner failing which it is stated that coercive action will be taken as per the provisions of the SARFAESI Act, 2002.

Given the submission made by learned counsel for the petitioner, as noted above, there will be a direction to the petitioner to remit an amount of Rs. 95,620/- within one month from the date of receipt of a copy of this judgment before the Bank and if the Bank receives the said amount within the time frame fixed above, the Bank shall forward the application received from the petitioner to the concerned Department of the State Government to explore the possibility of identifying as to whether the petitioner is entitled to get benefit of Ext. P1 circular scheme within three weeks from the date of receipt of the amount from the petitioner.

If and when the above-stated aspects take place, the State Government is directed to finalize the application received from the Bank taking into account the parameters provided under Ext. P1 circular dated 20.11.2017 or any other enabling orders or circulars and attain finality to the same at the earliest and any rate within three months from the date of receipt of the

[5] Arya K. R V The Assistant General Manager, THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN & THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE
TUESDAY, THE 13TH DAY OF OCTOBER 2015/21ST ASWINA, 1937, WP(C). No. 17271 of 2015 (H)

application from the Bank and intimate the same to the Bank without any further delay. The writ petition is disposed of as above.

**Findings**

- The banker will take various promotional activities promotion like social media, and television etc., there are various types of loans a banker will provide to their customers.
- From the study, we know that the banker will charge 7-10% of the interest for the education loan.
- Each year 10-15% of the study loan is sanctioned from their gross credit.
- The banker will take up to 7 days for the approval of the study loan
- When the borrower fails to repay the loan then the banker will find different modes to recover the educational loan, at first, they try to contact the borrower to pay the loan if they do not agree to repay it then the banker will suit a case on the borrower and also send a legal notice to the borrower and if it found that the borrower is bankrupt then the bank will agree for the comparison settlement.
- The banker will take the mortgage of assets above 10 lakhs for the study loan
- Normally the tenure for the repayment of a study loan is 5-8 years but then it depends on the student's course of study.
- Each year the recovery percentage of study loans is 70-80%
- Banker provides loans to their customers they have to keep in contact with them often so that the borrowers can repay the loan in time. The banker should also update all the information given by the borrower from time to time. [6]

**Suggestions**

- According to the study, Proper follow-up like reminders, personal contact, and contact with the employer is necessary for the recovery of the study loan, KYC should be updated from time to time by the banker. Permanent Address and phone number to be updated to get in contact with the borrower. Need to know the repaying capacity of getting a job after education.

[6] Interviewed personally

- Banks should also monitor and follow up on study loans before it becomes overdue. Prompt and timely action depending on the individual case is to be initiated. The loan should be sanctioned to meritorious students. A third-party guarantee should be taken and there should be a continuous follow-up with the guarantor
- Keeping track of the borrower after completion of education with personal contact of the borrower and their family members including the person who was involved in availing the loan. Action should be taken against defaulters as soon as possible. [7]

**Conclusion**

From the study, we come to know that the bankers find it difficult to recover the loan in time, this will affect the profitability, expansion, and further lending. Bankers while identifying prospective borrowers should strictly follow the existing guidelines implemented by the banks. Proper recovery steps should be taken regularly and wherever possible proper securities should be taken for the loans. Bankers should educate the borrowers about the impacts when the loans are not recovered in time. In case of difficulties in paying the loans, banker should have a conversation with the borrowers and give some more time to repay the loan in genuine cases.

More and more recovery areas and settlements can be conducted. It is the duty of the student who has taken an education loan from the bank to repay as per the contract and update the office and residential address to the bank so that, easy communication is possible. Most borrowers have reached a good position in society and they should not ignore the bankers who have helped them to reach that position. In case the borrowers are financially strong, can close the education loan before the due date. The borrowers should also know that they should be loyal to the bankers so that they can repay the loan as soon as possible or else the banker will take up all legal action against the loan defaulter.

[7] Personal interview and got suggestions from bankers.

# SURROGACY AND WOMEN'S REPRODUCTIVE HEALTH RIGHTS: ISSUES AND PERSPECTIVE AND ROLE OF INDIAN COURTS

**Gaurav Kumar Yadav***

**Janhvy Pandey****

***Abstract***

*The body of a human is an amazing machine. The Future of Delivery of the Child as a Test Tube Baby, Through New Reproductive and Cloning Techniques Surrogate Motherhood Will Open Up Unimaginable Opportunities in the sex domain. Since any method of reproduction that replaces marriage is a violation of the dignity of human reproduction, reproduction ceases to be sexual, and married couples can hastily become commodities for sex. Recognizing each other's dignity becomes arduous, notably in a pre-born child. According to Indian tradition, the two goals of life are to have children and to attain immortality through the birth of children. "Socially, the value given to biological paternity within heterosexual marriage is far preferable to the value of unconstrained childlessness, adoption, or alternative family structures."*[1]

*Therefore, like in India, like many other countries around the world, infertility has many harmful effects, especially on women: low self-esteem, emotional abuse and unstable marriages. There are many causes at the back of surrogacy. Interested parents who intend to surrogacy may systemize the surrogate pregnancy because the woman who is interested in becoming parents is infertile or incapable of carrying a pregnancy like having any history of medical illness that led to danger to her health, abortion, or malformation of uterine, or hysterectomy.*[2] *Political actions, mobilise and demand, principally about reproductive rights concentrate on maternal mortality, sexual harassment, abortion and contraception. This paper examines the preventive rights violations, laws relating to surrogacy in India the Role of the Court in Women's Rights to Reproductive Choices and analysis of the Surrogacy Regulation Act 2021.*

**Keywords: Surrogacy, Reproductive Choices, Mortality, Abortion**

* LLM, National University of Study and Research in Law, Ranchi

** LLM, National University of Study and Research in Law, Ranchi

[1] N Sarojini & V Marwah, *Reinventing Reproduction, Re-Conceiving Challenges: An Examination of Assisted Reproductive Technologies in India"*, 46 Economic and Political Weekly 104 (2011).

[2] Arthur Serratelli, Surrogate Motherhood Contracts: Should the British or Canadian Model Fill the U.S. Legislative Vacuum, 26 George Washington J Int Law Econ 633-74 (1993).

## Introduction

"*Women are not an interest group. They are mothers and daughters, and sisters and wives. They are half of this country and they are perfectly capable of making their own choices about their health.*" - Barack Obama

The body of a human is an amazing machine. The Future of Delivery of the Child as a Test Tube Baby, Through New Reproductive and Cloning Techniques Surrogate Motherhood Will Open Up Unimaginable Opportunities in the sex domain. Since any method of reproduction that replaces marriage is a violation of the dignity of human reproduction, reproduction ceases to be sexual, and married couples can hastily become commodities for sex. Recognizing each other's dignity becomes arduous, notably in a pre-born child.[3] A method of assisted reproduction known as surrogacy involves allowing one to be pregnant, to give birth, or to have a child. She may be implanted with an unrelated embryo or, in a more traditional type of surrogacy, with the child's inherited mother. For a marriage, the male half – called the inherited father – is usually the one who fathers the child through another woman in archaism.[4]

The word “surrogate” originates from the Latin word “subrogere”. To work "in place of", one must use the verb “to substitute”. When a prospective parent requests that a surrogate mother return a child to them without expecting any kind of payment., it is known as altruistic surrogacy. In other words, it is a free surrogacy. On the other hand, commercial surrogacy is an option. Offering a monetary reward to intended parents expressing interest in securing a willing surrogate. People, the government, and religious organizations have questioned the practice of involving money in delivery, making commercial surrogacy a controversial topic. When intended parents want to use surrogacy, agencies often assist them in handling the complex legal and medical aspects involved in the process.

Surrogacy is defined as the “*procedure by which a woman Gives birth to a child on behalf of another couple and, as per Section 2 (ZC) of the Surrogacy (Regulation) Bill 2019, gives the*

[3]L. van Zyl & A. van Niekerk, Interpretations, Perspectives and Intentions in Surrogate Motherhood, Journal of Medical E 404-409 (2000).
[4]Committee on Ethics (2008) ACOG committee opinion number 397, February 2008 Surrogate motherhood. Obstetrics & Gynecology, 111, 465., Scientific Research Publishing (Accessed Nov. 17, 2023) https://www.scirp.org/(S(351jmbntv-nsjt1aadkposzje))/reference/referencespapers.aspx?referenceid=868958.

*child to the intended couple after delivery".*[5] And the word which is a surrogate mother can also be figured out to the meaning of the word surrogate mother, as is the word surrogate mother according to Oxford terminology is: "a woman who bears a child on behalf of another woman, either from her egg or through implantation in her womb of a fertilised egg from the other woman."

There are many causes at the back of surrogacy. Interested parents who intend to surrogacy may systemize the surrogate pregnancy because the woman who is interested in becoming parents is infertile or incapable of carrying a pregnancy like having any history of medical illness that led to danger to her health, abortion, or malformation of uterine, or hysterectomy.[6] Political actions, mobilise and demand, principally about reproductive rights concentrate on maternal mortality, sexual harassment, abortion and contraception. However, as stated in the ICPD Program of Action, reproductive rights also include infertility care and treatment and that state: *"The objective should be to help couples and to give individuals full opportunities and opportunities to achieve their reproductive goals exercising the right to have children by choice"*[7] Worldwide, when differentiated into other facets of fertility, there is less mobility and Research that focuses On reproductive rights in science as it relates to infertility and related treatments.

Infertility is a common threat to reproductive health. It is estimated that 80 million people, or between 4% and 14% of the global population, are infertile. Many reasons contribute to the global infertility problem, including delayed marriage, delayed pregnancy, high spread of STDs, and childbearing or abortion resulting in unsanitary environments.[8] Infertility is considered a popular medical issue in India. Like most other countries, motherhood is socially expected of women in India and ascertain family descendants. "Motherhood is focal to the social fabric of femineity in India"[9] Everything else about women's roles is secondary.[10] According to Indian tradition, the two goals of life are to have children and to attain immortality through the birth of

[5] THE SURROGACY (REGULATION) BILL, 2019, Section 2(zc), (Bill No. 156-C of 2019 Act of Parliament)
[6] Arthur Serratelli, Surrogate Motherhood Contracts: Should the British or Canadian Model Fill the U.S. Legislative Vacuum, 26 George Washington J Int Law Econ 633-74 (1993).
[7]International Conference on Population and Development Programme of Action, (Accessed Nov. 17, 2023) https://www.unfpa.org/publications/international-conference-population-and-development-programme-action.
[8] Robert D Nachtigall, *International Disparities in Access to Infertility Services*, 85 Fertility and sterility 871 (2005).
[9] Sama-Resource Group for Women, *Assisted Reproductive Technologies: Autonomy or Subjugation? A Case Study from India*, 31 Women's Studies international forum, ELSEVIER 319 (2008).
[10] S Dasgupta, *Motherhood Jeopardized: Reproductive Technologies in Indian Communities*, London, Routledge 131 (2010).

children. "Socially, the value given to biological paternity within heterosexual marriage is far preferable to the value of unconstrained childlessness, adoption, or alternative family structures."[11]

Therefore, like in India, like many other countries around the world, infertility has many harmful effects, especially on women: low self-esteem, emotional abuse and unstable marriages.[12] Almost all religions of the world accept the importance and need of children. The happiest moments in a person's life are to become a parent. Having a child is presumed that a person has a holy duty towards his family and society, which is commonly fulfilled through marriage.

Typically, sexual activity between spouses occurs naturally during reproduction, and no other assistance is required. So, in both international and regional human rights frameworks, reproductive rights have been manifested as crucial rights. Everyone has the right to have reproductive rights, which is an installed truth. Yet, there are some conditions in which the exercise of this right could give rise to serious legal and human rights worries. The most recent non-property individual rights so-called fourth generation are reproductive rights, which are closely connected to the inalienable human right to respect someone's integrity, dignity etc. in life.[13]

The concept of privacy is in the Indian Constitution, as Indian courts have decided in this specific instance involving the right to privacy, several Indian judgments have laid down that the right to privacy is not intrinsic. After bestowing a thorough rationale and explaining the parameters of Article 21 of the Constitution, the judgment was later delivered in one of the confidential cases. So, nature makes privacy more manifest than otherwise. Albeit it is an inalienable right, according to some view privacy is also an intrinsic but non-absolute right. Other countries' notion of privacy differs enough from the Indian example. Unsurprisingly, the Indian Supreme Court has upheld the right to privacy and, on a case-by-case basis, has guaranteed that every individual is entitled to personal freedom as stipulated in Article 21 of the Indian Constitution as we Can detect intelligence privacy, [14] integrated and private [15] But apart from those protected, the Supreme Court

[11] N Sarojini & V Marwah, *Reinventing Reproduction, Re-Conceiving Challenges: An Examination of Assisted Reproductive Technologies in India"*, 46 Economic and Political Weekly 104 (2011).
[12] S. UNISA, "Childlessness in Andhra Pradesh, India: treatment-seeking and consequences", 7, Reproductive health matters. 54-64. (1999)
[13] Anatoliy Kostruba & Dr Aneesh V Pillai, *Women's Reproductive Rights and Their Scope Under International Legal Frameworks*, 8 Entrepreneurship, Economy and Law 18-28 (2021).
[14] James Q Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 Yale Law School (2003).
[15] Margaret Mead, *Coming of Age in Samoa: A Psychological Study of Primitive Youth for Western Civilisation (Perennial Classics)* 21 (1973).

of India is entitled to privacy. Article 21 of the Constitution guarantees the right to privacy and personal independence. The concept of "personal liberty" is expressed in Article 21.

**Prevent Rights Violations**

A large number of Indian women are choosing to become surrogate mothers to assist their families. Often, these are disadvantaged women who know little about commercial surrogacy. *Dr Ranjana Kumari, director of the Centre for Social Research, New Delhi says*, "Often, the woman does not even know what terms and conditions she is signing, apart from the fact that her womb will be used to give birth to a child will be done for." Albeit commercial surrogacy is governed by laws in India, agents often persuade families to send girls under the age of 16 for commercial surrogacy by creating fake documents. Women who want to become surrogates have various things in common, as per the new case study. The elementary commonality discovered is a desperate need for money or financial support. Their needs for this money include starting small enterprises, paying for their children's education and buying a house or a piece of land. Another finding revealed that most of them were uneducated and none of them knew the rules and procedures of surrogacy. In this study, a 28-year-old woman told her personal story and said,

*"I am in excruciating pain and am immobile." My weakness is from too many needles and medicines. I was not aware of all this before. Although things were easier then, I also had children of my own. I don't know why it is so complicated this time.* Their poverty and lack of education led them to constantly use surrogacy as a means of obtaining money. Agencies view them as "baby-making machines", pressuring them into labour every year.

The Indian government repealed surrogacy for LGBTQIA+ individuals and single parents in 2013. In 2015, a ban was imposed on foreign nationals using surrogacy, with embryo access permitted only for research purposes. *The Surrogacy Regulation Bill, of 2016* was enacted by the government to fully legalize domestic and charitable surrogacy. However, the bill could not be passed due to the adjournment of the parliamentary session. Ahead, the government enacted a new bill in 2019 which was a copy of the 2016 one. Lok Sabha approved it, but Rajya Sabha did not approve it. The Select Committee recorded the concerns of each member when the Upper House

referred it to them for advice and consideration. About fifteen of these recommendations were incorporated into the 2020 law.

The Committee's proposals and comments resulted in several amendments being incorporated into the *Surrogacy Regulation Bill, 2020,* which replaced the 2019 Bill. To safeguard the welfare of surrogate mothers, the Government of India passed a law outlawing commercial surrogacy. The Bill extends the insurance coverage for surrogate mothers from 16 months to 36 months to address the significant risks associated with medical problems after pregnancy. Importing and selling human embryos through surrogacy is punishable with a fine of up to Rs 10 lakh and a jail term of 10 years.[16]

### i. Laws Relating to Surrogacy in India

The history of surrogacy in India has become increasingly crucial in modern times. multiple accounts said rackets linked to immoral behaviour, exploitation of importation of human embryos and couplers, recantation of children, and surrogate moms. In India, the Law Commission also shed light on the requirement for legislation on Surrogacy.

If we look at the surrogacy Indian historical background that can be traced back to the first example of in vitro fertilization in India was that of a baby born in Kolkata. In the past, this cause was most crucial in light of how to reach assistance with rapidly advancing reproductive technology or ART. India also opened for business in 2002, the year commercial surrogacy began. Indian Surrogacy Laws India is a top choice for foreign childless couples seeking a place to live as surrogacy is allowed there despite the absence of a legislative framework. A different woman, called a gestational surrogate, performs the embryo transfer operation and later carries the pregnancy to a specific time. Surrogacy by artificial insemination happens when a surrogate mother becomes pregnant after which sperm insemination is carried out.

After birth, the child is given to the people who gave birth to him or her, and the surrogate mother gives up all parental rights. Baby Manji Yamada vs Union of India [17] "The Hon'ble

[16] Gaurav Kumar Yadav & Mohd. Rameez Raza, *Surrogacy in India: Immediate need for Reforms to Uphold the Rights of Surrogate Mothers*, (Sept. 23, 2021), https://www.hinducollegegazette.com/post/surrogacy-in-india-immediate-need-for-reforms-to-uphold-the-rights-of-surrogate-mothers.
[17] *Baby Manji Yamada v. Union of India (2008) 13 SCC 518.*

Supreme Court, different from tracing the derivation roots of surrogacy, has painted different types of surrogacies, such as traditional surrogacy, also known as the direct method, Gestational surrogacy, also known as the host way, was the case for altruistic surrogacy and commercial surrogacy." Gradually India has legalized and has started to increase the production of Although authorized before 2002, the need for commercial surrogacy, reproductive tourism, and overseas surrogacy was limited in 2015.

In 2002, the Indian Council of Medical Research (ICMR) set up surrogacy regulations aimed at safeguarding the surrogate mother and enabling parents. Engaging in legal surrogacy.[18] From 2002 onwards it is acceptable to say that commercial surrogacy was valid, and this was confirmed by the Indian Supreme Court in the Baby Manji Yamada case. Additionally, the court instructed and guided the legislature to make a relevant statute that would regulate surrogacy in India. Then came a flood of surrogacy-related laws passed by the legislature, resulting in the drafting of the Assisted Reproductive Technology Clinic Guidelines in 2008. The Surrogacy (Regulation) Bill 2016, which was later introduced and drafted in India, aims to outlaw commercial surrogacy and legalize the practice of altruistic surrogacy.

Later in the years 2008, 2010 and 2013, bills were introduced that reportedly proposed that assisted reproductive technology in India available for all and for single individuals and foreign couples. But assistive was Reproductive Technology Bill 2016 limits surrogacy available only to Indian married who are infertile couples or unable to procreate a child due to the reason of infertility.[19] This bill was replaced by the Surrogacy Bill 2019. Presently government has passed the Assisted Reproductive Technology Bill 2021 as well as the Surrogacy Bill 2020.

### ii. Right to Privacy Concern & Reproductive Autonomy in Surrogacy Bill?

Every Woman has a fundamental right to privacy, just as they have the freedom to choose how they want to reproduce and uplift their children. The Bill permits surrogacy only for married couples; It does not include cohabiting couples, singles, widows, divorcees and LGBTIQIA+

[18] Dinesh Jain, *Chapter 3*, (Accessed Nov. 17, 2023), https://main.icmr.nic.in/sites/default/files/guidelines/b.pdf.
[19] Assistive Reproductive Technology Bill of 2016. (Accessed Nov, 18, 2023) http://www.parliament.go.ke/sites/default/files/2017-05/The__Assisted_Reproductive_Technology_Bill.pdf

couples, which is against the Indian Constitution.[20] And Hindu adaptation and Maintenance act 1956.[21] Any person other than married couples entering into a contract of surrogacy shall become an offender under the Bill. In addition, the body that expands the jurisprudence for women's rights in India will be harmed by the government's complete ban on commercial surrogacy.

Suchita Srivastava v. Chandigarh Administration, [22] *"The Supreme Court held that the right to make reproductive choices comes under Article 21 of the Constitution and includes the right to carry on pregnancy to its full term, to give birth and to bear a child."* As a fundamental right and the source of endless derivative rights, Article 21 of the Indian Constitution is revered throughout India. Both the notion of life and all the wants of survival come under Article 21, which safeguards entitlement to life. The second liberty is privacy. According to Article 21, the rights to life and personal liberty stem from the right to privacy. *Union of India v. K.S. Puttaswamy,* a landmark decision [23] "*The judgment of nine judges of the Hon'ble Supreme Court of India has affirmed and settled an issue comfortably and declared that the right to privacy is a fundamental right and it is an inalienable right guaranteed under Article 21 of the Constitution of India."* Reproductive rights include the privilege of carrying a woman to full-term pregnancy Getting pregnant, and then having a baby.

And as dignity and bodily integrity, these rights are an element of a woman's right to privacy. The Indian Constitution bestows safeguards to women and gives them the freedom to make their own reproductive decisions under Article 21. However, the Medical Termination of Pregnancy Act of 1971 places the decision to have an abortion in the hands of doctors. *In State of M. P v.Gobind.[24] and State of U.P v. Kharak Singh.[25] "the right to privacy has been identified as a constitutionally protected right, being a facet of Article 21 of the Constitution. The personal decision of a single person about the birth of a baby through surrogacy is called "the right of reproductive autonomy" which can be inferred to be a facet of the right of privacy guaranteed under Article 21 of the Constitution."*

[20] The Constitution of India 1949, Article 14
[21] Hindu Adoptions and Maintenance Act, 1956, Section 7 & 8 (ACT NO. 78 OF 1956)
[22] Suchita Srivastava v. Chandigarh Administration, (2009) 14 SCR 989
[23] K.S Puttaswamy V. Union of India, WRIT PETITION (CIVIL) NO. 494 OF 2012
[24] Gobind v. State of M.P (1975) 2 SCC 148: AIR 1975 SC 1378.
[25] Kharak Singh v. State of U.P (1964) 1 SCR 332: AIR 1963 SC 1295.

A complete prohibition on commercial surrogacy consequences would be women being denied the option of using their breeding agency, for financial gain. This rejection of priority could result in a potential infringement of Constitutionally protected rights to reproductive autonomy, privacy, and bodily integrity. The measure also infringes rights safeguarded by the Indian Constitution and various international conventions that India is required to adhere to, which violates rights at both the national and international levels.

Similar to an article of the *Universal Declaration of Human Rights (UDHR*).,[26] *International Covenant on Civil and Political Rights,* Article 17[27] restricted undue interference from states on Women's right to privacy, as outlined by the ICCPR Committee, add their autonomy and physical integrity. The Bill's sweeping restrictions on commercial surrogacy violate these rights.[28]

**Role Of Court In Women's Rights To Reproductive Choices**

Over the past year, Indian courts have issued various renowned judgments considering Women's reproductive rights as an element of the "inalienable right to existence" are intrinsically safeguarded by the fundamental right to life. In some important decisions, courts have considered reproductive rights for the first time calling for equality of women and respect for the rights of women to take autonomy and decision-making regarding pregnancy. Indian courts have defined "reproductive rights" in a manner that upholds human rights norms.

In *Sandesh Bansal v. Union of India*, [29] *A public interest litigation that acknowledges that maternal deaths occur and demands accountability "the inability of women to survive pregnancy and giving birth to a child is a violation of According to According to Article 21 of the Indian Constitution, a woman is entitled to a basic life, and "the prime responsibility of the Government is to guarantee that every woman survives her pregnancy and gives birth to a child."* And in case of *Devika Biswas v. Union of India & ors.*[30] Held by the Supreme Court "*moved beyond that the*

[26] Universal Declaration of Human Rights 1948, Article 12
[27] International Covenant on Civil Political Rights 1976, Article 17
[28] Promise Institute, *India's New Surrogacy Bill: A Hurdle to Women's Reproductive Autonomy and LGBT Rights — Voices of Promise*, Voices of Promise (Accessed Nov. 17, 2023) https://www.promisehumanrights.blog/blog/2021/8/indias-new-surrogacy-bill-a-hurdle-to-womens-reproductive-autonomy-and-lgbt-rights.
[29] Sandesh Bansal v. Union of India W.P. (C) 9061/2008.
[30] Devika Biswas v. Union of India & ors W.P. (C) 81/2012.

*reproductive health framework to also recognize women's autonomy and gender equality as core elements of women's constitutionally-protected reproductive rights"*

The (SC) Supreme Court ruled that the "reproductive rights of an individual" fall under Article 21. Supreme Court considered the right to health as well as reproductive rights as a facet of personal liberty under Article 21 and defines such rights as "the right to access a spectrum of reproductive health knowledge, goods, facilities and services to capable individuals to make informed, free and responsible decisions about their reproductive behaviour."

However, the Supreme Court, while accepting the fundamental right of women to reproductive autonomy, said *"There is no doubt that a woman's right to make reproductive choices is also a dimension of 'personal liberty' as understood under Article 21."*[31] In the above cases In India, the judiciary has a crucial and adopting a progressive perspective in removing legislative and practical limitations that deny women and girls reproductive freedom.

**Surrogacy: Perspective & Problem**

Founded paternity with a hasty genetic test can be easy enough, but the problem isn't Basic and straightforward for the courts. What if a non-custodial father found after 15 years of "fathering" a child that he is not the child's biological father? Has his child support payment been returned to him? Alternatively, can a surrogate mother sue her husband-and-wife clients for unpaid child support for breach of their contract? Judges and legislators face difficult legal decisions on these issues. In Indian culture, the mother who gives birth is considered the only unit. As far as in respective of the Indian legal system, DNA testing to determine paternity does not exist. The name of the mother and her husband must be on the child's birth certificate.[32] The 228th report of the Indian Law Commission has come and made available on "Need for legislation to regulate assisted reproductive technology clinics as well as the rights and obligations of parties to surrogacy".[33]

[31] Suchita Srivastava v. Chandigarh Administration, (2009) 14 SCR 989
[32] Anshuman Mohit Chaturvedi, *COMMERCIAL SURROGACY: A CHOICE OR NEED*, RACOLB LEGAL, (Accessed Nov. 18, 2023) https://racolblegal.com/commercial-surrogacy-a-choice-or-need/.
[33] Law Commission of India. Report 228. 2009. (Accessed Nov, 18, 2023) http://surrogacylawsindia.com/admin/userfiles/file/report228 Pdf

Key comments were made that the Creation of the Law Commission although contracts between couples will still govern the surrogacy system, should not be used for commercial purposes. The surrogacy system must bestow Cash support for a surrogate child in case the commissioning spouse or another person dies before the child is born. The surrogate mother's life insurance should be included in the surrogacy agreement. The surrogate child's birth certificate should only have the names of the commissioning parents on it. It is imperative to safeguard the privacy rights of both surrogate moms and donors. The moment has come to outlaw sex-selective surrogacy. The only statute that should apply to abortion cases is the Medical Termination of Pregnancy Act of 1971.[34] The majority of women who sign up as surrogates do so when they need money. They did not have money to hire a lawyer, and were strangers of their legal rights. Horsburgh claims that after agreeing to deliver the client's child, the surrogate is physically abused. Moreover, contracts may hold mothers liable for danger such as illness, death, and difficult postpartum situations caused by pregnancy.[35]

**Problems in Surrogacy (Regulation) Act 2021**

The Government of India successfully enacted the Surrogacy (Regulation) Bill 2021 in both Houses of Parliament and it was signed into law by the President. A gravely erroneous solution reason far more pain and worry than the big questions it tries to answer. A large part of the law is based on a dreamy universe that does not exist and lacks common sense. These Affected singles, divorced people, single and married couples, and members of the LGBTQIA+ community find it extremely difficult, if not impossible, to parent together due to legal restrictions.

This bill allows altruistic surrogacy in India while completely banning commercial surrogacy. This only covers her medical costs and insurance during her pregnancy and does not include paying her anything financially for serving as a surrogate mother. In the present era of unbridled inflation and rising costs of living, legislators reckon that a woman will waive her social

[34] Assisted reproductive technology (regulation) bill – 2010, (2010). Bill, Ch. II, V, VII., Part I. and Schedule I, Part 7 on Forms (Accessed Nov. 18, 2023) http://www.nt.gov.au/justice/policycoord/documents/polcoord_surrogacy_consultationpaper.pdf.
[35] Dr. Ranjana Kumari, *Surrogate Motherhood- Ethical or Commercial*, Centre for Social Research (2003). (Accessed Nov. 18, 2023). https://wcd.nic.in/sites/default/files/final%20report.pdf

function and her obligation to serve as a surrogate without receiving any kind of financial or emotional compensation.

This impracticality is nearly followed by the following need: The surrogate must be the closest family member of the intended couple. The whole idea behind surrogacy is to forget the supporting woman, who disappears into anonymity after surrogacy and is never contacted again. With the involvement of a close family member, who often views the child as a surrogate, this new law creates a danger and may raise wryness about the surrogate mother's bond with the child.

If the surrogate mother travels, this may prevent the tendency for an emotional bond to develop. As the newborn baby grows, the parents will have difficulties and difficulties due to the emotional connection they have with the surrogate mother. The future of unmarried men and women who long to have partners and children as they mature is still unaddressed by this law. If a single person gets divorced and remarries after a few years of marriage, it will take hardly five years for him to become eligible for surrogacy.[36]

**Conclusion**

Surrogacy in India is entirely a contractual arrangement, so care must be taken to ascertain that the terms of the agreement do not collide with any laws. Be sure to pay attention to the surrogate's specifications, the types of surrogacies, the causes the prospective parents chose surrogacy, any mention of paternity in the agreement, and other subsidiary information. Every woman's experience as a mother is increased by nature, which has the wonderful power to create life within each individual.

As a result, reproductive rights recognised the natural desire that every couple has to have children. Crucial rights falling under the category of reproductive rights include the right to privacy, equality, non-discrimination, marriage, starting a family, freedom from sexual exploitation, autonomy, freedom from coercion, determination of one's numbers and differences,

[36] Dhiraj Kumar Rao, Govt's Impractical Surrogacy Law Is an Ordeal for Both Couples & Singles, The Quint, (Accessed, Nov. 18, 2023), https://www.thequint.com/opinion/govts-impractical-surrogacy-law-is-an-ordeal-for-both-couples-singles.

freedom from full marriage, right to motherhood and the ability to benefit from scientific advances, among other rights.

Consequently, all facets of reproductive rights are added to the interpretation of individual freedoms and privacy rights by the judiciary. It is the amenability of the state to safeguard individual rights as fundamental rights, which ascertain that privacy will not be infringed, and to take suitable action. So, the legislator must consider the safeguard Regarding the rights of the surrogate mother and the child.

The mistreatment must stop those surrogate mothers face during the surrogacy process. This results in the need to set up a legal framework to regulate surrogacy processes and safeguard the rights of the child born through surrogacy. consequently, women are now enjoying reproductive justice as a result of the Supreme Court's historic judgment on the Right to Privacy, which has permitted women's reproductive rights as an integral aspect of their fundamental rights.

**Suggestions**

- For distressed couples, the government should set up help centres where they can find selfless, altruistic women to assist them in the surrogacy process.
- The government has added a clause allowing foreign nationals, non-resident Indian couples living abroad and LGBTQIA+

# DECIPHERING THE JIO-DISNEY MERGER: SCRUTINY UNDER COMPETITION LAW

**Riya Kumari***

**Nupur Jajoo****

***Abstract***

*Reliance Industries Limited and Walt Disney have signed an agreement to merge their media operations in India on 28th February. This deal will also include the undertaking of Viacom18 merged into Star India. The entity also has exclusive rights to sporting events like Indian Premier League and Disney films. Nita Mukesh Ambani will be the chairperson of this JV and Uday Shankar will be the Vice Chairperson. This Joint Venture will be one of the leading TV and digital streaming platforms for entertainment and sports. Currently ranked 88th, Reliance is the largest private sector company from India to be featured in Fortune's Global 500 list of 'World's Largest Companies' for 2023.*

*The present article investigates the effect of establishing a Joint venture (Reliance and Walt Disney) that will create a new giant in the Indian media and entertainment sector. The purpose of this article focuses on three issues: (a) to analyze whether this merger will create a monopoly over Sports broadcasting (b) to find whether this agreement is violating the provisions of Competition Act (c) Is Reliance trying to abuse its dominant position in media and entertainment sector?*

**Keywords: Joint venture, Competition Act, Merger, Monopoly**

* Final Year student pursuing BBA, LLB (Hons.) from Narsee Monjee Institute Of Management Studies, Indore

** Final Year student pursuing BBA, LLB (Hons.) from Narsee Monjee Institute of Management Studies, Indore

## Introduction

The former rivals, who were engaged in a fierce contest over IPL rights until very recently, have decided to establish a joint venture (JV), aimed at strengthening the position and to create a new giant in the Indian media and entertainment sector. The agreement between Jio and Disney highlights the merging of telecommunications and over-the-top (OTT) services, where Jio's combined offerings have the potential to reshape what consumers prefer. By bundling telecom and OTT services together, Jio offers an enticing option that competes with standalone global giants like Netflix and Amazon Prime. This convergence not only adds value for consumers but also solidifies Jio's dominance across various sectors. As the Indian OTT market progresses, strategic partnerships and acquisitions will greatly influence its direction. The Jio-Disney deal signifies a significant step in this journey, emphasizing the strategic priorities guiding industry players in an increasingly competitive environment.

Reliance Industries Ltd. (RIL) led by Mukesh Ambani and The Walt Disney Company have reached an agreement to combine their digital streaming and television holdings in India. This merger forms a formidable media entity valued at $8.5 billion, boasting over 100 channels covering entertainment and sports, along with two digital streaming services. Moreover, this unified entity gains exclusive access to premium content such as Indian Premier League (IPL) matches, Disney films, and productions within India, alongside a rich array of international content. This collaboration involving RIL, its media arm Viacom 18, and Disney will unite various television channels like Colors, StarPlus, StarGOLD, Star Sports, and Sports18, alongside streaming platforms JioCinema and Disney+ Hotstar. It entails merging the operations of Viacom18 and Star India, with RIL maintaining control over the joint venture. As per the agreement, RIL will possess a 16.34% stake, Viacom18 will hold 46.82%, and Disney will have 36.84%. Additionally, Disney might contribute further media assets to the venture, pending regulatory and third-party approvals[1].

The competition for dominance in subscribers heightened as both platforms competed for unique content and sports events. Yet, the situation changed significantly with the Jio-Disney agreement, reshaping the competitive environment within the Indian OTT market.

[1] 'Disney, Reliance Seal $8.5 Billion Deal to Merge Indian Media Businesses'

As part of a calculated maneuver to impede Hotstar's expansion in subscribers, Jio utilized its extensive telecommunications infrastructure to provide complimentary access to top-tier sporting events such as the Indian Premier League and FIFA 2022. This bold tactic was designed to entice viewers away from Hotstar by offering premium content without any extra charges. The consequences were evident, as Hotstar experienced a significant decrease in its subscriber base during the preceding quarter.

Against this backdrop, this short note endeavors to shed light on the possible consequences of this merger for India's streaming platform market competition. The Jio-Disney agreement prompts worries about the misuse of market dominance. The integration of Jio's telecommunications and over-the-top (OTT) services, along with its assertive pricing approach, might restrict competition and impede innovation, particularly within India's live-streaming market. Furthermore, the dominance of one entity in the OTT sector could decrease consumer options and heighten entry barriers for new contenders, potentially resulting in market monopoly.[2]

**Reliance-Disney Merger: Anti-trust, Cricket streaming, Advertisers bargaining power**

Due to their combined market power, Walt Disney and Reliance's proposed merger of their media holdings in India may be subject to severe antitrust scrutiny. Attorneys have expressed concerns about the potential effects of the merged company's robust portfolio of cricket broadcast rights on advertisers. According to sector experts, the merger of Walt Disney's Indian media business with Reliance Industries' Viacom18 will have a significant impact on the media and entertainment sector in India. Lower tariffs for subscribers are expected to gradually end, and advertisers' bargaining power will suffer. It further stated that the joint venture will benefit from Disney's technological advantages, see lower losses in the OTT sector due to greater bargaining power over content creators, and possibly unlock higher revenue streams from the IPL with the consolidation of TV and digital rights under a single entity[3].

[2] Deccan Herald, 'A Disney-Reliance India entertainment merger may be beset with antitrust headaches' (*Deccan Herald*, 15 December 2023).
[3] Reliance-Disney merger may impact subscriber tariff, advertisers' bargaining power: experts, n.d.

In India, cricket enthusiasts hold players in high regard, nearly to the point of becoming deities. Businesses don't cut corners when it comes to purchasing broadcast rights or funding commercials to draw customers to their products. The most lucrative cricket competition in the world, the Indian Premier League (IPL), and the television and streaming rights to matches conducted by the International Cricket Council (ICC) are presently owned by Disney. In the meantime, Reliance has the Indian cricket board's rights for every match as well as the streaming rights for the IPL.

**Monopoly over Sports Broadcasting**

Given that Disney owns the television rights to the Indian Premier League and Viacom18 has the digital rights, the merged organization is expected to monopolize cricket programming in the nation. Additionally, Disney Star India was awarded the worldwide rights to all 2024–2027 International Cricket Council events, including the Cricket World Cup. In addition to cricket, Viacom18 is the sole Indian broadcaster of the 2024 Olympic Games in Paris. Given the Indian public's feelings for cricket, the largest obstacle in this scenario is very certainly the near-monopoly rights this combined corporation will have with regard to sports in India. Under the terms of the deal, RIL will own 16.34%, Viacom18 will own 46.82%, while Disney's share will be 36.84%[4].

Before the anticipated merger between Disney and Reliance generates a potential return to monopoly, Viacom18 and Disney temporarily replaced Star India as the dominant sports broadcasting company in a duopoly. It is true that the merged business formed by the Disney-Reliance transaction will have significant influence over profitable sports properties in India. Concerns over pricing, market competition, and consumer and broadcaster access to sports material are brought up by this concentration of power. It would be interesting to observe how competitors and regulatory agencies react to this changing environment and whether any steps are made to guarantee competition and fairness in the Indian sports broadcasting market.

[4] Reliance-Disney merger: An in depth analysis of what it means for the Indian M&E landscape - Adgully.com, n.d. (2024, February 4). Live Mint.

**Jio-Disney Merger: Unraveling through Competition Act, 2002**

The Competition Commission of India (CCI) is poised to examine the merger deal due to the potential dominance of the combined company, particularly in streaming and television. Specifically, cricket rights are anticipated to be scrutinized by regulators, along with overall market share and the influence of the merged entity. The CCI will assess whether the merger could substantially reduce competition and harm consumers, particularly concerning potential impacts on subscriber tariffs. K.K. Sharma, a former head of mergers at CCI, suggests that the proposed Disney-Reliance merger, given its significant market power, especially in cricket, will likely attract rigorous regulatory scrutiny, necessitating a thorough investigation by antitrust authorities.[5]

Section 4 of the Competition Act, 2022[6] (Act) is the part that addresses the exploitation of a dominant market position. This segment closely mirrors the European Union's regulation against dominance abuse as outlined in Article 102 of the Treaty on the Functioning of the European Union (TEFU)[7]. According to Section 4(1)[8] of the Act, enterprises operating within the relevant market are prohibited from engaging in any form of dominant position abuse. There are three stages in determining the violation of Section 4(1) of the Act: (i) determination of the relevant market, (ii) determination of 'dominance', and the (iii) determination of 'abuse' of that dominant position.

In the context of applying Section 4 of the Act to the Jio-Disney Deal, the relevant market can be defined as per Section 2(t)[9] of the act which defines relevant market as "a market comprising all those products or services which are regarded as interchangeable or substitutable by consumers because of characteristics of the products or services, their prices and intended use.

In this agreement, the pertinent market is identified as the 'online live streaming market'. This distinction is drawn because the characteristics of the broader OTT market differ significantly from those of online live streaming platforms. Whereas the OTT market, including global entities like Netflix and Amazon Prime, thrives on consumer engagement through a steady stream of new content like movies and TV shows, online live streaming platforms such as Jio Cinema and Disney

[5] Sarthak Vij, 'A review of the anti-competitive JV of Reliance and Disney-Hotstar' (*LinkedIn*, 29 February 2024).
[6] The Competition Act, 2002, s 4.
[7] Treaty on the Functioning of the European Union, Internation Law, 1 January 1958 (Italy).
[8] The Competition Act, 2002, ss 4(1).
[9] The Competition Act, 2002, ss 2(t).

Plus Hotstar primarily generate revenue and attract consumers through the broadcasting rights for various sports events.

Moreover, the differentiation between the two markets becomes more evident when we acknowledge that conventional OTT platforms do not venture into providing streaming services for sporting events, nor do live streaming platforms significantly engage in delivering content services. Although both Jio and Disney offer a restricted range of web series and TV shows, these offerings do not constitute their primary revenue stream nor the primary factor for retaining customers.

The live-streaming sector stands apart from the traditional offline streaming market, which includes entities like Star Sports or Doordarshan. This distinction between online and offline markets reflects recent regulatory trends, as evidenced by the Competition Commission of India (CCI) treating them as separate markets in various cases. This stance was notably seen in the various cases, where the CCI observed that due to the widespread adoption of online travel aggregators (OTAs) among Indian consumers, the online channel represents a unique distribution channel. It cannot be easily replaced or replicated by offline methods or direct sales without experiencing a significant loss in consumer outreach.

Thus, when examining the possibility of this merger, the pertinent market shifts to the realm of online live-streaming service platforms, separate and distinguishable from the broader OTT market.[10]

**Jio's Dominant position in the relevant market**

The criteria for defining the 'dominant position' are prescribed in Section 19(4)[11] of the Act, encompassing factors such as the size and capabilities of the enterprise, as well as the size and significance of its competitors in the market landscape. It is emphasized that "*Position of strength enjoyed by an undertaking which enables it to prevent effective competition being*

[10] Adgully, 'Reliance-Disney merger: An in depth analysis of what it means for the Indian M&E landscape - Adgully.com' (*Adgully.com - Latest News on Advertising, Marketing, Media, Digital & more*).
[11] The Competition Act, 2002, ss 19(4).

*maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitor, customers and ultimately of its consumers"* through various judgments.

In the current scenario, Jio holds a dominant position in the relevant market owing to two primary reasons. Firstly, it boasts a larger market share in comparison to other streaming platforms. Secondly, it possesses a substantial reservoir of resources, notably its extensive base of telecom customers, which surpasses that of its competitors.

Section 19(4) (h)[12] mandates the establishment of barriers to entry for competitors as a criterion for determining an entity's dominant position, while Section 19(4)(d)[13] stipulates the economic power of a business, encompassing advantages in commerce over rivals. Given the current scenario, Jio has the opportunity to utilize its extensive telecom customer base to modify plan pricing and introduce OTT services as an additional feature to existing recharge plans. By doing so, Jio can dissuade customers from opting for alternative OTT subscriptions over Jio-Disney (post-merger), effectively erecting obstacles for other entrants in the live streaming sector due to diminished customer interest in migrating to their platforms.[14]

The offline live-streaming sector features key contenders like Doordarshan, Star Sports, ESPN, and Ten Sports, whereas the online sector is mainly represented by Sony Liv, Disney Hotstar, and Jio Cinema. Disney and Jio stand out in the market, commanding a significant combined viewership of over 59 million and 32 million respectively. In contrast, Sony Liv, a smaller player, has only reached 8 million concurrent viewers, underscoring the dominance of Disney and Jio in this market segment.

The scarcity of competitors within this particular market segment highlights the imperative for the Competition Commission of India (CCI) to reassess its stance in this matter. Given the already high concentration in this market, the proposed merger carries the risk of monopolistic

[12] The Competition Act, 2002, ss 19(4)(h).
[13] The Competition Act, 2002, ss 19(d).
[14] Rupin Chopra, 'Jio and Disney Merger: From the Lens Of Competition Due Diligence - Antitrust, EU Competition - India' (*Welcome to Mondaq*, 27 February 2024).

behavior, potentially infringing upon Section 4 regulations. Hence, it's crucial for the CCI to carefully reconsider its decision regarding this merger.[15]

**Abuse of Dominant Position**

Finally, this agreement holds the considerable potential to enable Jio to abuse its dominant position, as it establishes unjust entry obstacles for its competitors seeking to penetrate the market. When considering the abuse of dominant position, there are two primary approaches for assessing abuse of dominance. (1) The ability of an enterprise to function independently of competitive forces in the relevant market. One must assess their ability to function autonomously regardless of market conditions and determine if they possess the strength to outperform competitors in the relevant market and impose constraints on consumers, and (2) The ability of an enterprise to control its consumers or competitors or the relevant market in its support. This stance has the potential to enhance the company's influence by allowing it to freely implement a strategy tailored to enhance its profits over rivals or attract consumers in a manner that dissuades new competitors, both in terms of rival firms and products.[16]

Following the Jio-Disney Merger deal, the landscape shifts significantly in the live-streaming sports segment. Jio stands to lose one of its major, if not its sole, competitor, Disney Plus Hotstar. Consequently, Jio Cinema emerges as the solitary contender for acquiring streaming rights for events like IPL and FIFA. This consolidation leaves a void in competitive dynamics, potentially enabling Jio to exploit its market position and influence pricing on its platform. It's crucial to emphasize the significance of this, especially given the substantial revenue IPL generates, making it the second highest revenue-generating sports league globally. Furthermore, the growing popularity of FIFA among Indian audiences is expected to drive up viewership, further accentuating this shift.

[15] Piyush Gupta and Himanshu Gupta, 'Unraveling the Jio-Disney merger: Examining its impact on India's streaming landscape' The Competition & Commercial Law Review.
[16] Business Today, 'Reliance-Disney merger: Here's how the deal can fundamentally transform India's media and entertainment landscape' (*Business Today*).

Given Jio's significant financial resources and partnerships with top sports brands, it is reasonable to suggest that it could potentially shape market dynamics to its advantage. This raises concerns about Jio operating independently from its competitors and exerting influence over consumer behavior and pricing strategies within the relevant market.

**Future Approach**

The merger between Jio and Disney indicates a risk of monopolistic behavior emerging within India's live-streaming sector. Given Jio's strong foothold in online live-streaming and the barriers it could erect for new entrants, concerns arise about fair competition and consumer options. This union might grant Jio considerable influence over pricing and market dynamics, potentially disadvantaging both industry rivals and consumers. It highlights the looming threat of a monopoly in live-streaming, which could stifle healthy competition and adversely affect consumers in India. This underscores the necessity for diligent oversight to ensure fair competition in India's evolving live-streaming landscape.

**Conclusion**

The merger between Jio Cinema and Disney+ Hotstar, if brought to fruition, holds immense potential to reshape the Indian OTT landscape. However, as with any major business transaction, it necessitates careful consideration of competition law provisions and adherence to due diligence practices. By navigating the regulatory landscape and ensuring compliance, the merged entity can not only revolutionize the entertainment experience for consumers but also set a precedent for responsible and competitive business practices in the Indian market.The CCI’s role is crucial in maintaining a fair competitive environment, and the merger may require divestment of certain assets or other remedies to gain approval.

# THE MENTAL HEALTH OF WORKERS UNDER THE EMPLOYEE STATE INSURANCE ACT, 1948, AND EMPLOYEE COMPENSATION ACT, 1923.

**Rose Ann Baiju***

**Navya L ****

***Abstract:***

*Mental health is a major issue in today's world. Mental health is a state of mental well-being that enables people to cope with the stresses of life, realize their abilities learn well and work well, and contribute to their community. It is very much essential in the social and work life of every individual. Mental health is nothing but a lack of mental disorders and includes mental goodness, self-efficacy, perception, independence, competency, etc.*

*According to the World Health Organization, "Mental health is a state of well-being in which an individual realizes his or her abilities, can cope with the normal stresses of life, can work productively, and can contribute to his or her community."*

*The world's mental health has reported that mental health is being affected for every 1 in 8 people and during the COVID-19 Pandemic, the mental health of people has increased from 26% to 28% in just one year.*

*There is an essential requirement to reduce the mental health disorders of people due to their workload, anxiety, fear, etc. Even if we cannot curb mental illness wholly in the world, at least we can try to reduce the issue by several methods like conducting mental health awareness programs, leisure time, etc.*

**Keywords: Mental Health, Well-Being, Self-Efficacy, Covid-19, Mental Disorder.**

## Introduction

*"There are wounds that never show on the body that are deeper and more hurtful than anything that bleeds."- Laurel. K. Hamilton*

Mental health is a major issue in today's world. Mental health is a state of mental well-being that enables people to cope with the stresses of life, realize their abilities learn well and

* 3rd year, Kristu Jayanti College of Law, Bengaluru, Karnataka

** 3rd year, Kristu Jayanti College of Law, Bengaluru Karnataka

work well, and contribute to their community. It is very much essential in the social and work life of every individual. Mental health is nothing but a lack of mental disorders and includes mental goodness, self-efficacy, perception, independence, competency, etc.

According to the World Health Organization, "Mental health is a state of well-being in which an individual realizes his or her abilities, can cope with the normal stresses of life, can work productively, and can make a contribution to his or her community."

Mental health can be determined by observing a person handling his work and others and stress and the way they approach a particular situation. Mental health is as important as the physical health of a person[1]. The health of a person is considered most important not only to accomplish his tasks but also to cope with their work and balance the family life. In today's world, we do not find people being at peace with their work as well as family due to their stress. Therefore, it is necessary to make sure that the mental health of any person is not affected to the core to the extent that they are not able to do their duties and work properly at the right time.

There should be effective solutions for the people who have not yet been affected with the mental disorders as well as the people who have already been affected with the mental disorders in their respective fields in which they are working. There should be the provision of proper health facilities, counseling sessions, leisure, and entertainment programs to refresh the minds of the people rather than stressing them for the tasks to be accomplished forcefully. It is also essential for the Government to continue with necessary measures for the people to compensate the people who have been suffering already from various mental disorders and also compensate the people who have been stressing on their duties such as mentioned in the Employees' Compensation Act and Employee State Insurance Act. The main concept of mental health disorders has been increasing after the era of COVID-19.

Mental health can also be caused by various reasons such as childhood experiences or any ongoing chronic diseases such as cancer, traumatic brain injury, diabetes, or addiction to usage of drugs, alcohol, etc.

In this research, we would like to mainly press on toward the mental health of workers and the eligibility for the workers to get compensation for the disorders that affected them due

[1] Waddell A, Kunstler B, Lennox A, Pattuwage L, Grundy EAC, Tsering D, et al. 2023;49:235–48.

to the pressure in the workplace, management, etc. under the Employees' Compensation Act and Employee State Insurance Act.

There are various reasons for which workers have been affected by mental health disorders. They are, Job insecurity, discrimination between employees in the company, long, unsocial, inflexible hours in the workplace, poor physical working conditions, understaffing, lack of control over job design or workload, violence, harassment, and bullying, etc. are the various reasons that are affecting people drastically resulting in a loss in the productivity of the market. Mental health can also be affected negatively by the discrimination faced by people due to race, gender, color, religion, age, disability, migrant status, etc.

**Analytical Reports:**

There are various surveys conducted across the world to observe the workers being affected by mental health disorders. According to a survey conducted by the World Health Organization, workers and students are being affected by mental health disorders leading them to suicidal attempts, depression, and dementia. The mental health of such people has to be taken care of as they contribute to the economic welfare of the people in the society.

In the year 2019, 1 in every 8 people or 970 million people around the world were living with a mental disorder. The mental disorder has been increasing drastically after the COVID-19 era. 15% of the working adults have been found suffering from mental health disorders. Globally, 12 billion working days have been lost due to anxiety and depression leading to massive loss in productivity. Almost 60% of the world's population is being suffering from mental health disorders.[2]

In the year 2020, the number of people living with anxiety and depression from COVID-19 increased from 26% to 28% in one year. The various types of mental disorders that people have been suffering are anxiety disorders which means where people are characterized by excessive fear and worry and relative behavioral diseases. In 2019, 301 million people suffered from anxiety disorder including 58 million children. Of the people who have undergone depression that is usual mood fluctuations and short-lived emotional responses 280 million people where 23 million are children and adolescents, and people who have been

[2] Charlson, F., van Ommeren, M., Flaxman, A., Cornett, J., Whiteford, H., & Saxena, S. New WHO prevalence estimates of mental disorders in conflict settings: a systematic review and meta-analysis. Lancet. 2019;394,240–248.

suffering from Post-Traumatic Stress Disorder (PTSD) the exposure to an extremely threatening or horrific event or series of events are 24 million people and people who are suffering from an eating disorder are 14 million people.

The Union Minister of State for Health and Family Welfare, Dr. Bharti Pravin Pawar stated this in a written reply in the Rajya Sabha, as per the National Mental Health Survey conducted by the National Institute of Mental Health and Neurosciences (NIMHANS), Bangalore in 12 States of the country, the prevalence of mental disorders including common mental disorders, severe mental disorders, and alcohol and substance use disorders (excluding tobacco use disorder) in adults over the age of 18 years is about 10.6%. The major findings of the survey conducted on 22nd March 2022[3] are as mental disorders are closely linked to both causation and consequences of several non-communicable disorders, nearly 1 in 40 and 1 in 20 persons suffer from past and current depression. Stress-related disorders affect 3.5% of the population and were reported to be higher among females. The survey data indicates that 0.9 % of the survey population were at high risk of suicide, and nearly 50% of persons with major depressive disorders reported difficulties in carrying out their daily activities.

**Provisions:**

The provisions for the mental health of workers are given under the Employees' Compensation Act,1923 Employees' State Insurance Act, 1948, and other legislations that provide several sections that provide medical benefits to the workers or employers who have been suffering from mental health issues.

- *Section 3 of the Employees' Compensation Act, 1923* provides that for any personal injury caused to a worker while discharging the duty, the employer will be obliged to reimburse the appropriate compensation to the employee.

[3] Survey on Mental Health-Related Issues/22nd March 2022/10

- *Section 2(8) of the Employee State Insurance Act, 1948* defines "Employment Injury" as personal injury to an employee caused by accident or occupational disease arising out of and in the course of his employment, being in insurable employment, whether the accident occurs or the occupational disease is contracted within or outside the territory of India.
- *Section 74 of the Code on Social Security Act, 2020* states that it mandates the employer to pay compensation if any employee gets injured by any kind of 'occupational disease' arising out of and in the course of employment. Therefore, these provisions state that there should be compensation provided mandatorily for the employees by the employers for being affected by mental disorders during their employment.
- *Chapter 5 of the Right of Persons with Disabilities (RPwD) Act, 2016* includes free healthcare for persons with disabilities, and the providence of hospital facilities to promote healthcare and prevent the occurrence of disabilities. It has mainly created a basis for employees in case of mental illness that can be termed as disability.

**Judicial Interpretation:**

- In the English case of *Barber v. Somerset CC*[4], what emerges from these decisions is that an employee must inform their employer of their stress. Likewise, an employer may content themself with what their employee tells them, without seeking to find out whether it is true. However, the Court of Appeal has very firmly closed the door on the argument that certain forms of employment are so stressful that they could endanger the mental health of the persons concerned (an argument that was put forward by teachers, social workers, and prison officers' unions).
- In another case of the English High Court in the *Walker v. Northumberland County Council case in 1994*[5], the plaintiff was a social worker handling cases of child abuse whose workload was increased initially without a salary increase. Later, he suffered a nervous breakdown due to excessive workload and he had another breakdown and was dismissed because his absence interfered with the running of the department. The employee filed a case against his employer which had displayed a culpably cavalier attitude to his state of health.

[4] *Barber v. Somerset County Council [2004] IRLR 475, HL*
[5] *Walker v. Northumberland County Council [1995] IRLR 35*

The judgment of the case considered that, although the breakdown had been caused by the plaintiff's excessive workload, it was not reasonably foreseeable at that stage that his work would damage his mental health. However, when he returned to work, the employer should have foreseen that he was at risk of suffering another nervous breakdown if he was once again exposed to the same workload as before also it was considered that, at the time when the plaintiff returned to work, it was "quite likely, if not inevitable" that he would have another breakdown, particularly as he did not receive any "additional help" that would have enabled him to avoid a recurrence of the illness. It was described as a "work-related psychiatric accident".

- In the case of *Sundarbai V. General Manager, Ordinance Factory, Jabalpur*[6], the appellant Suderbai's husband Moolchand was a workman in the Ordnance Factory, Khamaria, the respondent in this appeal. Moolchand died while working in the Factory. His post-mortem examination revealed that Moolchand was suffering from an aneurysm of the aorta and the cause of death was a rupture of aneurysm. The appellant applied to the Commissioner for Workmen's Compensation for the award of Rs. 7,000 as compensation alleging that the death of Moolchand resulted from injury caused by an accident arising out of and in the course of his employment. It was alleged that the injury was caused due to strenuous work. The respondent denied that his death was not during his employment.

  However, it was admitted that Moolchand was doing his normal work as a laborer in the Box Plant Section when he died. The appellant led evidence to prove that Moolchand was engaged in loading and unloading heavy boxes from a lorry and after the tea break, he died when he was cleaning covers. The respondent on the other hand examined to prove that Moolchand was doing the comparatively light work of cleaning covers. The doctor who had conducted the post-mortem examination was also examined and he stated that Moolchand died due to an aneurysm. He further stated that "if a man is already having the disease of aneurism, then over-strain will accelerate the death". The Commissioner rejected the evidence that Moolchand did the work of loading and unloading heavy boxes and he accepted the evidence that Moolchand was doing the combatively light work of cleaning covers. The Commissioner found no force in the contention that "Moolchand died due to strenuous work". In this view of the matter, the application for compensation was dismissed by the Commissioner by his

[6] *Sundarbai V. General Manager, Ordinance Factory, (1976) 2 LLN 58*

order dated 19th July 1972 against which the present appeal has been filed because in the *Employer's liability to Pay Compensation under sub-section (1) of section 3 of the Workmen's Compensation Act, 1923*, arises only "if personal injury is caused to a workman by accident arising out of and in the course of his employment." In the instant case there is no difficulty about the course of employment as the workman died while doing his normal work in the factory where he was employed. The question that arises for consideration in the case is whether the workman's death resulted from an injury by accident arising out of his employment.[7]

**Conclusion:**

Mental health is a major part of various fields for employees such as at their workplace, family life, etc. Therefore, the employees have an opportunity to improve themselves in their work by taking up various initiatives for addressing their mental health and well-being.

In the case of *Global Health Private Limited Vs. Local Complaints Committee*[8], the Madhya Pradesh High Court imposed a large fine of Rs. 25,00,000 for failing with the provisions of the Prevention of Sexual Harassment at Workplace Act, 2013. In this case, the complainant herself felt harassed and humiliated affecting her mental health at the workplace. The respondent was found guilty and was liable to pay compensation for the damages of loss and effect on her mental health.

Hereby, the Government has taken up various initiatives after the period of the COVID-19 era for the betterment of the health of people. Some of the initiatives taken by the Government are setting up a 24/7 helpline to provide psychosocial support, by mental health professionals, to the entire affected population, divided into different target groups like children, adults, elderly, women, and healthcare workers. Providing guidance by the professionals to various parts of the country, providing legal advocacy through various media platforms, the providing medical facilities through various programs like the National Mental Health Programme (NMHP), District Mental Health Programme (DMHP), Community Health Centre (CHC) and Primary Health Centre (PHC), Information, Education and Communication

[7] *Sundarbai V. General Manager, Ordinance Factory, (1976) 2 LLN 58*
[8] Global Health Private Limited v. Local Complaints Committee, District Indore and Ors.2020 LLR 40 (MP HC)

(IEC) activities such as awareness messages in local newspapers and radio, street plays, wall paintings etc. are undertaken by the States/UTs etc.

Therefore, it is important to take care of the mental health of the workers and it is essential to provide compensation for the people who have been affected by mental health disorders as specified under the Employee's Compensation Act, 1923 and Employee’s State Insurance Act, 1948.

# CONSTITUTIONAL VALIDITY OF ELECTORAL BONDS

**Tanu Kaushik***

**Nancy Prajapati****

***Abstract***

*Electoral bonds are the money instrument which can be bought by the any individual of India or any company from the State Bank of India and donate to any political party to use these funds in election publications. These bonds can be redeemable by the registered political party only. The main purpose of this scheme was to bring transparency in in political funding. The electoral bond scheme was introduced in 29 January 2018 headed by our honourable PM Narender Modi led NDA government. Right to vote is a constitutional right, there should be a fair election with lawful funding.*

*The electoral bond scheme was introduced to maintain the transparency and the accountability of the election. This scheme violated the principle of fair elections and no transparency in the election. February 15, 2024, marks a historic day in India's democracy as the Supreme Court delivered a landmark verdict in the case of Association for Democratic Reforms v Union of India 2024 INSC 113 striking down the Electoral Bonds Scheme. Upholding democracy as the Constitution's basic structure, the Court found the scheme unconstitutional in a unanimous decision, addressing every challenge raised. This decision directed government to stay the implementation of the electoral bond. The Court's ruling highlights the scheme's violation of the right to information and rejects the government's arguments, emphasizing that the Constitution cannot ignore potential misuse.*

**Case**: *Association for Democratic Reforms v Union of India 2024 INSC 113*

**Case Number:** *Writ Petition (Civil) No.880/2017*

**Parties**

**Petitioner:** Association for Democratic Reforms; Common Cause; Communist Party of India (Marxist**)**

**Respondent:** Union of India; Election Commission

* 4th Year B.A. LL.B (Hons.), Chanderprabhu Jain College of Higher Studies & School of Law, Delhi

** 4th Year B.A. LL.B (Hons.), Chanderprabhu Jain College of Higher Studies & School of Law, Delhi

**Bench**: CJI D.Y. Chandrachud, J. Sanjiv Khanna, J. B.R. Gavai, J. J.B. Pardiwala, J. Manoj Misra

**Issues**

1. Is the electoral bond scheme constitutional?
2. Does the electoral bond scheme violate the voters' right to information?
3. Can the Scheme allow anonymity with the view to protect donors' right to privacy?
4. Does the electoral bond scheme threaten the democratic process, and free and fair elections?

**Provision involved**

- The Finance Act, 2016 came into force. It amended Section 2(1)(j)(vi) of the Foreign Contribution Regulation Act, 2010 (FCRA), which defines "foreign source", to allow foreign companies who have a majority share in Indian companies to donate to political parties.
- Section 11 of the Finance Act, 2017 amended Section 13A of the Income Tax Act exempting political parties from keeping a detailed record of contributions received through electoral bonds.
- Section 135 amended Section 31 of the RBI Act. This permitted the Union government to "authorize any scheduled bank to issue electoral bond."
- Section 137 introduced a proviso to Section 29C of RoPA, exempting political parties from publishing contributions received through electoral bonds in "Contribution Reports."
- Section 154 amended Section 182 of the Companies Act, 2013 which removed the upper limit on how much a company could donate to a political party.

**Case history**

Electoral bond scheme came into force in 2018. And in 2019 there was some non-governmental organizations that filed a petition in Supreme Court against the validity of the scheme constitutionality.

On 12 April 2019, a bench led by Chief Justice Ranjan Gogoi, asked all political parties to submit details of the bonds in a sealed cover to the ECI. The Bench refrained from imposing a stay on the implementation of the scheme stating that "such weighty issues would require an in-depth hearing."

Later, the petitioner filed an application for a speedy hearing in November 2019, then again in October 2020 before the Bihar elections.

In early 2021, Association of Democratic Reform approached the Court seeking a stay on the scheme, before the commencement of a fresh round of bond sales and the election. This application of stay was again denied by the court.

On 16 October 2023, the petitioners approached the Court to hear the case prior to the 2024 General Elections. A Bench led by Chief Justice D.Y. Chandrachud, with other justices stating the "importance of the issue" referred the case to a five-judge Constitution Bench.

On 31 October 2023, a **five-judge Constitution Bench** led by CJI Chandrachud, with Justices Sanjiv Khanna, B.R. Gavai, J.B. Pardiwala, and Manoj Misra heard arguments over three days.

**Contentions of the case by petitioner**

- Petitioners argued that the electoral bonds scheme **increased corporate funding, black money circulation, and corruption**.
- They argued that voters have a **right to information** about political parties' source of funding, as it informs the policies and views of that party.
- The Union contended that the scheme was designed to guarantee confidentiality and **the right to privacy** of the donors, who were otherwise exposed to retribution from political parties that they did not fund.
- On 15 February 2024, the Court unanimously struck down the Union's 2018 Electoral Bonds (EB) Scheme. The Bench held that the Scheme violated the voters' right to information enshrined in Article 19(1)(a) of the Constitution. The Court also directed that the sale of electoral bonds be stopped with immediate effect.

## Introduction

Electoral bonds are the money instrument which can be bought by the any individual of India or any company from the State Bank of India and donate to any political party to use these funds in election publications. These bonds can be redeemable by the registered political party only. The main purpose of this scheme was to bring transparency in in political funding. The electoral bond scheme was introduced in 29 January 2018 headed by our honourable PM Narender Modi led NDA government.

In a landmark case decision, the Supreme Court of India deemed the electoral bonds scheme unconstitutional, citing concerns over transparency and potential misuse of funds. The court directed the State Bank of India (SBI) to cease bond issuance and disclose details to the Election Commission, underscoring violations of constitutional articles and the scheme's susceptibility to corruption. The ongoing legal scrutiny reflects broader concerns about political funding transparency and accountability.

Despite its objectives, the electoral bonds scheme faces challenges, prompting calls for reforms to ensure democratic integrity and fair electoral practices. Right to vote is a constitutional right. there should be a fair election with lawful funding. The electoral bond scheme was introduced to maintain the transparency and the accountability of the election. This scheme violated the principle of fair elections Nd no transparency in the elections.

February 15, 2024, marks a historic day in India's democracy as the Supreme Court delivered a landmark verdict striking down the Electoral Bonds Scheme. Upholding democracy as the Constitution's basic structure, the Court found the scheme unconstitutional in a unanimous decision, addressing every challenge raised. This decision directed government to stay the implementation of the electoral bonds.

This decision requires the government to cease issuing electoral bonds immediately and disclose all relevant information to the Election Commission of India. The Court's ruling highlights the scheme's violation of the right to information and rejects the government's arguments, emphasizing that the Constitution cannot ignore potential misuse.

## Electoral bonds

### i. Conditions

- Registration: The political party should be registered under section 29A of the Representation of the Peoples Act, 1951 (43 of 1951).

- Minimum Vote Share: The party must have secured a minimum of one per cent of the votes polled in the most recent Lok Sabha or State election.
- Verified Account by ECI: The Election Commission of India should have allotted the political party a verified account.

### ii. Limits of electoral bonds

These bonds are available in various denomination 1000,10000,1 lakh ,1 crore. There is no specific limit mentioned for the purchasing of electoral bonds.

### iii. Validity of the bonds

The Electoral Bonds shall be valid for fifteen calendar days from the date of issue and no payment shall be made to any payee Political Party if the Electoral Bond is deposited after expiry of the validity period.

The Electoral Bond deposited by an eligible Political Party in its account shall be credited on the same day.

### iv. Authorization

State bank of India was authorized to issue Electoral bonds to the citizens or any corporation of India. It can be encased by any authorized branch of bank in India.

**Purpose of electoral reforms**

There are mainly 2 goals of the electoral bond scheme are as follows:

**Transparency**: Electoral bonds were introduced with the aim of enhancing transparency in political funding. By routing donations through bonds, the identities of individual donors remain anonymous, but the transactions are recorded by the issuing banks and monitored by regulatory authorities.

**Accountability:** Political parties are required to disclose the funds received through electoral bonds in their financial statements submitted to the ECI. This promotes accountability and enables greater scrutiny of party finances.

**Use of electoral bonds**

There are few pointers must be followed while using the bonds:

**Issuance**: Electoral bonds are issued by authorized banks at specific intervals, typically a few times a year. These bonds are available in fixed denominations ranging from as low as Rs 1,000 to as high as Rs 1 crore or more.

**Purchase**: Any eligible individual or entity, including companies and registered political parties, can purchase electoral bonds from designated branches of authorized banks. These bonds can be bought either through digital channels or by visiting the bank in person.

**Donation**: Once purchased, the electoral bonds can be donated to registered political parties of the donor's choice. These bonds serve as a legal mode of making political contributions

**Redemption**: Political parties can in cash the electoral bonds within a specified period, typically within 15 days of issuance. The funds received through electoral bonds are credited to the party's designated bank account, which is monitored by the Election Commission of India (ECI).

**Criticism of the scheme**

As there is pros and cons of everything so there are some criticisms of the electoral bonds are as follows:

- Critics argue that the anonymity of donors undermines transparency and accountability in political funding, as it allows for potential influence peddling without public scrutiny.
- While political parties are required to disclose the total amount of funds received through electoral bonds, they are not obligated to reveal the identities of individual donors. This opacity has raised concerns about the potential for quid pro quo arrangements between donors and political parties.

- Despite the legal framework governing electoral bonds, there are concerns about the possibility of misuse or circumvention of regulations, particularly in the absence of stringent enforcement mechanisms.
- Violated the article 14 and article 19 (1)(a) of Indian Constitutions.
- Infringe the right of information of the voters.
- It also violated the right to fair election in the country.

**Decision**

The constitutional bench gave the decision on the case which even includes the Chief Justice of India D.Y. Chandrachud. The Supreme Court held that the Electoral Bond Scheme was **unconstitutional** for **violating the right to information of voters**.

The court held that the electoral bond scheme should be struck down unconstitutional on the following grounds:

- It infringed the right to information of the voters by adding the condition of not disclosing the information related to the fundings.
- It also violated the right to fair and free election has the funds given to political party are merely or may be from the unlawful source.
- It also rejects the argument given on the right to privacy of the donor as this the matter of free election so there should be no secrecy in these terms are allowed.
- It also violated Article 14 and Article 19(1)(a) of Indian constitution.

The Supreme Court declared electoral bonds unconstitutional, directing SBI to cease issuance and submit bond details to the Election Commission.

Unanimously, the bench found provisions allowing anonymous funding to political parties. It criticized the deletion of provision, permitting unlimited corporate funding. The court highlighted the undue influence of companies on the electoral process and emphasized the need to curb corruption and ensure fair elections. SBI must disclose bond details to ECI, to be published within respective deadline.

The Electoral Bonds Scheme in India, currently under scrutiny in the Supreme Court, has faced criticism for its alleged lack of transparency and potential to promote corruption. Petitioners, including the Association for Democratic Reforms, argued that the scheme undermines democracy by favoring ruling parties and creating disparities in political funding.

**Analysis**

In present scenario of the case, although the petitioners raised the point about how the electoral bond scheme violated shareholder rights, the court primarily focused on analyzing the provisions within the broader framework of fundamental and voter rights. It is imperative to evaluate the impact of these provisions on shareholders and their interests. The public right to information was the contested by the petitioner.

The term of not disclosing the information of the bonds purchased by the shareholders raises the concern regarding transparency and accountability of the scheme which aimed to maintain transparency in the elections fundings. Non-disclosure of information on electoral funding to shareholders raises serious concerns regarding transparency and accountability.

Section 166 of the Companies act imposes a fiduciary duty on the directors to act in the best interests of the shareholders. It is essential that particulars of financial information are disclosed to the shareholders as they have the right to know what their money is being used for. This helps to informed decisions related to trading of securities and object to the same in case they believe that the funds are not a sound business decision or the same is prejudicial to their interests or the company's interests. As the companies have a choice to whether they chose to funds any political party of their choice through electoral bonds nor this helps in the transparency and accountability provided to the shareholders' funds.

The amendment to Section 182(3) of the company's act preserves the pre-existing inequality in power between shareholders and the board / promoters / management and placed the shareholders in an even weaker position.

As per Section 136 of the CA, every shareholder has a right to a copy of the financial statement which also contains the profit and loss account. Non-disclosure of such financial information directly affects their right to vote and their right to sell their securities.

Moreover, the removal of the first proviso, which limited contributions to 7.5% of average net profits, opened the door to shell companies being set up with the sole purpose of making political donations without any significant business operations. This also permitted loss making companies to contribute to political parties and allowed companies to significantly influence governmental policies. Thus, the 2017 amendments were, in the prejudicial to the interests of the shareholder.

**Conclusion**

Right to vote is our constitutional right. As we have right to choose our representative similarly political parties have right to publicize their parties and manifesto for winning the elections. For the advertisement or publicize, political parties need some funding. To know whether these fundings are coming from a lawful source or not the government introduced the scheme electoral bond scheme.

Electoral bonds are financial instrument or securities used to donate funds to political parties of own choice. An electoral bond is likely a promissory note that can bought by Indian citizens from any branch of State Bank of India. The citizen or any corporation can used these to donate funds to the any political parties of their choice. These bonds are payable on demand of the bearer.

In a recent case, the supreme court of India deemed the electoral bonds scheme unconstitutional, concerns over transparency and misuse of the funds. These reflect the broader concern on transparency and accountability of the funds donated. The main aim of the scheme was to reform and sanitize the political funding system in India.

# COMMUNITY SERVICE IN INDIA- AN ALTERNATIVE TO CORPOREAL SENTENCING IN BHARATIYA NYAYA SANHITA

**Sanika Brahme***

***Abstract***

*The present paper aims to delve into the intricacies of community service as a form of punishment and analyzes its emergence and configuration in India. It focuses especially on the amendment made to Bhartiya Nyaya Sanhita about community corrections, scrutinizing all relevant sections.*

*The Present paper shall divulge into the aspect that community service is certainly needed in India; however, its effectiveness hinges on robust policing and inclusive implementation of comprehensive legislation. The paper clears that community service orders will not always lead to recidivism and establishes that it might as well achieve the opposite. Importantly, this paper maintains an impartial stance and is unbiased in the sense that it analyses challenges as well as benefits, without favoring any particular perspective. Concludingly, the paper shall provide relevant suggestions and improvements in this arena of law.*

***Keywords*- community service, an alternative to imprisonment, Bhartiya Nyaya Sanhita, recidivism, reformative theory.**

## Research Objectives

The following research objectives formulate the back of the present paper and are the guiding lines upon which the research initiative shall be derived. The researchers in the present paper aim to strive to attain these objectives and to shape the fundamental essence of the study.

- To understand the status quo and whether a community service order is compatible as a form of punishment in the contemporary backdrop. Similarly, to assess the future of the community service order penalty and the way through which it shall prevail

* *1st year BBA LLB (Hons), Symbiosis Law School, Pune*

- To understand the scope of petty offenses and the implementation of community service orders as a punitive measure for such infractions
- To provide solutions for the potential challenges by the implementation of community service orders as a form of punishment vis-à-vis the vague nature of the same in the new laws
- To propose solutions that could be utilized by the courts, and the government to overcome the challenges associated with community service orders in the long term and the correction of the present issues

**Research Questions / Hypothesis**

The present study is a serious attempt to address the following research questions which form the core of the present study-

A. Can India adopt Community Service orders like other international nations in the global scenario?

B. Whether community service is the solution to the disinclination of recidivism *(the tendency of a convicted person to re-offend)*?

C. Addressing the specific issues in the implementation and administration of community services order penalty

D. Attending the limitations and inhibitions in executing community service orders

**Research Methodology Utilized**

This research is a culmination of a thorough examination of prior studies in the same domain. Extensive investigation was conducted by scrutinizing multiple databases. Moreover, the perspectives articulated in this research paper are meticulously scrutinized through a combination of empirical study (actual and objective observation or experimentation) and theoretical discourse.

This paper represents a comprehensive collaboration across legal, socio-economic, and related fields, amalgamating research findings from diverse disciplines. The goal is to propose a robust

alternative to physical punishments, with a particular emphasis on community service penalties. Concludingly, this research will encapsulate various suggestions and recommendations derived from the above-mentioned methodology.

**Lacuna In the Present Research**

Much research has been done before on community service orders as an alternative form of punishment. Many countries around the globe already have this system of mechanism in their criminal reform codes. Similarly, research for implementing community service as an alternative to punishment particularly to its scope in India has also been done in the past. However, the researchers in the present study have examined a new topic specific to the policing aspect of it and drove into the depths of community service as a punishment 'in the new codes of Bhartiya Nyaya Sanhita.' This current study is naturally characterized as exploratory research which is primarily centered around the examination of the newly brought policy of incorporating an alternative approach to punishment.

**Expected Outcomes of The Present Research Paper**

- A clear idea of community service as a form of punishment for offenses of minor nature with various forms of its examples
- An understanding as to why community service order is a robust mechanism as a substitute for imprisonment and custodial sentencing
- A comprehensive grasp of the workings of community service order in other international countries around the globe and how it may/may not work similarly in the Indian context
- Exploration of the prima-focus multifaced solutions for the issues encountered during the implementation of community service orders

**Understanding The Need of Community Service Order Policing in BNS By the Government**

The impetus behind initiating a structural legal reform and thereby adding community service as punishment stemmed from three pivotal reasons, including but not limited to, firstly, solving the prima facie problem of prison overcrowding, secondly, the codification of already existing community reform punishments afforded by the court in the form of judicial pronouncements, and lastly, incorporating a dynamic and up-to-date legal system as many countries in the globe already follow community service order as one of the alternatives to communal sentencing punishment. The impact of implementing this policy of community service orders will lead to bringing forward a paradigm shift in societal progress by reinforcing the societal mindset.

**Criminal Law Perspective into Community Service**

In criminal law, community service is an essential substitute for more conventional types of punishment like jail time or fines. Legally speaking, community service has several advantages for both criminals and society at large. First, it promotes a sense of accountability and rehabilitation by enabling criminals to actively contribute in a good way and make amends to the community. By working on projects that directly benefit the community, offenders can improve their feelings of responsibility, acquire useful skills, and grow more compassionate. In addition, community service may be customized to meet the unique requirements of the community and the offender, providing a more individualized and rehabilitative approach to justice. Economically speaking, community service can lessen the load on the criminal justice system by lowering the price of incarceration and minimizing prison congestion.

Numerous international legal precedents acknowledge the significance of community service in the context of criminal justice. For example, since the Criminal Justice Act of 1972, courts in the United Kingdom have had the authority to sentence offenders to community service orders, which give them the mandate to perform unpaid labor as a component of their punishment. Similar to this, the Criminal Code of Canada frequently provides community service orders, which let offenders serve their time in the community without being imprisoned. Furthermore, community service orders are frequently used to encourage the rehabilitation and reintegration of offenders into society in nations like Australia and New Zealand. The aforementioned global precedents underscore the widespread acknowledgment of community

service as an invaluable instrument in the management of criminal justice, stressing its function in fostering responsibility, recuperation, and community involvement.

**Background: Gauging A Baseline**

On 11th August 2023, Indian Home Minister Amit Shah introduced a new bill called Bhartiya Nyaya Sanhita (also known as BNS) in parliament to replace the criminal codes of the country. However, due to the subsequent changes made to this first draft, it was withdrawn and the 2nd bill called BNS-2 was presented in Lok Sabha on 12th December 2023. This was approved on 20th December; subsequently, receiving approval by the Rajya Sabha on 21st December, and officially became the law.

The Indian Penal Code of 1860 was replaced by this 2nd bill of Bhartiya Nyaya Sanhita (BNS-2) and this study will analyze the specific statutory change brought forward by the government within BNS-2 namely, the community service aspect as a form of punishment for petty offenses. Thus, the government has currently implemented the community service order as a part of alternative punishment.

However, community service as a punitive measure has not been defined, thereby its wide scope gives rise to ambiguity. Its inchoately fragmented and exhaustive nature with no defined boundaries encompasses a wide interpretational base, thus it could give rise to numerous issues if it is not effectively integrated into BNS-2.

**Introduction: Understanding The Basis of Community Service Orders**

Community service has been discussed in Bhartiya Nyaya Sanhita only as a form of punishment. However, its definition is given in Bhartiya Nyaya Suraksha Sanhita (formerly known as CrPc) as *"Community service shall mean the work which the Court may order a convict to perform as a form of punishment that benefits the community, for which he shall not be entitled to any remuneration."*[1]

Thus, community service is the specified number of hours of unpaid labor ordered by the court to be done by an offender for the benefit of the public. The Criminal Code of Canada

[1] Bhartiya Nyaya Suraksha Sanhita 2023, § 23 (3)

frequently provides community service orders, letting offenders serve their time in the community without imprisonment.

Furthermore, community service orders are frequently used to encourage the rehabilitation and reintegration of offenders into society in nations like Australia and New Zealand. The aforementioned global precedents underscore the widespread acknowledgment of community service as an invaluable instrument in the management of criminal justice, stressing its function in fostering responsibility, recuperation, and community involvement.

According to the American Bar Association, it is defined as *"a program through which convicts are placed in unpaid positions with non-profit or tax-supported agencies to serve a specified number of hours performing work or service within a given time limit as a sentencing option or condition*."[2]

**Application: Service for the community?**

The community service orders are exclusively designated only for '***offenses of petty nature****'*. As a result, this approach is particularly effective in aligning perfectly with the principle that minor offenses should receive proportionate punishments thereby mitigating unjust harsher punishments. The community service orders are specifically applied to '***first-time and casual offenders***.' Thus, providing them with a community service order punishment as an alternative to corporeal or institutional punishments is considered to be reformative to their very essence as it has a strong impact on the offender with reparative realization as well as expiation.[3] As a result, it is to be noted that it has been made clear that in case of heinous crimes like rape, murder, robbery, etc., community service as punishment cannot be granted.[4]

This form of punishment is usually also applied to the two focal groups, namely, first, ***old, vulnerable, and physically disabled offenders***, and second, ***minors*** who have committed crimes with lesser knowledge of the effect and with limited intentional harm.[5] Thus, a community service order benefits society and the offenders who get the chance to contribute

[2]M.K Harris, Community Service by Offenders (American Bar Association 1980) 6.

[3] R. Thilagaraj, Jianhong Liu, Restorative Justice in India: Traditional Practice and Contemporary Applications, Springer, 2017, 91

[4]Lalit Anjana, Community Service as an Alternative to Imprisonment, (2021) 2 INDIAN J.L. & LEGAL RSCH.1

[5] Eshen Li, China's community corrections: an actuarial model of punishment, (2015) 64 CRIME L.& SOC. CHANGE 1

back to society and make amends for their behavior. This can help them get over social stigma and rebuild their trust and relationships.[6]

**Analysis Of BNS: Community Service Perspective**

We shall now embark on a thorough analysis of community service orders by exploring all the sections in Bhartiya Nyaya Sanhita that pertain to this topic. In total, nine sections namely 4, 8(4), 5, 200, 207, 224, 301(2), 353, and 354(2) are about community service order as a form of punishment. We shall look at all the sections having community service as punishment.

- **Sec 4 of BNS** corresponds to the same by introducing an additional penalty as community service. The very introduction to community service orders in BNS comes in Chapter II of punishments in the respective Section 4(f).
- Similarly, Sec 5 and Sec 8(4) mention the consequences in instances of defaulting on fine payments or community service obligations as punishments. Thus, in case of default, **Sec 8(4)** imposes imprisonment of description, which the offender might've been sentenced to[7]. Similarly, the duration of imprisonment has also been stated in **Sec 5** which gives two months of imprisonment for offenses not exceeding rupees five thousand and extends it to four months of imprisonment for offenses not exceeding rupees ten thousand. Lastly, it bars the duration of imprisonment to one year for all kinds of offenses that have community service as punishment.
- **Sec 200** provides community service as punishment for a public servant who unlawfully engages in the practice of trade when barred from doing so along with other alternatives of punishments which include a fine or one year of imprisonment. The court will give priority to community service as punishment wherever it deems fit. An attempt of suicide to induce a public servant is also punished with community service in **Sec 224** with the same punishments as given.
- **Sec 301(2)** punishes theft with the conditions
- The value of the property of theft must be less than five thousand

[6] Ankita Roy, Community Service Sentencing and its significance in the Indian criminal justice system, (6 Feb 2024), https://www.livelaw.in/articles/community-service-sentencing-and-its-significance-in-the-indian-criminal-justice-system-248589, accessed 7 Feb 2024
[7] Bhartiya Nyaya Sanhita (2023), § 8(4)

- the offender should restore the amount of property stolen
- He shall be a first-time offender

**Punishment For Miscellaneous Causes**

**Sec 207** gives community service punishment to a person who fails to appear at a specified time and place as stated by the court giving alternative punishments such as imprisonment to the extent of 3 years or fine.

**Sec 353** punishes with community service for an offense of intoxication or trespass and annoying others with alternative punishments being a fine to the extent of one thousand rupees and imprisonment of twenty-four hours.

**Punishment In Case of Defamation**

**Sec 354(2)** talks about the offense of defamation which is dealt with the punishment of community service and may be coupled with imprisonment to the extent of a maximum of two years. Thus, an imprisonment of two years can be avoided merely by doing community service effectively as the courts recognize defamation as a form of petty offense.

Given the elevated frequency of defamation charges in the past, courts began to feel a necessity for reform within the judicial system to address the current issue comprehensively. An example of the same is the defamation charges against Rahul Gandhi which cost him 130 days of his membership.

**Understanding Precedents on The Present Issue**

It is impossible to overestimate the significance of judicial examination of community service in the context of criminal law. The process of judicial analysis guarantees that community service orders are suitable and efficient in accomplishing the goals of rehabilitation, justice, and reintegration into the community.

Judges can customize community service orders to fit each unique case by carefully weighing elements like the type and gravity of the offense, the offender's history and

circumstances, and the needs of the community. The primary cases concerning themselves with the aspect of community services are as follows:

- In ***Babu Singh v State of Uttar Pradesh***, the court recognized community service as an alternative form of punishment as early as 1978[8]. It even referred to meditative drills and study classes for the accused to have a reformative device of punishment.

- Similarly, in the case of ***Sunita Gandharv v State of Madhya Pradesh***, courts took into account the broad power they have while imposing bail conditions to encompass community service and reformative actions.[9] This emphasizes rehabilitation over punitive measures which is particularly beneficial for non-violent offenders.

- On a similar lane of community service concerning bail conditions, the case of ***Aparna Bhat and others v State of Madhya Pradesh and others*** stands significant.[10] It was held that the courts should use the wide power of discretion concerning bail conditions judiciously. Community service should not be granted for offenses that justify patriarchal reasoning and diminish sexual crimes by trivializing the survivor. Community service impositions for bail such as plantation of trees, working in hospitals during COVID, etc. are impermissible for offenses of such a harsh nature.

- In ***Sanjay Choudhury v State and Ors.***, the Delhi High Court felt that imprisonment for petty offenses, especially for first-time offenders, prisons can have a deteriorative impact on them in terms of the environment in prisons.[11] Prisons are overcrowded and lack sanitary measures which can exploit the offenders significantly. Thus, the courts held that community service should be given as a reformative form of punishment if the case involves petty offenses.

- In ***TK Gopal v State of Karnataka***[12], the court held that the law requires punishment to be meted out to the criminal but at the same time, reform of the criminal through various processes must also be established preserving his basic human rights, namely, human dignity, and human sympathy.

[8] Babu Singh v. State of U.P., (1978) 1 SCC 579
[9] Sunita Gandharva v. State of M.P., 2020 SCC OnLine MP 2193
[10] Aparna Bhat v State of Madhya Pradesh 2021 SCC OnLine SC 230
[11] Sanjay Choudhary v. State of Rajasthan, 1999 SCC OnLine Raj 81
[12] T.K. Gopal v. State of Karnataka, (2000) 6 SCC 168

**Community Sentencing Models in Other Countries**

Community service as an alternative to sentencing has been successfully implemented by multitudinous countries for an extended period. We shall review the mechanisms of some of the most prominent countries following this and how India can go about achieving the same. Examining the approaches of these preeminent countries can offer valuable insights for India in adopting similar measures.

In this research paper, only three countries are studied which include the US, for it is the world's largest economy, the UK, for Indian law has been birthed from UK law, and lastly, China, for both are seeking to establish their position in the world in terms of social, cultural, economic and strategic military context.

**Community Service in the US**

Community service as punishment arose in California in the 1960s when judges started rendering Labour as punishment especially cleaning up litter from playgrounds and free spaces and sweeping floors. This practice in California was soon taken up by other states and community service areas were extended to many other roles such as providing help in hospitals and service centers.

Initially, funding for community service programs was provided by the Law Enforcement Assistance Administration, which had a huge impact on society as a whole. However, when the funds of LEAA were depleted, the concept of community service orders was welcomingly taken by the US government.

**Community Service in the UK**

The roots of the origin of community service can be traced down to 1553 to the House of Correction of Bridgewell Palace in London where they condemned vagrancy and instituted labor instead of the idleness accompanied with imprisonment. Thus, the idea was to use work as a form of imprisonment to discourage people from being idle in prisons.[13] This was a long

[13] K Pease, ''Community Service Order'' (1985) 6 Crime and Justice 56

time ago but it was officially implemented in 1970 after the report called non-custodial and semi-custodial penalties which was later popularly known as the Wotton report.[14]

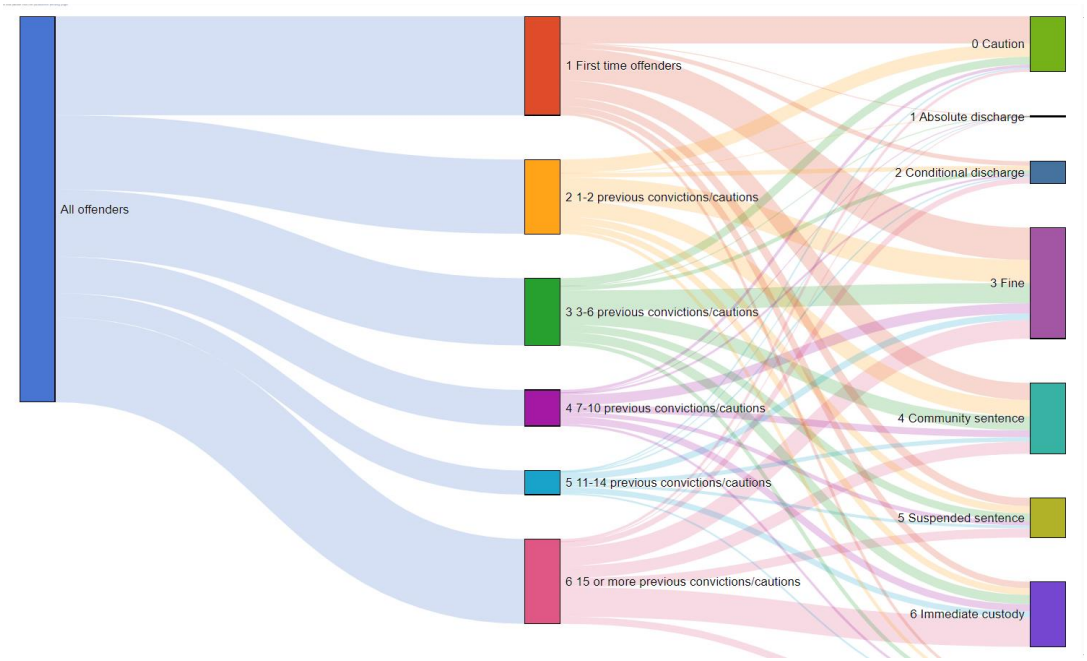
This report strongly emphasized alternatives to sentencing and held that offenders should necessarily be engaged in some sort of community service to make reparations to society. It also advocated for its nature of being a cost-effective and constructive alternative.[15] This report, when followed showcased the highest success rate among all penal developments in the last three decades in England and Wales.[16]

In the contemporary scenario in the UK, community service punishment is called community payback and is given if someone is convicted of an offense but not sent to prison. It is given for assault, theft, and damaging property. It involves 40-300 hours of community service based on the extent of crime which requires 4 days of work if unemployed and reduced days per week for an extended period if the person has a job.[17]

This aspect of community service which lets people have a job as well as adjust community service in the evenings is highly efficient as it does not cease the source of income in low-income families and keeps the economy flowing on a large-scale view. At the same time considering its pitfall, due to its flexible nature, it might not be taken seriously by the offender thereby leading to more issues of absenteeism and lax practice which are later dealt with in detail in the current research paper. However, in the UK, community service as punishment is given on a large scale which can be seen in the statistical data of the Ministry of Justice of the UK which showcases 62,161 cases wherein community service is given for offense.[18]

*The below image illustrates the same-*[19]

[14] Lee, J.R., NON-CUSTODIAL AND SEMI-CUSTODIAL PENALTIES (1971)
[15] Lewis, S., Vennard, J., Maguire, M., Raynor, P., Vanstone, M., Raybould, S. and CRG, A.R, The resettlement of short-term prisoners: an evaluation of seven Pathfinders 2003
[16] Reddy, B., Community Service Orders: An Alternative Sentence. 1991 *3*(2) *Singapore Academy of Law Journal*, pp.230-237
[17] Gov.UK, Community sentences: Community Payback GOV.UK (www.gov.uk), accessed 8th February 2024
[18] UK, Ministry of Justice, 'Criminal Justice System and Offenders Criminal History' https://moj-analytical-services.github.io/criminal_history_sankey/index.html, accessed on 8th February 2024
[19] Id



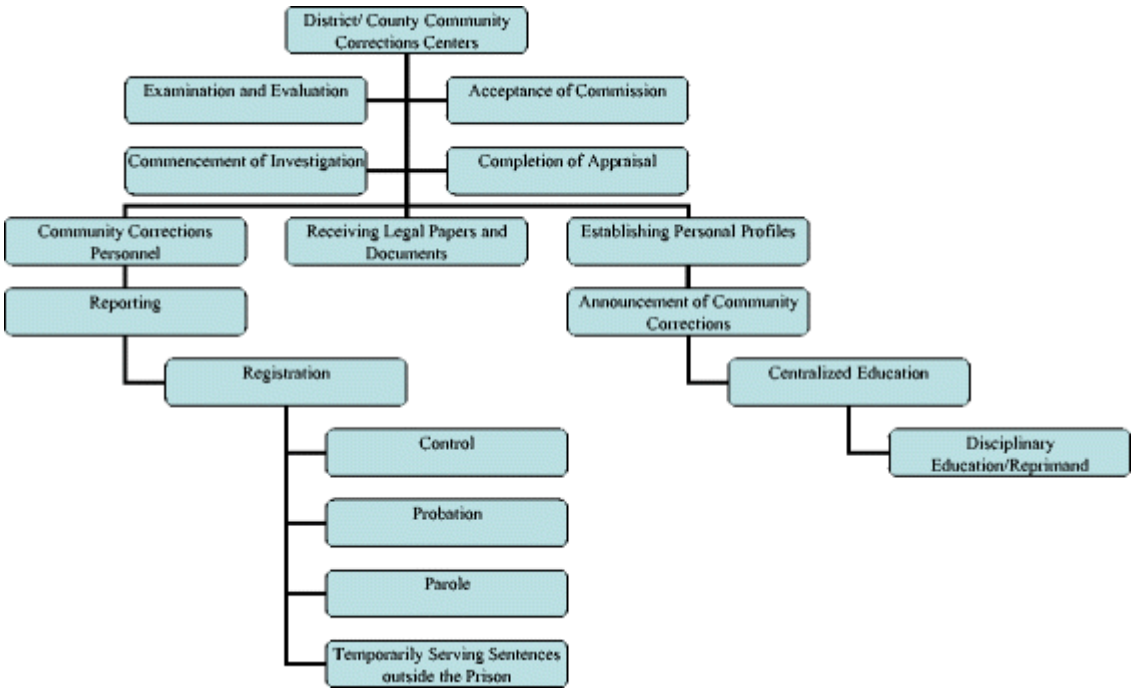

**Community Service in China**

In earlier times, China, as a communist country, vested significant discretion in the government to determine punishments. Later, the 2000s were followed by a transgressional shift from penal philosophy to rehabilitative ideals thereby incorporating the 'rule of law' principles and maintaining a harmonious conduct in the society.[20] In China also, minor offenders are the stakeholders benefitting from community corrections. Five types of offenders qualifying for community correction programs are as follows-

- The ones sentenced to public surveillance
- The ones under probation
- The ones permitted to serve sentences outside prison
- The ones to whom parole have been granted
- The ones who are permitted to serve their sentences outside the prison and deprived of their rights[21]

[20] Enshen Li, China's community corrections: An actuarial model of punishment, (2015) 64 CRIME L. & SOC. CHANGE 1
[21] Id

*The below picture shows the mechanism of community service correction followed in China*[22]-




**Required Or Not: Convergence Of the Legal Situation**

We shall review whether community service orders are required in India by analyzing the challenges and benefits attached to them.

**Benefits**

Community service orders are essential for the offender as they provide them the opportunity to reform themselves into a better person. The public perception of offenders is also improved as they pay back their dues to society and emphasize rehabilitative methods with community involvement. The most effectual task community service undertakes is the non-stigmatization of the offender by removing the 'prison tag' from him.[23]

This has a huge impact on his psychological mindset. Several benefits of community service have been outlined by Hudson and Galloway. These are as follows-

- Reduces intrusion of the justice system

[22] Li, E. "China's community corrections: an actuarial model of punishment" (2015) 64 Crime Law Soc Change (1), 1–22
[23] Supra 4

- Reduces recidivism
- Various types of agencies benefit from the Labour that the offender provides
- Cost-effective nature
- Increases community support within the criminal justice system
- Works as an alternative to imprisonment[24]

India may go about adopting community service as a punishment for offenses however, the nature of its success depends upon its implementation. It has to address a few challenges which include absenteeism, lengthy procedures in case of default, lax practice, menial tasks, discretion, and many in queue.

**Challenges**

When we punish offenders for petty offenses, we are providing them with the punishment of menial work. The community service guideline stipulates it to be a service of a menial nature like cleaning, sweeping, serving, etc. More often than not, these tasks are not required to be done as there exists sufficient manpower and Labour in India to undertake these tasks. There is a huge availability of temporary, also called odd-jobs workers, who choose different natures of small-scale jobs to sustain themselves.

Hence, a pertinent question arises- are there enough meaningful tasks available to accommodate the substantial number of offenders in need of community service? Moreover, considering the broader perspective, the creation of menial jobs solely to fulfill community service requirements seems counterproductive and devoid of purpose.

Secondly, while evaluating the impact of community service on recidivism, it's crucial to consider whether it fosters genuine rehabilitation in offenders or merely serves as a lighter alternative to incarceration. There's a risk that the community could inadvertently lead to increased recidivism. By substituting imprisonment with community service, offenders may perceive the punishment as less severe, potentially undermining its deterrent effect. This leniency and ease of community service could inadvertently encourage more offenders, leading to a rise in recidivism rates.

[24] Pease K, (1985) ''Community Service Order'' 6 Crime and Justice

Moreover, a separate entity or department of government will have to be created to manage all mechanisms of the offenders undertaking the community correction punishment. The issue of lax practice and absenteeism is naturally imminent and cannot be avoided unless persons of authority are appointed to administer these offenders to oversee them as well as regulate them. Similarly, the lengthy procedure to be followed if community service is defaulted adds to the extra burden of the courts.

**Analytical Understanding of Community Service Vis-À-Vis Its Significance**

A major break from conventional approaches to criminal justice may be seen in India's recent implementation of community service, which is indicative of a rising awareness of the need for alternative sentencing choices. Although community service is not a brand-new idea in India, its official inclusion in the legal system signifies a significant change in the direction of punishment that is more restorative and rehabilitative. When compared to other regions of the world, the way community service is interpreted and carried out in India raises several important questions.

The ambiguity and inconsistent definition of the criteria and extent of community service under Indian law is one area of concern. In contrast to several legal jurisdictions that have precise principles and standards for the imposition of community service orders, the legal system in India may allow for some court discretion and ambiguity. This could compromise the efficacy and equity of community service as a sentencing option and result in differences in sentencing practices.

In addition, the implementation of community service in India depends on having sufficient infrastructure and resources. The goal of reducing the jail population and fostering offender rehabilitation is admirable, but there are real obstacles to be overcome to successfully incorporate community service into the current criminal justice system. Particularly in a nation as diverse and populated as India, problems like supervision, monitoring, and collaboration with community organizations may provide substantial obstacles.

On the other hand, there is a stronger administrative framework for community service in other countries where it is more prevalent, like the UK, Canada, and Australia. To facilitate the successful execution of community service obligations, some jurisdictions have created extensive policies, procedures, and support networks. Furthermore, community service

initiatives in these nations frequently entail collaborations with nearby institutions and groups, promoting increased community support and involvement.

Furthermore, India and other nations may have quite different cultural and socioeconomic contexts for community work. Social stigma, caste relations, and economic inequality are a few examples of the factors that may affect community service's acceptability and efficacy in India as a means of punishment and rehabilitation. Therefore, these particular contextual elements and potential cultural impediments to the effectiveness of community service programmes must be taken into account in any attempt to implement and extend them in India.

In summary, the introduction of community service in India is a step in the right direction towards changing the criminal justice system, but it must be critically interpreted and implemented in light of other countries' legal systems. To fully realize the potential of community service as a workable substitute for customary forms of punishment in India, it will be imperative to address concerns of clarity, consistency, infrastructure, and cultural relevance.

**Suggestions And Recommendations for Alternatives**

There is a need to think about the possible solutions to the challenges that are accompanied by community service corrections. An alternative that can be used to decide if community service orders should be given or not is using an actuarial justice mode of punishment. This is defined as 'methods involving the identification of genetic personality traits, background experiences, and past behaviors of individuals to predict their risk for future or even past criminal behaviors.'[25] Thus, instead of trying to change and reform offenders, the focal point should be on controlling the offenders who might commit more crimes in the future by identifying them using various methods.

**Conclusion: Summarizing the Entire Issue**

The novel policy of the addition of community service as a punishment for petty offenses offers a multifaced solution that leads to the address of several pressing societal issues. Importantly, it is a huge step up for innovation, reform, and seeking justice as it fosters the

[25] Harcourt, B.E (2007) Against Prediction: Profiling, Policing, and Punishing in an Actuarial Age

rehabilitation of individuals. It even solves the issue of prison overcrowding and alleviates the burden on the government for the potential expenditure that might be incurred for updating new facilities as well as building new prisons which may affect the economy adversely.

This policy is akin to a mahout guiding an elephant, but here the dynamics are quite uncertain - it's unclear who is truly in control, as the elephant seems to steer the course**.** This means that, even if this policy is beneficial in the long run, its vague nature and its quality of extensivity in its interpretation can prove detrimental to society as a whole. Thus, the policies that are framed need to be inclusive, well-in-depth, and effective.

The schemes under community service need to overcome many hurdles to find their suitability in the Indian context. The hurdles include public acceptance, continuous monitoring by an authorized individual, biases, and differences of opinion among the judges while meeting the nature of punishment under a community service order. [26] Thus, alternatives for incarceration are unquestionably needed. But only if they are to have a well-developed judicial code and procedure.

Concludingly, challenges and limitations are inherent like community service orders. The key to unlocking their potential benefits lies in their effective implementation and policing.

[26] Supra 22

# DECODING THE ABROGATION OF ARTICLE 370: HISTORICAL SIGNIFICANCE, LEGAL GROUNDS, AND PRESENT-DAY IMPLICATIONS

**Shebin Paul***

***Abstract***

*This paper focuses mainly on the abrogation of Article 370, with particular reference to the recent Supreme Court judgment on December 11, 2023. The judgment upheld the Modi government's August 2019 decision to end Jammu and Kashmir's special status. The paper discusses the judgment's legal grounds and analyzes the repercussions. Article 370 which granted special provisions to J&K such as having its constitution and other such special powers, was a cornerstone in the relationship between the state and the Indian Union since its inclusion in the Union in 1949. The abrogation of that very cornerstone has had significant implications not only on the future trajectory of the state within the Indian Union but also on regional stability due to the widespread protests and unrest in the Kashmir valley and so forth.*

*The paper begins with an exploration of the historical context and provisions of Article 370, outlining its significance and the autonomy it conferred. The core of the paper deals with legal grounds discussed in the Supreme Court judgment concerning the government's rationale, the validity of the steps taken, and the amendments involved in the decision. Furthermore, the paper discusses the contemporary issues faced by Jammu and Kashmir following the decision regarding the abrogation, including political reactions, security and human rights concerns, and economic and social impacts on the regions.*

**Keywords: Article 370, Jammu and Kashmir, Ladakh, Kashmir Valley, Abrogation, Supreme Court judgment, human rights, autonomy, economic impact, legal grounds**

* 2nd year BBA LLB, Christ University (Deemed to be), Central Campus, Bangalore, Karnataka

**Historical background of Article 370 and its Abrogation**

Article 370 of the Indian Constitution gave the State of Jammu and Kashmir special status regarding the application of the law, except legislation on international, external, and defence affairs, property ownership, and citizenship rights. It was a transitional arrangement until Jammu and Kashmir formed its constitution and was hence only a temporary provision as it was part of the "Temporary, Transitional and Special Provisions" in Part XXI of the Indian Constitution. Article 370, which came into effect in 1949, exempted the state from the Indian constitution.

The Maharaja of Jammu and Kashmir, Hari Singh, offered to accede to the Dominion of India in respect of only three areas: communications, foreign affairs, and defence, in a letter dated October 26, 1947, addressed to the Governor General. Before the actual accession, Jammu & Kashmir and India signed an instrument of accession. The Instrument of Accession is a formal document that acknowledges a state's consent to an existing treaty. It is exchanged with the treaty parties or deposited with a designated state or international organization, allowing a nation that did not originally sign a treaty to become a party to it. On 26 January 1950, the Constitution (Application to J & K) Order, 19 was made by the President. It specified the subjects and articles of the Indian Constitution that would apply to Jammu and Kashmir, as required by Article 370 of the Indian Constitution with the modifications and exceptions agreed upon by the state government.

The order provided the initial framework for J&K's unique constitutional relationship with the Indian Union. Article 370 in the Indian Constitution was meant to express the identity of Jammu and Kashmir, due to the special circumstances in which it acceded to India. It provided special status to the state, allowing it to create its constitution and restricting the application of other provisions of the Indian Constitution. The J&K constituent assembly was dissolved on January 25, 1957, after the state constitution was made. As the Constituent Assembly was dissolved, the status of the abrogation of Article 370 was left in doubt. According to Article 370(3), the president could declare that the article would cease to be operative through a public notification, provided the recommendation of the Constituent Assembly was obtained.

**Abrogation of Article 370**

On December 19th, 2018, President Ram Nath Kovind issued a proclamation imposing President's Rule in Jammu and Kashmir under Article 356 of the Constitution of India.

The President issued a Presidential Order (CO 272) on August 5, 2019, that amended the interpretation of 'Constituent Assembly' under Article 370(3) to 'Legislative Assembly' by amending Article 367. Article 367 is an interpretation clause that outlines the general principles and procedures for understanding the Constitution to ensure that the provisions are applied consistently and correctly. This was to allow the Union Parliament to abrogate Article 370. Subsequently, a Statutory Resolution was passed by both Houses of Parliament recommending that Article 370 be dissolved. Thereafter, a second Presidential Order ( CO 273) was issued which held that Article 370 would cease to operate and that Jammu and Kashmir was a part of the Union of India. Following the abrogation, Parliament passed the Jammu and Kashmir Reorganisation Act, 2019, on August 9, 2019, bifurcating the state into two Union Territories: Jammu and Kashmir and Ladakh.[1]

The decision to abrogate Article 370 was based on the government's belief that it hindered the integration of Jammu and Kashmir with the rest of India. The Indian Government justified its action by saying it would help end violence and militancy, bring socio-economic development, promote equal rights and opportunities, and ensure better regional governance. Various petitioners in the Supreme Court challenged the decision. This led to a batch of writ petitions and appeals being filed, which the Court subsequently heard. The petitions challenged the constitutional validity of the Jammu and Kashmir Reorganization Act, 2019, which bifurcated the state into Union Territories of Jammu and Kashmir and Ladakh, effectively revoking the special status granted under Article 370[1][5].

The justification for the legal grounds of the abrogation of Article 370 centres on several key arguments presented by the Indian government and upheld by the Supreme Court. Central to this justification is the interpretation of the constitutional provisions that allowed the President of India to issue the order abrogating Article 370. Abrogation of Article 370 was quite complex,

[1] "Understanding the Abrogation of Article 370: Insights into Its Origin and Impact," SC Observer (2023), https://www.scobserver.in/journal/understanding-the-abrogation-of-article-370-insights-into-its-origin-and-impact/.

hence several questions were raised before the Constitution bench by the reference for determination. They include

- Whether the provisions of Article 370 were temporary or whether they acquired a status of permanence in the Constitution;
- Whether the entire Constitution of India could have been applied to the State of Jammu and Kashmir in the exercise of the power under Article 370(1)(d);
- Whether the Jammu and Kashmir Reorganization Act 2019 by which the State of Jammu and Kashmir was bifurcated into two Union Territories (Union Territory of Jammu and Kashmir and Union Territory of Ladakh) is constitutionally valid
- Whether there are limitations on the exercise of power by the President or Parliament under Article 356
- Whether Jammu and Kashmir retained an element of sovereignty or internal sovereignty when it joined the Union of India
- Status of the Constitution of Jammu and Kashmir

The justification given as per the December '23 judgment is as follows:

**Whether the provisions of Article 370 were temporary or whether they acquired a status of permanence in the Constitution:**

Article 370 was held to be a temporary provision on the reading of the historical context in which it was included. It was introduced to provide for an interim arrangement until the constituent assembly of the state was formed and could make a decision on the legislative competence of the union on matters and ratify the constitution. Article 370 was placed in part XXI of the constitution which deals with temporary and traditional provisions and the marginal note the provision which states "temporary provisions concerning the state of Jammu and Kashmir".

**Whether the entire Constitution of India could have been applied to the State of Jammu and Kashmir in the exercise of the power under Article 370(1)(d):**

The power under Article 370 (1) (d) can apply to a single provision or a whole constitution.

**Whether the Jammu and Kashmir Reorganization Act 2019 by which the State of Jammu and Kashmir was bifurcated into two Union Territories (Union Territory of Jammu and Kashmir and Union Territory of Ladakh) is constitutionally valid**

J&K will regain statehood, while Ladakh will remain a Union Territory. The Solicitor General confirmed this during a court hearing. The court accepted this position and didn't rule on whether J&K's reorganization into UTs was legal under Article 3. Ladakh's UT status is considered valid under Article 3(a) and its Explanation I, allowing UT creation by separating territory from a state. The Election Commission of India is instructed to conduct J&K state assembly elections by September 30, 2024. 21 specific steps are provided for this purpose.

**Whether there are limitations on the exercise of power by the President or Parliament under Article 356:**

After a detailed reading of Article 356 in particular and Part XVIII as a whole, it was found that there are limitations on the power, the reason being, the thread that runs through Part XVIII of the Constitution when read as a whole is that differing levels of executive and legislative power are required to handle an emergency under Articles 352 and 356. Article 356(1)(a) does not opt for an all-or-none formula. The "all or any" phrase indicates that the scope of power exercised by the Union Government must depend on the circumstances for issuing the Proclamation; The principle underlying Article 356(1)(c) is that the exercise of power by the President must be "desirable or necessary" to give effect to the objects of the Proclamation.

The following standard is laid down to assess actions under Article 356 after the Proclamation has been issued:

- The exercise of power by the President under Article 356 must have a reasonable nexus to the object of the Proclamation;
- The person challenging the exercise of power must prima facie establish that it is a mala fide or extraneous exercise of power.
- The exercise of power by the President for the everyday administration of the State is not ordinarily subject to judicial review.

The argument of the petitioners that the Union Government cannot take actions that have irreversible consequences when a Proclamation under Article 356 is in force is not accepted. The power of the Legislature of the State under Article 357 to repeal alter or amend a law enacted by Parliament in the exercise of the power of the Legislature of the State must be read in the context of the amendment introduced by the Constitution (forty-second Amendment) Act 1976. An express repeal by the competent legislature is required for the law to cease to exist after the amendment. The argument that Parliament can only assume the law-making process of a state legislature when a Proclamation under Article 356 is issued is not accepted as Article 357 ensures that Parliament or the President are not impeded by an absence of competence while exercising the powers of the state legislature.

**Whether Jammu and Kashmir retained the element of sovereignty or internal sovereignty when it joined the Union of India:**

Para 8 of IoA said that nothing in the instrument would affect the continuance of the sovereignty of the maharaja in and over the state. The constitutional setup or any other factors did not indicate the sovereignty of Jammu and Kashmir rather it was to further define the relationship between the union of India and the state of Jammu and Kashmir. The Preamble of the Constitution of Jammu and Kashmir, Sections 3, 5, and 147 of the State Constitution, coupled with Article 1 of the Constitution of India read with the First Schedule as well as Article 370 indicate in no uncertain terms that a system of subordination (as understood by the definition of sovereignty) exists by which the State is subordinate to the Indian Constitution first and only then to its own Constitution.

The Constitution accommodates concerns specific to a particular State by providing for arrangements that are specific to that State. This is a feature of asymmetric federalism, like Article 370 which became applicable to Jammu and Kashmir on the adoption of the Constitution. The case of Prem Nath Kaul addressed the question of whether the monarch held full legislative powers after the adoption of the Indian constitution in J&K but before the adoption of the J&K constitution. The decision in this case applied only to the question and didn't address the sovereignty of J&K upon integration with India.

**Status of the Constitution of Jammu and Kashmir**

After the application of the entirety of the constitution of India to the state, the constitution doesn't fulfil any purpose, the constitution of the state is inoperative.

**Present day implications**

The abrogation of Article 370 by the Indian government in August 2019 was a landmark decision aimed at integrating Jammu and Kashmir more fully into the Indian Union, with the intended goals of promoting development, curbing separatism, and enhancing national security. However, evaluating the extent to which these objectives have been met requires a detailed analysis of the outcomes and aftermath of this decision. This includes examining the socio-economic developments in the region, the level of integration achieved, and the prevailing security situation. Additionally, the reaction of the local population must be scrutinized to understand whether the abrogation has resulted in positive change or exacerbated existing issues.

The revocation of Article 370 has had various effects, the key points include

- All Indian laws apply to Jammu and Kashmir which ended the dual legal system that existed before promoting the complete integration of Jammu and Kashmir into the Indian Union. The people of Jammu and Kashmir are guaranteed the fundamental rights established in the Indian Constitution, promising equal protection under the law.
- The ease of doing business and the reduction of trade and commerce restrictions have helped boost investments from the private sector, opening up new avenues for economic growth and development in the region. The region will also receive direct financial assistance from the Union government for various developmental projects and initiatives
- The removal of Article 35A, which was an inevitable consequence of the removal of Article 370, led to greater gender equality. Women will no longer lose their resident status if they marry outside the state.
- The government’s efforts to combat cross-border terrorism were more effective. The abrogation facilitated better coordination and implementation of security measures in the region.

- The number of educational institutions and job opportunities in the region increased and students can now avail themselves of various national-level competitive exams and scholarships.
- Increased visitors were observed due to enhanced security and an open atmosphere.
- The reorganization of Jammu and Kashmir into union territories (J&K and Ladakh) allowed for more efficient and accountable governance.[2]

While the abrogation of Article 370 in August 2019 marked a significant political shift in Jammu and Kashmir, not everything has been positive in its aftermath. The move, which stripped the region of its special autonomous status, has led to considerable political unrest and social instability. It led to a multitude of human rights violations and socio-political challenges in Jammu and Kashmir. The restriction of movements, detention of political leaders, and communication blackouts have severely infringed upon the basic human rights of the local population. The reduction of the state's autonomy and the inability of residents to exercise their right to self-determination[3] has further deepened the sense of disenfranchisement.

Concerns are mounting over the dispossession of residents by outside buyers and investors, threatening the fragile environment of the Kashmir Valley with potential exploitation by big industries. The loss of land rights, once considered inherently Kashmiri, signifies a profound loss of sovereignty. Decisions made by a distant central government, often without the consent of the local populace, exacerbate feelings of alienation.

The replacement of "permanent residents" with a loosely defined category of "domiciles" undermines the identity of the indigenous people. Additionally, the repeal of laws that once protected land ceilings, established public rights to commons, and prevented land alienation has stripped away vital safeguards, leaving the region vulnerable to unchecked development and exploitation.[4]

[2] Right to Self Determination: An Analysis of the Unresolved Conflict in Kashmir within the context of Article 370, 3.4 JCLJ (2023) 234
[3] Violation of Right to Self Determination and Constitutional Mandate in Context of Removal of Article 370, 1.1 JCLJ (2020) 205
[4] Land, Laws and Loss in Kashmir, 12.2 JILS (2021) 89

## Conclusion

In conclusion, the abrogation of Article 370 marks a pivotal moment in India's constitutional and political history. While the move has been lauded for promoting national integration and economic development in Jammu and Kashmir, it is imperative to address the multifaceted consequences it has brought forth. The legal grounds for the abrogation, rooted in the Indian government's interpretation of constitutional provisions, have been a subject of intense debate. Yet, beyond the legalities, the socio-political impact on the local populace cannot be overlooked.

The advantages of the abrogation, such as potential economic growth, better gender equality, improved governance, and enhanced security measures, present a compelling case for its justification. However, these benefits must be weighed against the significant outcry and perceived violations of basic human rights among the residents of Jammu and Kashmir. The restrictions on freedom of expression, prolonged detentions, and curtailment of civil liberties have elicited widespread criticism, highlighting a severe disconnect between governmental actions and the lived experiences of the people.

Ignoring these human rights concerns undermines the democratic ethos and risks long-term instability. Therefore, while the abrogation of Article 370 may offer tangible benefits, policymakers must engage in meaningful dialogue with the affected communities and ensure that their rights and voices are respected and heard. Balancing national interests with human rights is essential for achieving lasting peace and harmony in the region.

# AN ANALYTICAL OVERVIEW OF LAND ACQUISITION LAWS AND FARMER PROTESTS

**Vanshika Shukla***

***Abstract***

*The analysis examines the intricate dynamics of land acquisition laws and the subsequent farmer protests, focusing on legal frameworks and socio-economic implications. It delves into the evolution of land acquisition policies, highlighting key legislative changes and their impacts on rural communities. The study also explores the underlying causes of farmer dissent, emphasizing issues such as inadequate compensation, displacement, and loss of livelihoods. Through a comprehensive review of case studies and protest movements, it seeks to understand the broader implications for agrarian societies and policy-making. The findings underscore the need for more equitable and transparent land acquisition practices, ensuring fair treatment of farmers while balancing developmental goals.*

**Keywords: Land Acquisition Laws, Farmer Protests, Agricultural Reform, Government policies**

## Introduction

In recent years, the intersection of land acquisition laws and farmer protests has emerged as a focal point of socio-political discourse globally, particularly in agrarian economies like India. This convergence underscores the complex interplay between economic development aspirations, governmental policies, and the rights and livelihoods of farming communities. Land acquisition laws, designed to facilitate infrastructure and industrial projects, often intersect with deeply ingrained agricultural practices and land ownership traditions, giving rise to contentious debates and grassroots mobilizations. At the heart of these discussions lie questions of equity, justice, and sustainability. How can nations balance the imperative of economic progress with the protection of farmers' rights and the preservation of agricultural landscapes?

* Research Scholar, Department of Legal Studies, Banasthali Vidyapith, Jaipur

This analytical overview seeks to delve into the nuances of land acquisition legislation, examining its historical evolution, key provisions, and implications for farming communities. Moreover, it endeavours to elucidate the catalysts behind farmer protests, exploring the grievances, aspirations, and collective actions driving these movements. By critically assessing the legal frameworks, socio-economic dynamics, and grassroots resistance movements, this overview aims to provide a comprehensive understanding of the complexities inherent in the interface between land acquisition laws and farmer protests. Through this exploration, we endeavour to shed light on the multifaceted dimensions of this critical issue and the potential pathways towards equitable and sustainable land governance.

## Legal Framework of Land Acquisition

Land acquisition refers to the process by which governments or authorized entities take private land for public use, typically providing compensation to the landowners. This process is governed by a robust legal framework to balance the interests of the public with the rights of private landowners. The laws and regulations surrounding land acquisition vary by country, but generally share common principles and practices.

## Key Principles of Land Acquisition

I. **Public Purpose:** The foundation of land acquisition laws is that land can only be acquired for a "public purpose." This includes infrastructure projects like highways, railways, schools, hospitals, and other projects that benefit the public. The definition of public purpose has evolved and expanded over time, but it remains a core principle.

II. **Compensation:** Fair compensation is a critical component. The idea is to ensure that landowners are not financially worse off due to the acquisition. Compensation typically includes the market value of the land, additional payments for disturbances, and sometimes solatium for emotional distress.[1]

III. **Due Process:** Land acquisition processes must adhere to due process to ensure transparency, fairness, and justice. This includes proper notification to landowners, the opportunity to object, and the right to appeal decisions.

[1] Chowdhury, S., 'The Politics of Land Acquisition in India: Law, Politics, and Processes' 2[1], Journal of Indian Law and Society 33-52, [2010].

IV. **Eminent Domain:** This principle grants the state the power to take private land for public use, with the obligation to provide fair compensation. It is rooted in the idea that the needs of the many outweigh the rights of the few, provided the process respects legal safeguards.

**Procedures for Land Acquisition**

I. **Notification:** The process usually begins with a notification indicating the government's intent to acquire land. This notice is published in official gazettes and local newspapers, and directly communicated to affected landowners.

II. **Survey and Inspection:** Authorities conduct surveys and inspections to assess the suitability of the land for the intended purpose. This includes measuring the land, identifying boundaries, and evaluating current usage.

III. **Objections and Hearings:** Landowners have the right to file objections to the proposed acquisition. Hearings are conducted where landowners can present their case. Authorities must consider these objections before proceeding.[2]

IV. **Declaration and Acquisition:** After considering objections, a declaration of acquisition is made, and the land is formally acquired. This declaration is also published and communicated to landowners.

V. **Compensation Assessment:** Compensation is determined based on market value and additional factors like the loss of livelihood and the cost of relocation. Valuation methods may vary, but the aim is to ensure fair and adequate compensation.

VI. **Disbursement of Compensation:** Compensation is disbursed to landowners, either as a lump sum or in instalments. Landowners have the right to appeal the compensation amount if they believe it is inadequate.[3]

**Compensation Mechanisms**

I. **Market Value:** The primary basis for compensation is the market value of the land, determined by recent sale transactions in the area or comparable sales data.

[2] Sivaramakrishnan, K., 'The Right to Land and the Rule of Law: The Politics of Land Acquisition in India' 36[2], Asian Studies Review 231-247, [2012].
[3] Narayanan, R., 'Comparative Analysis of Land Acquisition Policies: India and China' 14[2], Asia-Pacific Journal on Human Rights and the Law 183-202, [2013].

II. **Solatium:** An additional amount, usually a percentage of the market value, is provided to compensate for emotional distress and the inconvenience caused by the acquisition.

III. **Rehabilitation and Resettlement:** In cases where acquisition significantly impacts livelihoods, additional support is provided for rehabilitation and resettlement. This may include alternative land, housing, employment support, and other measures to restore living standards.

IV. **Interest Payments:** If there are delays in compensation payments, interest is often added to ensure that landowners are not financially disadvantaged by the delay.[4]

**Challenges in Land Acquisition**

I. **Disputes over Compensation:** One of the most common challenges is disputes over the adequacy of compensation. Landowners may feel that the compensation does not reflect the true value of their land or adequately cover their losses.

II. **Protracted Legal Battles:** Land acquisition often leads to lengthy legal battles, delaying projects and increasing costs. These disputes can arise over compensation, the definition of public purpose, and procedural fairness.[5]

III. **Relocation and Rehabilitation:** Ensuring that displaced people are adequately rehabilitated and resettled is a significant challenge. Failure to do so can lead to social unrest and long-term negative impacts on affected communities.

IV. **Balancing Development and Rights:** Striking a balance between the need for development and the rights of landowners is inherently challenging. Excessive use of eminent domain can lead to public outcry and loss of trust in authorities.[6]

**Impact on Farmers**

The land acquisition laws have significantly impacted farmers, often leading to widespread protests due to perceived injustices in compensation and loss of livelihoods. These laws, designed to facilitate infrastructure and industrial projects, frequently result in the

[4] Ghatak, M., & Ghosh, P., 'Land Acquisition and Compensation in India: Reforms and Challenges' 47[4], Journal of Development Studies 537-552, [2011].
[5] Roy, A., 'Land Acquisition and the Marginalisation of Rural Communities in India' 10[1], International Journal of Rural Management 19-39, [2014].
[6] Narayanan, R., 'Comparative Analysis of Land Acquisition Policies: India and China' 14[2], Asia-Pacific Journal on Human Rights and the Law 183-202, [2013].

displacement of farmers from their ancestral lands. Many farmers argue that the compensation offered is insufficient and does not reflect the market value of the land, leading to economic instability. Additionally, the loss of land disrupts agricultural practices, which are their primary source of income, exacerbating poverty and leading to social unrest.[7] The psychological toll of losing ancestral property further deepens their grievances, fuelling continued opposition and demands for more equitable policies.

**Economic Displacement and Loss of Livelihoods**

For farmers, land is not just an asset but a means of livelihood. The acquisition of agricultural land disrupts their primary source of income, leading to economic displacement. Even with compensation, farmers often struggle to find equivalent employment opportunities, as their skills are primarily tied to farming. This displacement can lead to long-term economic insecurity and poverty.

**Inadequate Compensation and Valuation Disputes**

Despite legal provisions for fair compensation, many farmers report receiving amounts that are far below the market value of their land. Valuation disputes arise due to outdated assessment methods and lack of transparency in the process.[8] This inadequacy leaves farmers with insufficient resources to rebuild their lives or invest in new ventures.

**Social Disruption and Cultural Impact**

The acquisition of land often leads to the fragmentation of rural communities, which are tightly knit and dependent on shared resources. The loss of ancestral land can erode cultural and social ties, leading to a sense of loss and identity crisis among the affected farmers. The

[7] Sud, Nikita, 'The Men in the Middle: A Missing Dimension in Global Land Deals' 41[4], Journal of Peasant Studies 563-582, [2014].
[8] Chakraborty, S. & Bose, P., 'Land Acquisition Laws and Protests: A Cross-Sectional Analysis of Farmer Movements in India' 21[3], Journal of Agrarian Change 527-544, [2021].

disruption of traditional lifestyles and community networks exacerbates the social impact of land acquisition.[9]

**Social and Cultural Implications**

The land acquisition laws and ensuing farmer protests in various countries have profound social and cultural implications. These laws often exacerbate the socio-economic disparities between urban and rural populations, as farmers, traditionally holding land passed down through generations, find their livelihoods and cultural heritage threatened. The forced acquisition of land disrupts age-old agricultural practices, leading to a loss of traditional knowledge and community cohesion.[10]

Socially, it fuels tensions between the government and rural communities, sparking widespread unrest and protests. These movements, often marked by solidarity and collective action, highlight the cultural significance of land as more than an economic asset, symbolizing identity, heritage, and sustenance. The protests underscore the clash between modernization drives and the preservation of agrarian lifestyles, fostering a dialogue on sustainable development that respects cultural legacies and social equity.[11]

**Case Studies**

Land acquisition laws are crucial in shaping the economic and social landscape of any country. These laws govern the process by which the government or its designated authorities can acquire private land for public purposes, such as infrastructure development, industrial projects, and urbanization. However, these acquisitions often lead to significant disputes and protests, particularly from farmers who are directly affected by the loss of their land and livelihoods.

[9] Rao, N., 'Land Acquisition, Rehabilitation and Resettlement: Law, Politics and the Elusive Search for Balance' 48[42], Economic and Political Weekly 34-40, [2013].
[10] Pattenden, J., 'Gatekeeping as Accumulation and Domination: Decentralisation and Class Relations in Rural South India.' 11[2], Journal of Agrarian Change 164-194, [2011].
[11] Banerjee-Guha, S., 'Accumulation and Dispossession: Contradictions of Growth and Development in Contemporary India' South Asia: 36[2], Journal of South Asian Studies 165-179, [2013].

### *I. Nandigram, India (2007)*

The West Bengal government's attempt to acquire land for a Special Economic Zone led to violent protests, resulting in several deaths and injuries. The conflict highlighted issues of forced land acquisition and inadequate compensation for displaced farmers.[12]

### *II. POSCO Project, India (2005-2017)*

The South Korean company's plan to build a steel plant in Odisha faced prolonged resistance from local farmers. Issues included forced displacement, environmental concerns, and inadequate compensation, leading to the eventual cancellation of the project.[13]

### *III. Singur, India (2006)*

Tata Motors' plan to build a car factory was met with fierce opposition from farmers whose land was acquired. Protests and legal battles resulted in the Supreme Court ruling the acquisition illegal, leading to the return of the land to farmers.[14]

### *IV. Dakota Access Pipeline, USA (2016)*

The Standing Rock Sioux tribe protested against the pipeline's route, which threatened their water supply and sacred lands. The conflict drew national attention to issues of indigenous land rights and environmental protection.[15]

### *V. El Tambor Mine, Guatemala (2012-2016)*

Farmers and indigenous communities protested against a gold mining project, citing environmental degradation and lack of consent. Persistent protests led to the suspension of the mine's operations by the Guatemalan courts.[16]

---

[12] Bose, Sayoni, 'Attachment to place and territoriality in Nandigram land struggle, India' 13[1], Human Geography 1-20, [2020].
[13] Mishra, Pradeep, 'Does impact assessment meet stakeholder expectation: case study of POSCO project in Odisha' Impact Assessment and Project Appraisal 35[5], Research Gate 397-406, [2019].
[14] Ghatak, Maitreesh & Mitra, Sandip & Mookherjee, Dilip & Nath, Anusha, 'Land acquisition and compensation: What really happened in Singur?' 48, Economic and Political Weekly 32-44, [2013].
[15] White, George & Millett, G & Maier, B., 'The Dakota Access Pipeline (Dapl): The Political Geographies of a Controversy' 31, Research Gate 7-18, [2022].
[16] Fox, Samantha, 'History, violence, and the emergence of Guatemala's mining sector' 1, Research Gate 152-165, [2015].

### *VI. Cauvery Delta, India (2020)*

Farmers in Tamil Nadu opposed the Hydrocarbon Exploration and Licensing Policy, fearing it would harm agriculture and water resources. The protests highlighted concerns over environmental impacts and the sustainability of farming livelihoods.[17]

### *VII. Beijing, China (2011)*

Farmers in Daxing district protested against the expropriation of their land for urban development. The protests turned violent, highlighting the tensions between rapid urbanization and rural livelihoods in China.[18]

### *VIII. Cane Creek, USA (1980s)*

The Tennessee Valley Authority's plan to build a dam faced opposition from local farmers due to the submergence of fertile land. The protests emphasized the need for better compensation and consideration of agricultural interests.[19]

### *IX. Ciudad Barrios, El Salvador (2017)*

Farmers protested against the government's plan to allow mining in their region, fearing water contamination and health issues. The protests succeeded in getting the government to ban mining activities in the area.[20]

### *X. Thuy Tu, Vietnam (2009)*

Farmers protested against the construction of a golf course on agricultural land, leading to violent clashes. The case underscored issues of land rights and the government's prioritization of development over agriculture.[21]

### *XI. Taita Taveta, Kenya (2015)*

Farmers opposed the government's plan to lease their land to foreign investors for biofuel production. The protests highlighted concerns over food security and the displacement of local communities.[22]

---

[17] Solaraj, Govindaraj & Dhanakumar, ks & K., Rudhravel & Mohanraj, Rangaswamy, 'Water Quality in Select Regions of Cauvery Delta River Basin, Southern India, with Emphasis on Monsoonal Variation' 166, Environmental monitoring and assessment 435-44, [2009].

[18] Huang, Liuqian, 'Research on Effect of Beijing Post-Olympic Sports Industry to China's Economic Development' 5, Energy Procedia 2097-2102, [2011].

[19] Wuenschel, Amarina, Bartel, Jim A., Bernal, Alexis, 'Forty Years of Change in Piute Cypress (Hesperocyparis Forty Years of Change in Piute Cypress (Hesperocyparis nevadensis), a Rare California Tree, After Frequent Fire and Drought' 41[1], Energy Procedia 1-16, [2023].

[20] Hrynkow, Christopher, 'Archbishop Oscar Romero: The Making of a Martyr by Emily Wade Will. Eugene, USA: Wipf and Stock, 2016' Journal: Community-Engaged Research, 3[1], Teaching, and Learning 19-206, [2017].

[21] Thuy Ngoc, Ho & Anh, Tu., 'Green Economy Development in Vietnam and the Involvement of Enterprises' 7[1], Low Carbon Economy 36-46, [2016].

[22] Mwakesi, Irene & Wahome, Raphael & Ichang'i, Daniel, 'Mining Impacts on Society: A Case Study of Taita Taveta County, Kenya' 11[11], Journal of Environmental Protection 986-997, [2020].

***XII. Dong Tam, Vietnam (2017)***

Villagers clashed with authorities over the expropriation of land for a military-owned telecom company. The violent confrontation brought attention to land rights and the misuse of power by state enterprises.[23]

***XIII. Kodingamali, India (2018)***

Indigenous communities protested against bauxite mining in Odisha, citing environmental degradation and loss of livelihood. The protests emphasized the importance of safeguarding indigenous rights and natural resources.[24]

***XIV. Mundra, India (2011)***

Fishermen and farmers protested against land acquisition for the Adani Group's port and SEZ project, citing environmental harm and loss of livelihoods. The protests highlighted conflicts between industrial development and local economies.[25]

***XV. Rosia Montana, Romania (2000-2013)***

Farmers and environmentalists protested against a gold mining project, fearing environmental destruction and cultural heritage loss. The protests led to a government decision to halt the project, preserving the region's ecological and cultural landscape.[26]

**Causes and Dynamics of Farmer Protests**

Farmer protests over land acquisition laws are driven by several interrelated causes and dynamics. Central to these protests is the perceived unfairness in the land acquisition process, where farmers often feel that they are inadequately compensated for their land, which is essential not only for their livelihood but also for their cultural and social identity.

Legal frameworks for land acquisition frequently prioritize industrial and infrastructural development, sometimes at the expense of agricultural communities. The lack

[23] Coxhead, Ian., 'Vietnam in 2017: Flying Fast in Turbulence' 58, Asian Survey 149-157, [2018].
[24] Mishra, Manoranjan & Santos, Celso & Nascimento, Thiago & Dash, Manoj & da Silva, Richarde & Kar, Dipika & Acharyya, Tamoghna, 'Mining impacts on forest cover change in a tropical forest using remote sensing and spatial information from 2001-2019: A case study of Odisha (India)' 302, Journal of Environmental Management 1-17, [2022].
[25] Patel, Kush & Patel, Chirag & Patel, Dhaval M & Parmar, Abhijitsinh & Patel, Dixit, 'Literature study on Tsunami Evacuation System in Mundra city'4, International Journal for Scientific Research & Development 321-613, [2016].
[26] Jarosz, K., 'Roşia Montană in Romania: Roman Gold Mines and the Power of Protests' 2[1], Journal of Community Archaeology & Heritage 57–71, [2015].

of transparent and inclusive decision-making processes exacerbates these tensions, as farmers are rarely consulted or given a meaningful role in negotiations.

Additionally, the dynamics of these protests are influenced by broader socio-economic conditions, such as rising rural indebtedness, declining agricultural incomes, and inadequate support for sustainable farming practices.[27] Political mobilization and advocacy by farmer unions and non-governmental organizations also play a critical role, transforming localized grievances into widespread movements.

The protests are further fuelled by distrust in government policies and promises, reflecting a deeper discontent with the rural development model that seems to marginalize small and medium-scale farmers. As a result, the dynamics of farmer protests are complex, involving a blend of economic, social, and political factors that reflect the broader challenges facing the agricultural sector in many countries.[28]

**Policy Implications and Recommendations**

Land acquisition, the process by which governments acquire private land for public purposes, is a contentious issue worldwide, often leading to significant social and political conflicts. In many countries, including India, land acquisition laws aim to balance development needs with the rights of landowners, particularly farmers. However, these laws frequently result in protests and unrest among farmers who feel inadequately compensated or forced to relinquish their land.

**Enhanced Compensation Framework:** Policies need to ensure that compensation is fair and reflective of market values. This might include compensation for future potential value and not just current use value.

I. **Consent and Participation:** Laws should mandate consent from a significant majority of landowners and ensure their active participation in the acquisition process. Participatory approaches can mitigate resistance and improve trust.[29]

[27] Borras, Saturnino M. Jr. & Franco, Jennifer C., 'Global Land Grabbing and Political Reactions 'From Below''34[9], Third World Quarterly 1723-1747, [2013].
[28] McMichael, Philip., 'The Land Grab and Corporate Food Regime Restructuring' 39[3-4], Journal of Peasant Studies 681-701, [2012].
[29] Basu, D., & Das, D., 'Land and Labor in Indian Agriculture: Discourses on Growth and Poverty' 7[3], Agrarian South: Journal of Political Economy 290-319, [2018].

II. **Resettlement and Rehabilitation:** Effective and timely implementation of resettlement and rehabilitation measures is crucial. This includes providing alternative livelihoods, housing, and community infrastructure.

III. **Transparency and Accountability:** Increasing transparency through clear, accessible information about the acquisition process and ensuring accountability through independent oversight bodies can help build trust.

IV. **Legal and Institutional Reforms:** Reforming legal frameworks to align with best practices in human rights and sustainable development is essential. Strengthening institutions to handle disputes and grievances effectively can also improve outcomes.

V. **Market-Linked Compensation Models:** Develop models where compensation is linked to the future value of the land, potentially including equity stakes in the projects developed on acquired land.[30]

VI. **Community-Led Development Plans:** Encourage community-led development plans where affected communities have a significant say in how the acquired land is used and developed.

VII. **Strengthen Legal Protections:** Amend laws to enhance protections for landowners, including stricter consent requirements and higher compensation standards.

VIII. **Capacity Building for Implementation:** Invest in capacity building for the institutions responsible for land acquisition to ensure effective and efficient implementation of laws and policies.

IX. **Regular Policy Reviews:** Establish mechanisms for regular review and updating of land acquisition laws and policies to adapt to changing socio-economic conditions and address emerging issues.

X. **Alternative Dispute Resolution Mechanisms:** Promote alternative dispute resolution mechanisms to handle conflicts and grievances more efficiently and amicably.

XI. **International Best Practices:** Adopt and adapt international best practices in land acquisition, ensuring alignment with global human rights and development standards.[31]

By addressing these issues through comprehensive policy reforms and robust implementation mechanisms, it is possible to balance the needs for development with the rights and livelihoods of farmers, leading to more sustainable and equitable outcomes.

[30] Mishra, S., 'Farmers' Agitation and State Response in Contemporary India: A Case Study of Maharashtra' 49[6], Journal of Asian and African Studies 717-732, [2014].
[31] Kumar, R., 'Land Acquisition, Rehabilitation and Resettlement Act 2013: A Critical Analysis' 3[2], Journal of Land and Rural Studies 221-229, [2015].

## Conclusion

Finally, the complexities surrounding land acquisition laws and the resultant farmer protests underscore the necessity for balanced and inclusive policymaking. While land acquisition is often crucial for infrastructure and industrial development, it must be approached with sensitivity to farmers' livelihoods and rights. Adequate compensation, rehabilitation measures, and genuine consultation processes are vital to mitigate conflicts and ensure fair outcomes.

Moreover, a transparent and participatory approach in formulating land acquisition policies can foster trust between stakeholders and promote sustainable development. The ongoing protests highlight the need for continuous dialogue and proactive measures to address grievances, uphold democratic principles, and achieve equitable progress for all parties involved. Only through collaborative efforts can a harmonious balance between development imperatives and farmers' welfare be achieved.

# THE PORCHE CASE: REVISITING JUVENILE JUSTICE IN INDIA

**Anureet Kaur***

**Namandeep Kaur****

***Abstract***

*India's juvenile justice system has been developing constantly to meet the twin goals of protecting society and rehabilitating young offenders. In this research study, the researchers have delved into the intricacies of the Juvenile Justice System in India, using the Porche case as a focal point for analysis. Along with analyzing current changes and noteworthy case studies, the study examines the legislative framework, historical development, and structural mechanisms supporting juvenile justice. This study also provides an in-depth overview of the current status of juvenile justice in India through a comparative analysis of rehabilitation vs punishment, legal and ethical issues, and the prospects and obstacles for reform. Policy implications and proposals are put forth to direct future efforts toward a more equitable and efficient juvenile justice system.*

**Keywords - Juvenile Justice, Porche Case, Rehabilitation, Punishment, and Legal Framework.**

## Introduction

India's juvenile justice system is at a turning point, shaped by a complicated web of social, legal, and ethical factors. The Indian legal system is always working to strike a balance between the requirements of young offenders for rehabilitation and the demands of justice and public safety, given the country's growing youth population and rising rates of juvenile delinquency. Nevertheless, The Indian System has tilted towards rehabilitation like many other developed countries. However, *the Porsche case* in Pune is a dreadful narrative that has unrevealed the loopholes in the system and has made the public infuriated. There has always been a continuous contest between rehabilitation and punishment as a measure to provide justice and well-being of the society. This fragile equilibrium has been sharply

* 2nd year of BA LLB, Rajiv Gandhi National University of Law, Punjab
** 2nd year of BA LLB, Rajiv Gandhi National University of Law, Punjab

highlighted by the terrible but crucial *Porche case,* which has sparked important discussions and changes to the juvenile justice system.

**Juvenile Justice System in India**

Over the past few decades, India's juvenile justice system has experienced substantial changes, moving from a punitive to a more rehabilitative and reformative framework. The Reformatory Schools Act, of 1897, which was passed during the British colonial era, is credited with founding juvenile justice in India. Following independence, the nation saw the adoption of the Children Act, of 1960, which established the groundwork for a distinct legal system for children.[1]

The Juvenile Justice (Care and Protection of Children) Act, 2000 is the cornerstone of India's contemporary juvenile justice system. It was passed to comply with global norms established by the United Nations Convention on the Rights of the Child (UNCRC).[2] Later, to address new issues and improve the legal framework for the protection and care of minors, this Act was revised in 2006, 2010, and, most significantly, in 2015.[3]

A major change was brought about by the *Juvenile Justice (Care and Protection of Children) Act, 2015*, which included a clause allowing children, between the ages of 16 and 18, who were charged with serious crimes, to be tried as adults in specific situations.[4] The public uproar that followed the *Nirbhaya gang rape* case in Delhi, in which a juvenile was among the accused, prompted this revision.[5] To guarantee the correct adjudication and care of juveniles, the Act also established Juvenile Justice Boards (JJB) and Child Care Committees (CWC).[6]

The cornerstones of the juvenile justice system in India are rehabilitation and reintegration. To ensure that juveniles may reintegrate into society as contributing members, the system places a strong emphasis on educational programs, counseling, and vocational

[1]Mohan Shakti, *Juvenile Justice System in India A Statutory and Procedural Study*, University (2014), https://shodhganga.inflibnet.ac.in:8443/jspui/handle/10603/145628.
[2] Study of Juvenile Justice Act and System in India (Paper) | ProBono India, https://probono-india.in/research-paper-detail.php?id=643.
[3]*Id.* at 3.
[4] THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2015, No. 2, Acts of Parliament, 2015 (India).
[5] Juvenile Justice System In India, https://legalserviceindia.com/legal/article-6794-juvenile-justice-system-in-india.html.
[6]*Id.* at 4.

training. The purpose of Observation Homes, Special Homes, and Places of Safety is to care for and rehabilitate children while their cases are pending and following adjudication.[7]

To improve child protection and expedite adoption processes, the Juvenile Justice Act underwent its most recent and important change in the year 2021. Many modifications were made by the *Juvenile Justice (Care and Protection of Children) Amendment Act, 2021*, which required that no child be placed in institutional care for more than three years and gave District Magistrates the jurisdiction to issue adoption orders.[8]

The Indian juvenile justice system is dynamic, as demonstrated by recent case studies. The trial of a 16-year-old accused in the 2017 *Pradyuman Thakur murder case* brought the 2015 Act's modifications into sharp relief.[9] The case demonstrated the judiciary's complex approach in determining the juvenile's level of maturity and the nature of the offense they committed.

The 2018 *Kathua rape murder case* is another relevant example. In this case, the violent attack and death of an eight-year-old girl sparked countrywide demonstrations and called for harsh punishments against the offenders, including minors.[10] To provide justice for victims and balance the rehabilitative requirements of juvenile offenders, this case spurred discussions on the effectiveness of the current juvenile justice framework and the necessity for additional reform.

**The Porsche Case: A Comprehensive Analysis**

On the night of May 19, a tragic incident took place in Pune. A 17-year-old, who was driving a Porsche Taycan under the influence of alcohol at a speed of around 150-200 km per

[7]Divangi Bhargav, *Juvenile Justice System in India- A Critical Analysis*, (2024), https://papers.ssrn.com/abstract=4790810.

[8] THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) AMENDMENT ACT, 2021, No. 23, Acts of Parliament, 2015 (India).

[9] Pradyuman murder: Detained Ryan student a porn addict, often carried knife to school, India Today (2017), https://www.indiatoday.in/mail-today/story/pradyuman-thakur-murder-ryan-international-school-detained-student-porn-addict-gurugram-cbi-1082463-2017-11-09 (last visited Jun 10, 2024).

[10] Mohd. Akhtar vs The State Of Jammu And Kashmir, AIR 2018 SC 2075.

hour, hit a motorcycle, causing the deaths of two people.[11] He was arrested at the moment and was taken to the Yerwada police station.[12]

After the incident, the minor was taken to the police station. An FIR was filed against him. The FIR was filed under section 304A of IPC instead of section 304. Section 304A is death by negligence whereas; section 304 is culpable homicide not amounting to murder. The maximum punishment under 304A is two years in jail, whereas the maximum sentence under 304 is life or ten years in prison. Moreover, police conducted two tests to check alcohol consumption- a blood test and a personal appearance test.[13] They turned out to be negative. It was later found that the blood samples were switched.[14]

Later, that minor was presented before the Juvenile Justice Board and was granted bail. Minor was asked to write a 300-word essay on the effect of road accidents and their solutions and undergo "de-addiction counseling".

After many mass protests by the public on granting bail so easily, on 22 May, the bail order was canceled by the Juvenile Justice Board, and sent the minor to Nehru Udyog Observation Home.[15] The police filed another FIR under section 302. It is trying to get permission to execute a minor as an adult.

Under section 15 of the Juvenile Justice Act[16], juvenile who are between 16-18 years of age and have committed heinous crimes can be tried as adults. For a crime to be heinous, the minimum punishment for that offense should be 7 years.[17] The offense under which the minor is booked is section 302. Under section 302, maximum punishment is 7 years but there is no minimum punishment. Thus, it is not considered a heinous crime as per the definition.

---

[11] Prateek Goyal, *Porsche, pizza, police, politics: The midnight deaths of two techies in Pune*, NEWSLAUNDRY (June 7, 2024), https://www.newslaundry.com/2024/05/23/porsche-pizza-police-politics-the-midnight-deaths-of-two-techies-in-pune.

[12] *Id.*

[13] Nadeem Inamdar, *Pune Porsche accident: Teen Driver's blood sample was thrown in the dustbin, says top cop*, HINDUSTAN TIMES (June 7, 2024), https://www.hindustantimes.com/cities/pune-news/teen-driver-s-blood-sample-was-thrown-in-dustbin-top-cop-101716836746536.html.

[14] *Id.*

[15] R Raj Rao, *Pune Porsche Crash Case: Delving into Observation Home Dynamics*, THE FREE PRESS JOURNAL (June 7, 2024), https://www.freepressjournal.in/pune/pune-porsche-crash-case-delving-into-observation-home-dynamics#:~:text=The%2017%2Dyear%2Dold%20boy,the%20city%20for%20two%20weeks.

[16] Juvenile Justice (Care and Protection of Children) Act, §15, No. 201602, Acts of Parliament, 2015 (India).

[17] THE WIRE, https://thewire.in/law/supreme-court-offence-minimum-imprisonment-seven-years-heinous (last visited 8 June 2024).

Moreover, *the Porche Case* exemplifies the complicated dynamics of the juvenile justice system, in which the gravity of the offense needs a delicate balance between punishment and rehabilitation. This case exemplifies the difficulties that the judiciary has when adjudicating serious acts committed by minors, which necessitates a sophisticated approach that takes into account both the seriousness of the crime and the opportunity for change. It underlines the need to establish a framework that may fulfill public expectations for justice while adhering to juvenile rehabilitation ideals.

The *Porche Case* ultimately emphasizes the significance of having a fair and effective legal procedure, capable of addressing severe offenses while encouraging prospects for the rehabilitation of juvenile offenders into society. Thus, it can be said that there are many lacunas in law.[18] The case is still pending but it shows that there need to be reforms and the stance should be made clearer.

## Comparative Analysis of Rehabilitation and Punishment in Juvenile Justice

The juvenile system has undergone many changes leading to increasing focus on rehabilitation rather than punishment. This section will analyze the underlying purpose of rehabilitation and punishment and are different advantages and disadvantages of both approaches.

### Rehabilitation

The purpose of rehabilitation is to discover the causes of delinquent behavior and counteract them to transform the juvenile into a law-abiding citizen.[19] It emphasizes the reformation of the juvenile through education and skill building.[20] The advantages of Rehabilitation include that it counters the root causes of the crime. It tries to ensure that the minor does not commit the crime again. It focuses on the personal growth of the minor. It is a more humane and effective method in the long term. On the side, there are some disadvantages of rehabilitation as well. Often the offenders who have committed heinous

[18] S. Krishnan, *Critical analysis of interpretation of age factor of a juvenile in Pune Porsche case*, THE DAILY GUARDIAN (8 June 2024), https://thedailyguardian.com/critical-analysis-of-interpretation-of-age-factor-of-a-juvenile-in-pune-porsche-case/.
[19] Sudha Yadav, Akhilesh Ranaut, Juvenile Justice Reforms: Evaluating the effectiveness of Rehabilitation Vs Punishment, 5 IJFMR 1, 2 (2023).
[20] *Id.*

crimes cannot be reformed by rehabilitation alone. Moreover, rehabilitation programs are very resource intensive.[21]

**Punishment**

Punishment has been used to counter crime from time immemorial. It creates a deterrent effect in the minds of others to prevent further crime. There is also a sense of justice when punishments are given to offenders. However, there are cons of punishment as well. It does not cater to the root cause of criminal tendency. It does not reduce the chances of that person committing a crime again.

Both rehabilitation and punishment have their pros and cons. Therefore, it is important to have a balance of both for an effective juvenile system. Rehabilitation is efficient in long run and should be focused while dealing with juveniles as they can be reformed. However, this is not the case with each offender. Some commit heinous crimes having full knowledge. It is wrong to get them away with their crimes. They should receive punishment.

**Legal and Ethical Considerations in Juvenile Justice in India**

Ethically, the juvenile justice system must navigate the tension between retribution and rehabilitation. The principle of *parens patriae*, where the state acts as a guardian, underscores the ethical obligation to prioritize the best interests of the child. This involves providing educational and psychological support to facilitate the juvenile's reintegration into society.[22] However, balancing this with societal demands for justice and safety, particularly in cases involving serious offenses, remains a complex ethical dilemma as also seen in seen in the recent *Porche case* in Maharashtra.

The judiciary's involvement in interpreting and applying these legal requirements while considering ethical standards has been brought to light in various high-profile cases. As earlier discussed, the decision to pursue a 16-year-old as an adult in the *Pradyuman Thakur case* spurred discussions over the propriety and ramifications of such actions. The handling of

[21] *Id.* at 5.
[22] Juvenile Delinquency In India: Reasons, Justice And Solutions - Free Essay Example, Edubirdie, https://edubirdie.com/examples/juvenile-delinquency-in-india-reasons-justice-and-solutions/.

the 2018 *Kathua rape murder case* by the judiciary also highlighted the necessity to strike a balance between protecting minors' legal rights and popular indignation.

Furthermore, a potential ethical foundation is provided by the advent of restorative justice techniques. Instead of only enforcing punishment, restorative justice aims to mend the harm caused by illegal action via community service and reconciliation with victims.[23] By encouraging responsibility and empathy in young offenders, this strategy supports the juvenile justice system's rehabilitative objectives. The requirements of justice, rehabilitation, and society protection must be carefully balanced due to legal and ethical considerations in juvenile justice.

**Challenges and Opportunities in Juvenile Justice Reform**

The Indian juvenile justice system has several difficulties despite a strong legislative foundation. These include a shortage of competent staff, poor rehabilitation programs, and social stigma attached to young people who are facing legal action. The ongoing underfunding of juvenile justice facilities is also one of the main concerns.[24]

Moreover, the court system is frequently overworked, which causes delays in the resolution of juvenile cases. These delays may lead to juveniles being detained for extended periods, which violates their rights and interferes with their normal developmental and psychological processes.

Social stigmatization is a common problem for juvenile offenders, impeding their ability to reintegrate into society. They may experience marginalization and discrimination as a result of this stigma, which will make it challenging for them to get the social support networks, jobs, and education they need for a full recovery. In addition, a large number of those working in the juvenile justice system—including police, judges, and caregivers—do not have the necessary training or sensitivity to deal with cases involving minors. This shortcoming may result in cases being handled improperly and the special needs of the juveniles not receiving enough support.[25]

[23]Juvenile Delinquency in India | India Legal, (Jun. 22, 2022), https://www.indialegallive.com/laws-research-indepth/juvenile-delinquency-in-india/.
[24] Varsha, *Juvenile Delinquency in India: Challenges and Solutions*, B&B Associates LLP, https://bnblegal.com/article/juvenile-delinquency-in-india-challenges-and-solutions/
[25] SHAKTI MOHAN, supra note 1.

Extensive reforms must be implemented to address these issues if the Indian juvenile justice system is to survive. This entails strengthening the capacity of juvenile justice facilities, enhancing staff training, growing the scope of rehabilitation and reintegration initiatives, and promoting a more sympathetic public perception of young people who are in legal trouble. Legislators must also make sure that changes to the law maintain children's rights while striking a balance between the demands of justice and public safety.

Although there are many obstacles facing India's juvenile justice system, there are also chances for radical change. India can make sure that its juvenile justice system supports the rehabilitation and reintegration of young offenders into society in addition to upholding the principles of justice by implementing effective reforms.

**Policy Implications and Recommendations For Future Action**

The *Porsche case* has exposed the weaknesses and limitations of our juvenile justice system despite many amendments. The law has many lacunas and there is no clarity as well. In the Indian Juvenile Justice System, rehabilitation is emphasized rather than punishment. The policies are made considering reforms. Rehabilitation is important because it tries to uproot the causes of crimes. Many minors indulge in crimes because of their bad parenting, poverty, environment, or lack of knowledge.

Rehabilitation tries to transform them into law-abiding citizens. All the countries of the world are moving toward rehabilitation. However, the law is misused by many as well. Many people take unfair advantage of these laws. Many minors indulge in heinous crimes and get away with them because of their age. *Porsche case* is a prime example of it. Punishment is important for such people to create deterrence in the minds of other potential offenders.

A balance between rehabilitation and punishment policies is needed. There should be proper implementation of the present laws as well. First, technical barriers to rehabilitation need to be resolved. There should be proper funding, institutions, and staff for proper rehabilitation. Second, the recourse taken should depend on an individual basis.[26] If there is a serious crime committed or a repeat offender is there, punishment can be given. A person

[26] Nishant Chauhan, Deepti Yadav, *Juvenile Justice Reforms: Evaluating the effectiveness of Rehabilitation Programs*, 26 ACCLAIMS 1, 10 (2023).

with an adult mind should be tried as an adult. However, proper procedure should be followed in deciding this.

Apart from these problems, there are many problems and lacunas in the Indian Justice System in general as well. There is corruption, and tampering with evidence. In the *Porsche case* itself, tampering with blood samples was done. The driver of the family was forced to take the blame on himself. Bail was easily granted on conditions such as writing an essay. These events show the weakness of the whole system. There are reforms needed in the system as well. There should be more transparency and efficient implementation of the present laws.

**Conclusion**

The *Porche Case* has brought significant attention to India's juvenile justice system, emphasizing the difficult delicate balance between rehabilitation and punishment as well as the wider moral and social ramifications of handling juveniles who are in trouble with the law.

Significant progress has been made in bringing India's juvenile justice system into compliance with international norms through the Juvenile Justice (Care and Protection of Children) Act, 2015, and its subsequent amendments. The clause permitting the prosecution of minors as adults for serious offenses, however, highlights the conflict between the general public's desire for strict punishment and the fundamental goal of juvenile justice, which is rehabilitation.

To sum up, the *Porche Case* is an essential point of reference for examining and reassessing India's juvenile justice system. The way forward is to build a well-rounded strategy that protects juvenile rights and developmental needs while maintaining public safety and justice. India's juvenile justice system can develop into a model of compassionate and equitable justice by accepting the opportunities and challenges it presents and encouraging each young offender's capacity for reform and rehabilitation.

# ANALYSIS OF COLLEGIUM SYSTEM & DISCOVERING ALTERNATIVE SYSTEM FOR JUDICIAL APPOINTMENT CONCERNING BEST PRACTISES IN THE WORLD

**Shivashankar***

***Abstract***

*In a Democracy, the Judiciary plays a major role in keeping an eye on the actions of the other two branches and upholding people's rights. Appointment to the post of Judge should progressively take place so that the independence of the judiciary is ensured. Judges should have high standards and integrity. In Indian practice, judges in the higher judiciary are selected through the collegium system.[1] The forum consists of India's chief justice and other 4 supreme court judges. Their decision is binding on the president. Whatsoever, there is no say, to anyone in this system other than those 5 seniors most Judges.[2]*

*This will uphold the independence of the judiciary. But nothing is absolute in this country. The recommendation of the executive or parliament should also be considered. Members of parliament are elected by laymen. Focusing on the analysis of 4 judges' cases is imperative. This research work focuses on how judges are appointed in other countries. Why can't we adopt some of the best practices in our country?*

*They suggested the best practice our policymakers can adopt so that the independence and integrity of the judiciary are upheld.*

**Keywords: Judicial appointment, collegium system, NJAC, Cabinet, Democracy, electing the judges, recording the interview of the judiciary.**

## Introduction

Democracy is the form of polity to which most countries on this planet Earth subscribe to. Democracy is the polity system where all the people rule themselves. Democracy has been defined by Former American president Abraham Lincon,

*4th Year B.A. LL.B, Shri Dharmastala Manjunatheshwara Law College, Mangalore, Karnataka.

[1] Aparna Chandra, William Hubbard, siton kalantry, ' From executive appointment to the collegium system: the impact on diversity in the Indian supreme court'(2019)SSRN< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3417259> accessed on 25 April 2024

[2] Ibid 1

*"DEMOCRACY IS A GOVERNMENT OF THE PEOPLE, BY THE PEOPLE AND FOR THE PEOPLE"*[3]

*-A.L*

As it is fairly derived from his definition. The boss in this government system is finally the layman.

To protect himself and his interest from any aggression, our founding fathers have elaboratively drafted a constitution that is perhaps a detailed one. The judiciary plays a vital role in resolving the matters of the citizens. There are a lot of devices that a layman can use to enforce his rights. Judges in the court should be of high standards and integrity. So that the laymen can have trust in them. Appointment to such a sacred position needs to be detailly inked.

The high courts and the supreme court have been assigned to the important role of resolving civil as well as criminal cases and also a constitutional question. The variety of cases that these courts solve- some political repercussions dealt with by them, necessitate that the judges who constitute these courts should be of the right calibre, well versed in the legal acumen.[4]

For this purpose, in the process of appointment of judges, the necessary care should be taken. Criticisms have been occasionally levelled that the selection has not been proper and has been induced by ulterior consideration.

When a plea was strongly put forward for the appointment of those who may be described as "committed judges "besides that, charges of favouritism have been levelled not only against the chief minister but also against the chief justice.[5]

The basic postulate of the judiciary is to adjudicate the dispute between the citizen and citizen and between the government and government. The independent judiciary is indispensable for ensuring the rule of law. Attack on the independence of judiciary reveals on occasion a design to browbeat and overawe the judiciary. So, judges' appointments should be above all mysterious secrets.

---

[3] Allen c.guelzo,' Lincoln and democracy 'Friends of Lincoln Collection(2024)< https://www.friendsofthelincolncollection.org/lincoln-lore/lincoln-and-democracy/ > accessed on 26 April 2024

[4] Law commission, the method of appointment of judges(law com no 121) pages 4-5

[5] K Venkataraman, 'What can CJI Bobde do about charges levelled against judges by the Andhra Pradesh Chief Minister' the Hindu (Hyderabad, 18 October 2020) 1

In India, we have a collegium system but that has a lot of fowls, as senior advocate Fali S Nariman reiterates[6]. We are in exploration to find an alternative to the judicial appointment system (collegium system) that is efficient and welcomed by the legal fraternity, perhaps for the betterment of laymen.

**Method of research.**

A secondary research method has been devised to do this research.[7]Here the scholar studies the already framed material. And incorporates it into his work. To avoid any loss of ethics, pay the debt by citing the mother material.

**Provision of the Indian constitution dealing with the appointment of the judiciary**.

Article 124 and Article 217 state the appointment of judges to the supreme court and high court. It is articulated as

**Article 124 -appointment of Supreme Court judges.**

"*Every judge of the supreme court shall be appointed by the president by warrant under his hand and seal after consultation with such judges until he attains the age of 65, provided in the appointment to another court other the post of chief justiceship. The chief justice of the country should be consulted*." [8]

**Article 217- appointment of high court judges.**

*"Every judge of a high court shall be appointed by the president by a warrant under his hand and seal after consultation with the chief justice of India and the governor*

[6] India Today web desk, 'judges' job is not to appoint judges', India today, (Delhi, Jan 24, 2023)
[7] Tegan George, 'What is secondary research? definition, types, & examples'(2023)scribbr< https://www.scribbr.com/methodology/secondary-research/ >accessed on 25 April 2024
[8] V.N sukla, Indian constitution (first published 1950, EBC 2022)320

*of the state, and in the Case of appointment of another judge, chief justice of high court has an opinion to say".*[9]

This article signifies that every Supreme Court judge and high court judge shall be appointed by the president after due process. In the case of high court judges, the opinion of the Supreme Court chief justice and governor of that state has to be taken. Along the same line while appointing a district court judge's consensus of the chief justice of that state high court has to be taken. judges.

**Age of retirement of various judges.**

In India, the Supreme Court judges retire at the age of 65. high court judges at 62 and in lower courts judges get their retirement at the age of 60. while we go down the rank the age of retirement also decreases[10].

**The present system of collegium and recommended NJAC.**

Former CJI UU Lalith affirms that,

**"***We don't have a system better than this. If we don't have anything qualitatively better than collegium system, naturally, Today the model as per which we work needs perfect mode***"**[11]

The collegium system is the system where the judges appoint their fellow judges themselves without any intervention. In this system, the chief justice of the supreme court along with 4 other senior judges constitute a collegium.[12] With a thorough evaluation of profiles of all recommended candid judges or advocates or legal luminary in the eye of CJI, merit, legal acumen, and service are given preference, select a judge for appointment or elevation. The next chief justice should also be part of the collegium. The report of selection is sent to the president for approval. The president has to accept. No resend provision here. There are no proper checks and balances in this system. Lack of transparency plagues the system. The chairman of the collegium is not answerable in any forum

[9] Supra 9, p 430
[10] Mayank barman, 'retirement age of judges in India'(2019)legodesk < https://legodesk.com/legopedia/retirement-age-of-judges-in-india/ > accessed 26 April 2024
[11] Padmashri Sharma, 'no need to change collegium',(2023)live law, < https://livelaw/amp/top-stories > accessed 26 April 2023
[12] Ibid 1

**NJAC System.**

NJAC or National Judicial Appointment Committee is a committee formulated by the government to appoint judges of various levels. It includes the law minister, the chief justice of India, 2 most senior judges, two eminent people[13]. These eminent people are to be nominated by a committee consisting CJI, the prime minister, the opposition leader, prime minister for a period of 3years. And 4 senior-most judges of the Supreme Court along with the CJI[14]. This is a revolutionary step taken by the government of India through the NJAC Act 2015[15]. NJAC has to recommend the senior judge have CJI of the Supreme Court. Provided he is qualified for that post. NJAC also select the judges and chief justices of various state high courts.

**Why NJAC is not the best option judges' appointment?**

NJAC is criticized by many senior judges and retired judges because of political intervention in the appointment of judges. That will corrode the sole objective called justice. Political intervention means those leaders who are actively participating in all kinds of activity and biased to their party ideology, intervene in selecting judges and may go on to select the judges favouring them[16]. This will also hamper natural justice and will hamper the justice delivery system as a whole. The second thing is that present sitting judges may tilt, in judging the cases, towards the ruling party to get the elevation in the line.

**Analysis of case law.**

There are 4 landmark cases related to the appointment of judges. It is famously referred to as a 1-4 judge's case.

[13] Diksha Munjal, 'Why is the NJAC verdict at the centre of the impasse over the appointment of judges'(2023)the Hindu < https://www.thehindu.com/news/national/explained-why-is-the-njac-verdict-at-the-cen > accessed 26 April 2024
[14] ibid
[15] ibid
[16] ibid

*S.P Gupta v. Union of India (1st judge's case)*[17]

Questioning the executive appointment of the judiciary, and political influence in picking judges resulted in an eruption of a series of protests by lawyers, and advocates. S.P Gupta along with another advocate filed a writ petition questioning the same. It also questioned whether such an act violates judicial independence, appointment of judges to the higher judiciary is the primary task of Chief Justice. The petitioner herein argued that any interference in appointment would be against the separation of powers and judiciaries' independence. Justice Bagavathi, writing for the majority, opined that the executive had the power in this regard and the judiciary has no say. Dissenting to it Beg J pointed out that JUDICIARY SHOULD HAVE an active role in appointing judges to ensure the independence of the judiciary and to prevent lobbying and political interference. This is an important judgement in the view of strengthening of judiciary and its role of upholding the rule of law, constitutionalism, and democracy without any interference. This case paved the way for subsequent judges' cases. As a result of this case, the Judges (transfer and Appointment) Act 1977 was enacted by which the collegium system was introduced.

*Supreme Court AOR Association v. Union of India (2nd judge's case)*[18]

This case recognised the 'primus inter pares' role of CJI. Following the upholding of the transfer of chief justice of Himachal High Court in Saket Chand v. Union of India case vested ultimate power with the central government. Meanwhile, a bill was introduced giving power to the president to set up the National Judicial Commission. Bill failed due to the dissolution of the 9th Lok Sabha. A batch of petitions were filed before the Supreme Court to overrule the S.P Gupta case. The question before the bench is the meaning of the word" concurrence" and the role of CJI in appointing Judges. Consultation that included an integrated, participatory and consultative process. To appoint the CJI seniority should only prevail as a criterion provided that he is fit for that post. By 7:2 earlier case first judge's case has been overruled. Also, the definition of the term consultation has been widened.

[17] S.P Gupta v. Union of India, AIR 1982 SC 149
[18] Supreme Court AOR Association v. Union of India, (1990) 2 S.C.R.433

*In re special reference 1 of 1998 (3rd judge's cases)*[19]

This is not a case but an opinion sought by President K.R. Narayana regarding the question of law relating to the collegium system

*Supreme Court AOR Association and another v. Union of India (4th judge's case, NJAC abolition case)*[20]

In this case enacted law called NJAC 2014 was challenged. By a 4:1 majority, this enactment was made unconstitutional and void before it came into force. By preserving the judicial sanctity the court also invalidated the 99th constitutional amendment and restored the old system of the collegium.The above-cited cases embrace the collegium system and shield the political interference in the appointment of the judiciary.

**Best practices followed by other foreign countries while appointing judges to courts.**

In the Indian constitution, we have many articles that have been derived from various constitutions across the world like, Provisions of fundamental rights adopted from the USA, emergency provisions from the Weimer constitution, the rule of law from the UK, etc[21]

There is nothing wrong in adopting good practices of other countries in our national practices through Inking necessary formalities. That idea has eventually made groundbreaking transformation in those countries. Best practices can be adopted if it solves the issue at hand.In the Constitution, we have many articles that have been derived from various constitutions across the world.

To quote AMBEDKAR JI,

*"As to the accusation that the draft constitution has reproduced a good part of the provision of the Government of India Act 1935, I make apologies, there is nothing to be ashamed of in borrowing. It involves no plagiarism. Nobody holds the patent rights in the fundamental ideas of the constitution"*[22]

[19] In re special reference 1 of 1998
[20] Supreme Court AOR Association and another v. Union of India, AIR 2015 SC 5457
[21] Hemant Singh, the constitution of India: features borrowed from other countries(2021)Jagran Josh < https://www.jagranjosh.com/general-knowledge/constitution-of-india-feature >accessed on 26 April 2024
[22] Saumya saxsen, 'important feature of Indian constitution',(2019) ipleaders, , <https://blog.ipleaders/important-feature-of Indian-constitution/ > accessed 26 April 2024

## I. Judicial Retention Election in America

"Former Tennessee supreme court justice penny white ran for election in a to keep her seat being a pro-death penalty Democrat conservative groups rallied against as a result she lost the election" This incident motivated erstwhile law student turned HLS professor to think the relationship between law and justice"[23]

In the book "the people's court[24] "saugerman provides a historical perspective on judicial election and other methods of judicial selection. In some states of America, he claims that merit selection, which involves selection through a panel of professional and executive appointment to a first term followed by retention election. Those judges are fighting against each other to retain their posts. Those with the highest number of votes will be retained.[25] This is one system that motivates the judges to deliver people-friendly judgements and orders.

## II. The separate profession of judgeship.

Students of France have been conferred with the option of either lawyers or judges as judges are nominated by the fellow advocate as followed in many parts of the world. judges as appointed once and they serve for life. For their appointment, there exists a high council of judiciary. Execute has no say here.[26]

## III. Judicial selection committee in Israel.

In Israel, judicial appointments are done Judicial selection committee. Judicial selection committees consist of judges lawyers and politicians here former has outnumbered the latter in the Constitution. The judge's law 1953 was amended three times in 2004,2008,2022.[27] Which governs the selection of judges to a higher court.2008 amendment brought a new rule that there should be 7 members majority.[28] In 2022, the amendment brought a unique change that might not be there anywhere. The committee have to record the entire interview of the Supreme Court candidate has to be recorded and be made publicly

[23] Jeri zeder, 'Elected or appointed', (2012) Harvard Law Bulletin,< https://hls.harvard.edu/today/in-new-book-shugerman-explores-the-history-of-judicial-selection-in-the-u-s > accessed 26 April 2024
[24] ibid
[25] ibid
[26] Cour de cassation, https://www.courdecassation.fr/en/about-court (French judiciary website) accessed 27 April 2024
[27] Amichai Cohen, Yuval Shany, 'The fight over judicial appointments in Israel'(2023)lawfare < https://www.lawfaremedia.org/article/the-fight-over-judicial-appointments-in-israel >accessed 27 April 2024
[28] ibid

available online to increase transparency of the appointment process. Presently there are two proposals to alter the judicial appointment committee both proposals want to lessen legal professionals from the committee to increase the presence of ruling government members,[29] this is a bad sign.

### IV. As per the International Council of Jurists.

International Council of jurist[30] has analysed the judicial appointment process across the world and studied various legal materials available and the experience of ICJ from its inception. They put it as Judicial councils are a proven means of safeguarding judicial independence and judicial accountability. They put forth the following observation

The council should majorly consist of members of the judiciary elected/selected through peers. The non-judicial members include law professionals, lay members of the public and other members of civil society but in no way, politician should be involved in this. The council should be solely responsible for the appointment, transfer, disciplinary action and suspension of judges.

The council should manage its funds and adequate human resources for its operation in order not to depend on the government. There should be adequate measures should be taken in selecting representing judges from all communities of the following place. Youth should be given more opportunities. So that they can innovative ideas to work. [31]

### Recommendations

By analysing various practices of parts of the world and taking into consideration the opinion of ICJ, it is recommended by the researcher to have a system like this. For elevation or appointment to the supreme court intending high court judges, senior advocates, or chief justice of the high court have an election contest. Which would be voted by a college consisting of advocates, supreme court judges, other high court judges, legal experts or jurists from various fields, law professors, law students with necessary qualifications and legal

[29] ibid
[30] International Council of the Jurist, http://internationaljurist.org/ accessed 26 April 2024
[31] 'Judicial council and other national mechanism for selecting appointing, promoting, transferring, removing judges," submission to the special rapporteur on independence of judges and lawyers for a report to the human right council session in June' (2018) ICJ<https://www.ohchr.org/sites/default/files/Documents/Issues/IJudiciary/JudicialCouncils/InternationalCommissionJurists.pdf >accessed 27 April 2024

researchers. The intention behind adding only people related to the law field is that they would be able to analyse the work done by such judges effectively. They would be learned, so any type of corruption might not arise. The judge with a major vote share will have an interview to face in front of the council selected among the college voters with the chief justice of India being a part. Such interviews must be recorded and published on the Supreme Court website. Such judges will work until 70. In selecting a judge for district and high court an exam needs to be conducted. This would be an appropriate method

**Conclusion**

judicial appointment system should be free from political shadow and they should thoroughly the candidate who has a high level of legal acumen and integrity. In a large amount cases, the government itself is a litigant so it makes no sense to have power in such a committee.

Presently, the colonial-gifted, Collegium system is in operation for the appointment of judges. There are many lacunas in this old system like favouring the kith and kins of erstwhile judges or presently working judges or nepotism. newly enacted NJAC to have political intervention which will destroy free and fair trial. There is a need for the best formality in place for appointing the judges.

Parliament must make a new law by which the above best practice is involved. The judiciary is the last hope for a common citizen if it is a case of political or police atrocity, or social crime like rape people approach with a ray of hope that justice may be delayed but catered judiciously. I may conclude this small effort by citing the words of John Rutledge,

*"As long as this buckler remains to the people, they cannot be liable to much or permanent oppression"*

# BEYOND THE GRAVE: NECROPHILE AND LEGAL RIGHTS OF THE DEAD BODY

**Ankisha Vandana***

***Abstract***

*This research paper delves into the prevalence of necrophilia in India, the inadequacies of current legal frameworks, and the urgent need for legislative reform. Despite increasing cases, including notable instances like the Nithari case of 2006, Indian law remains silent on specifically criminalizing necrophilia. Existing provisions under Section 297 of the IPC (now § 301 of BNS) and the repealed Section 377 are insufficient. Section 297 vaguely addresses trespassing on burial grounds but does not encompass necrophilia, leading to judicial challenges and acquittals due to a lack of precise statutes.*

*This paper explores the moral and legal implications of necrophilia in India and globally. It emphasizes the necessity for explicit laws, drawing on international examples where necrophilia is criminalized, such as the UK's Sexual Offences Act, Canada's Criminal Code, and New Zealand's Crimes Act. The research argues that the right to dignity extends beyond death, as recognized in international human rights frameworks like the Fourth Geneva Convention and UN resolutions.*

*The study calls for amendments to Indian law, proposing the inclusion of necrophilia under Section 377 by defining "corpse" alongside "man," "woman," and "animal," and removing "trespass" from Section 297, or amendment in new criminal law. These changes would align India with global standards, ensuring justice and maintaining societal values by safeguarding the dignity of deceased individuals.*

## Introduction

The term Necrophilia is derived from the Greek language, where "Necro" refers to death or a corpse, and the suffix "-philia" denotes love or affection. It was initially coined by the Belgian

* 2nd year, National University of Study and Research in Law, Ranchi

psychiatrist Joseph Guislain.[1] Necrophilia can be defined as an abnormal fascination that encompasses a range of behaviours involving sexual intercourse or sexual activities with a dead body. It is also referred to as necromania or necrophilism.[2]

The Indian Constitution does not clearly define post-mortem rights, raising questions about state recognition of deceased individuals' rights. Although the enforcement of wills posthumously indicates some recognition, the ambiguous legal framework allows for crimes like necrophilia to persist. Section 297 of the IPC (now § 301 of BNS) addresses trespassing on burial grounds, but it does not specifically penalize necrophilia. This legal ambiguity results in judicial challenges, often leading to the acquittal of accused individuals due to the lack of precise legal statutes.

The past decade has seen a rise in necrophilia cases in India, not only in mortuaries but also involving the exhumation of corpses and even murder to engage in sexual acts with the deceased. The sole existing legislation, Section 297 (or § 301 of BNS), is insufficient, highlighting the need for specific legal provisions to address and criminalize necrophilia explicitly.

This paper explores the concept of necrophilia, and its legal and moral implications in India and globally, and examines related sections of the IPC, including 297 (§ 301 of BNS) and the now-repealed 377, which addressed unnatural sexual acts. It also discusses the notion that the right to privacy ends at death, potentially justifying actions involving deceased bodies.

**Research Problem**

We are noticing a shift in the pattern of crime over time. With the rise of modernity, new forms of criminal activity are also emerging, such as cyber-crimes. This is also true for the disturbing phenomenon of necrophilia. If the method of committing crimes is evolving, the legal system should also evolve. Given the escalating frequency of Necrophilia cases, it is imperative for legislation to enact a law addressing this issue.

The Nithari case in 2006 is a highly notable instance of necrophilia. Surprisingly, even in the year 2024, we have not enacted any legislation specifically addressing necrophilia,

[1] Necrophilia definition &; meaning, Merriam-Webster, https://www.merriam-webster.com/dictionary/NecrophiIia (last visited April 6, 2024).
[2] Kumar, Pradeep & Rathee, Sushma & Gupta, Rajiv. (2019). Necrophilia: An Understanding. The International Journal of Indian Psychology. 7. 607-616. 10.25215/0702.073.

despite the increasing number of cases. Meanwhile, several foreign countries have already implemented laws about necrophilia. This research paper aims to examine the inadequacy of current legislation in addressing the crime of Necrophilia and the urgent necessity of implementing appropriate laws to address this issue.

**Research Question:**

I. Should Necrophilia be considered a crime?

II. Does a dead body have legal rights?

III. Are the present laws in IPC/ BNS sufficient to punish the culprit charged with Necrophilia?

IV. What should India learn from foreign countries w.r.t the law for Necrophilia?

**Legal Rights of Dead Body:**

In a Resolution passed in 2005, the *UN Commission on Human Rights highlighted the significance of treating deceased bodies with dignity, which involves appropriate handling, management, and disposal, as well as consideration for the needs of families*. The State is obligated to pass domestic legislation that aligns with its international obligations. Necrophilia, in this context, is characterized as an act of vandalism rather than a sexual assault against an individual.[3]

Now, focusing on the most prominent issue regarding the legal status of a deceased body about the rights granted to the deceased in the Indian Constitution. The response is unsatisfactory within the current legal framework in India. In the case of *Paramananda Kataria v. UOI,*[4] it was determined that Article 21 of the Constitution imposes a duty on the State to protect life, which includes both the living individual and the deceased body. In the case of *Ramji Singh Mujeeb Bhai v. State of U.P and Ors.*,[5] it was emphasized that according to article 21, the term "person" guarantees the right to live with dignity, which also includes the right to dignity of their deceased body. In the case of *Amrutha v. The Commissioner*,[6] the court noted

[3] Section 377, IPC ; The Curious Case of Necrophilies in India: CRLRR BlogCrLRR (2021), https://crlreview.in/section-377-ipc-NecrophiIia-in-india/ (last visited April 13, 2024).
[4] Paramananda Kataria v. UOI, 1989 SCC (4) 286.
[5] Ramji Singh Mujeeb Bhai v. State of U.P and Ors., 2009 SCC Online All 310.
[6] Amrutha v. The Commissioner, W.P.No.33762 of 2017.

that even deceased individuals possess a right to privacy and their spiritual essence should not be disrupted, as they continue to exist eternally after death.

*Justice Prafulla Chandra Pant, Acting Chairperson of the National Human Rights Commission (NHRC),* has recently suggested the need for a new law to safeguard the respect and honor of deceased bodies. He emphasized that the rights of the deceased, including the right to life, fair treatment, and dignity, as outlined in Article 21 of the Indian Constitution, should be extended beyond the living individuals to their deceased bodies.

Regardless of whether a death is natural or unnatural, it is the responsibility of the State to safeguard the rights of the deceased and prevent any criminal activity involving the deceased body. Nevertheless, Indian Criminal Laws have neglected to consider respect and honor due to a deceased body in cases of Necrophilia. Although the authorities have made legal statements and provided instructions, the State has not successfully passed a law under the Indian Penal Code that aligns with the Constitution of India to stop the infringements on an individual's right to dignity.[7]

**Cases Of Necrophilia in India:**

- *Surendra Koli v. State of UP:*

  In India, this case which is also known as the Nithari case of 2006 stands out as the most notable instance of Necrophilia. This case involved the apprehension of serial killers Surendra Koli and Mohinder Singh Pandher, who were implicated after the discovery that 19 girls had gone missing. Subsequently, it was discovered that the pair engaged in the act of killing the girls and subsequently engaged in sexual activity with their deceased bodies.

  The police officials discovered multiple pornographic CDs and explicit images of both children and women during their search of the suspect's residence, serving as incriminating evidence. Following that, a legal case was filed against Kohli under multiple sections of the Indian Penal Code (IPC), encompassing charges of rape, murder, kidnapping, and criminal conspiracy. Nevertheless, the Central Bureau of

[7] *Supra* note 3.

Investigation (CBI) faced difficulties in prosecuting Pandher and Kohli for necrophilia due to the absence of clear legal provisions in the country about this crime. After fourteen years, our situation has not improved.[8]

- *Saikia Case.*

In a recent case in May 2020, law enforcement arrested a 50-year-old man in Assam for allegedly engaging in sexual intercourse with the corpse of a 14-year-old girl. The incident was reported from a village located in the Dhemaji district, which shares a border with Arunachal Pradesh.

Akan Saikia, the defendant, is a polygamist with two spouses and works as a daily laborer. He faced charges under Sections 306 (abetment of suicide) and 377 (unnatural offenses) of the Indian Penal Code, as well as Section 8 (punishment for sexual assault) of the POCSO Act.[9]

- *Rangaraju v. State of Karnataka.*

In 2015, a woman was found murdered with signs of sexual assault. The accused was arrested and found guilty under Sections 376 and 302 of the IPC by the Sessions Court. However, the High Court overturned the rape charge, ruling that Sections 375 and 377 do not apply to deceased individuals, as a corpse cannot consent or be considered a person under these sections. The Court highlighted the lack of specific provisions addressing necrophilia in the IPC, noting it as a psychosexual disorder not explicitly covered under "sexual offenses" in the Penal Code, 1860.

The Court observed that during the trial in the Sessions Court, various circumstances such as the recovery of the murder weapon and the accused-appellant's failure to provide a satisfactory explanation for incriminating circumstances strongly indicate his guilt. After carefully examining both sections, the Court observed that the Session's Court failed to recognize that a deceased body cannot be referred to as a human or person. Therefore, neither Section 375 nor Section 377 of the Indian Penal Code would be applicable.

Thus, no wrongdoing has been committed that falls under the category of

[8] Surendra Koli v. State of UP, 2011 (4) SCC 80.
[9] Asiaville Desk, What is Necrophilia and some well-known cases of Necrophilia from India Asiaville (2020), https://www.asiaville.in/article/what-is-NecrophiIia-and-some-well-known-cases-NecrophiIia-in-india-67368 (last visited April 13, 2024)

offenses punishable under Section 376 of the Indian Penal Code (IPC). The Court emphasized that rape necessitates the absence of consent from the victim. A deceased individual is not a sentient being and cannot therefore express opposition to a sexual assault. At most, it can be regarded as sadism and necrophilia."[10]

These incidents are merely a few examples. India has experienced an increasing incidence of Necrophilia in the last ten years but currently lacks any legislation specifically addressing this crime.

**IPC And BNS On Necrophilia:**

In India, there is no specific legal provision that criminalizes the act of necrophilia. The Indian Penal Code, of 1860, does not have provisions for such a grave and morally reprehensible crime. Regrettably, the recent legislation of BNS also neglects to address anything regarding the matter of concern. Upon examining the penal code, it is evident that Section 297 of IPC or Section 301 of BNS vaguely attempts to establish penalties for trespassing on burial grounds and for showing disrespect towards the deceased human body.

The preceding passage fails to specify that deceased bodies are also entitled to the rights of dignity and protection against sexual misconduct. This section pertains to instances of Necrophilia that do not involve trespassing into a burial place, but rather occur in other locations where Necrophilia can be carried out, such as the Nithari serial killings.

Bhartiya Nyaya Sanhita has omitted Section 377 of the IPC, which talked about unnatural sex, making it more difficult to penalize the offenders of necrophile. Section 377 of the IPC imposes penalties for acts considered to be unnatural offenses. Engaging in sexual activity with a deceased individual is unquestionably contrary to the natural order, but there are restrictions on this behaviour.

**Limitations in the Present Indian Laws:**

Explicitly, the aforementioned incidents were characterized as barbaric due to the manner and nature in which the offenses were committed, rather than the number of victims or murders involved. Moreover, the Indian Penal Code (IPC) has a narrow scope when it comes

[10] Rangaraju v. State of Karnataka, 2023 SCC Online Kar 23.

to addressing crimes committed against the deceased, particularly those that are morally disturbing. The offenders were prosecuted under section(s) 297 and 377 of the Indian Penal Code (IPC) or Section 301 of the BNS in any typical case of necrophilia, as there were and still are no specific provisions that adequately punish the act of engaging in sexual intercourse with a deceased body, which completely violates the dignity of the deceased individual. Nevertheless, due to the countless variations of Necrophilia observed in society, the enforcement of these two provisions presents a significant challenge for the authorities. There are three main reasons to examine the complexities of current penal provisions.

Section 297 of the Indian Penal Code (IPC) or Section 301 of the Bhartiya Nyaya Sanhita (BNS) establishes the legal consequences for individuals who trespass on burial grounds, thereby disrespecting human remains and causing emotional harm to others. The main challenge in invoking any case of Necrophilia under this section is to establish the essential element of trespassing into a burial place. However, in many cases, the perpetrator falls short of meeting this requirement as no trespassing has been committed.

Furthermore, this exception does not apply in cases where the accused intentionally killed someone solely to obtain their corpse, or if the crime was committed in a different location where no unauthorized entry took place. There are numerous limitations associated with the aforementioned provisions, as individuals cannot be charged under the section even if they are caught engaging in any of the prohibited acts outlined in the sections. For example, if someone is present in an official capacity, such as an official employee in the morgue or a gateman, they cannot be held responsible because they have not trespassed, which is the first requirement of the mentioned section. The penalty for such a grave offense, which has wide-ranging consequences for society and infringes upon the fundamental right to a respectful burial as outlined in the relevant section, namely one year of incarceration, does not have any ameliorating impact on the crime.

The absence of Section 377 in the Bhartiya Nyay Sanhita (BNS) implies that acts of unnatural sex, such as necrophilia, are no longer penalized. This section historically imposed severe penalties for consensual sexual activities deviating from the natural order, involving a man, woman, or animal. However, the Supreme Court's Navtej Singh Johar ruling decriminalized consensual homosexual activities.

In necrophilia cases, consent is irrelevant as deceased individuals cannot provide consent. This meets two criteria of Section 377: the act is unnatural and involves a human body. Despite its ambiguous definition, "unnatural offenses" traditionally include acts not leading to procreation, thus encompassing necrophilia.

Recognizing a deceased body's quasi-subject status, the law should criminalize necrophilia to ensure dignity and justice. This would align India's legal framework with international standards and address legislative gaps effectively.

**Overview Of International Law:**

To address heinous crimes like necrophilia, India must incorporate international perspectives. Indian laws frequently evolve to rectify legislative deficiencies, and international laws offer guidance. Respect for the dignity of deceased individuals is a human right, emphasized in international agreements like **Article 130(1) of the Fourth Geneva Convention**, which mandates respectful treatment and proper burial of the deceased. *The 2005 UN Commission on Human Rights resolution underscores the dignified handling of human remains and respect for family needs*[11].

Countries with common law systems provide useful examples. The **UK's Section 70 of the Sexual Offences Act, 2003**[12]**,** criminalizes sexual acts with corpses. In the US, necrophilia varies between felony and misdemeanor charges. **Canada's Section 182**[13] of the Criminal Code criminalizes necrophilia, and **New Zealand's Section 150 of the Crimes Act, 1961**[14], penalizes actions harming a corpse's dignity. **South Africa also prohibits necrophilia under Section 14 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007**[15]. These international laws can inform India's legislative amendments to better address necrophilia.

[11] LexLife India, do we need updated NecrophiIia laws in India? Lexlife India (2020), https://lexlife.in/2020/09/15/do-we-need-updated-NecrophiIia-laws-in-india/ (last visited April 13, 2024).
[12] Sexual offences Act, 2003, § 70.
[13] Criminal Code, 1985, § 182.
[14] Crimes Act, 1961, § 150, No. 43, Public Act, 1961.
[15] Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, § 14, No. 13.

**Conclusion:**

Necrophilia, a grave violation of societal norms and the dignity of the deceased, remains inadequately addressed by Indian law. The current legal provisions, including Sections 297 and 377 of the Indian Penal Code (IPC), fail to effectively punish this abhorrent act. There is an urgent need to amend the IPC to explicitly address necrophilia, reflecting practices from countries with stringent laws against this crime. Existing ambiguities necessitate revisions to strengthen penalties and ensure comprehensive coverage of the offense.

To address this, the term "trespass" should be removed from Section 297, and "corpse" should be added to Section 377 alongside "man," "woman," and "animal.", if considered in the new laws of BNS. Otherwise, the new criminal law should be amended to add protection from necrophilia. This would unambiguously include necrophilia under punishable offenses. As India is a signatory to international conventions safeguarding the dignity of the deceased, incorporating these principles into domestic law is imperative. The Indian legal system must urgently recognize and address necrophilia to uphold societal values and ensure justice.

# A COMMENTARY UPON THE EVER-EVOLVING INTERFACE BETWEEN COMPETITION LAW AND INTELLECTUAL PROPERTY RIGHTS

**Vedant Saxena***

***Abstract***

*It is not the case that the law pertaining to a particular subject matter is to be overlooked in the event of the existence of a law pertaining to another. Each piece of legislation holds its necessity and is indispensable towards bringing about social welfare. While laws are formulated with the aim of peaceful co-existence, there do arise instances of conflict. A household example in this regard is the conflict between Competition law and IP law. The very basis of the aforementioned incompatibility stems from the fact that IP Law grants exclusive rights to owners of original and unpublished works, while Competition law aims at fostering a healthy competitive atmosphere by working against market power.*

*In a nutshell, IP Law works towards the grant of monopolistic rights, while Competition Law goes about the reduction of monopoly power to ensure healthy competition and prevent potential abuse of dominance. Both Competition law and IP law account for social welfare and therefore, such conflict cannot be overlooked. While IP law boosts creativity and encourages investment on account of the creation of market power, Competition law seeks to provide consumer satisfaction by ensuring the availability of quality goods and services and reasonable market prices.*

*Therefore, both laws work across different roads in achieving a common goal, i.e., consumer satisfaction. In this paper, the author discusses the points of intersection between Competition law and IP Law and suggestions, discussed across a plethora of judicial pronouncements, to resolve such conflict.*

**Keywords: Competition Law; Intellectual Property Law; Anti-Competitive Behaviour; Monopoly; Licensing.**

* Student, Rajiv Gandhi National University of Law, Kishanpur urf Bakhshiwala, Punjab

## Introduction

The competition laws of India are governed by the Competition Act of 2002. This Act is aimed at eliminating unhealthy practices by companies that bring about an 'Appreciable Adverse Effect on Competition' (AAEC), thereby ensuring consumer satisfaction and preventing the creation of potential barriers to market entry and reduction in competition.[1] 'Intellectual Property', on the other hand, essentially refers to 'creations of the mind'. The laws governing IP grant the author of an original work the exclusive right to use and reproduce the subject work. Therefore, IP Law favours exclusivity and monopolistic rights, intending to foster innovation. Such exclusivity prevents the unauthorised exploitation of the author's work by other people, which in turn encourages creativity.

However, such exclusive rights could bring about market power and lead to the creation of a monopoly, as defined under the Competition Act, of 2002. A conflict between Competition law and IP Law arises in the event of the aforementioned dominant position being abused since the same violates the principles of the former.[2]

Thus, the primary concern of Competition law with respect to IP Law is the aspect of market power; IP encourages market power and this may lead owners of IP to employ anti-competitive practices. This may involve setting prices higher than usual, which in turn would bring about a gradual deterioration in innovation and sustainable increases in living standards.[3]

## The conflict between Competition Law and IPR

- **Section 3 of the Competition Act, 2002**

  The Competition Act, through Section 3, seeks to put a check on agreements that are anti-competitive in nature. In order to facilitate the discovery of such agreements that are mostly formulated in a clandestine manner, it has been held that mere circumstantial evidence regarding the existence of such an agreement is substantial enough. However, as

[1] Eshan Ghosh, *Competition Law and Intellectual Property Rights with Special Reference to the TRIPS Agreement*, RESEARCH PAPER FOR THE COMPETITION COMMISSION OF INDIA (2010).
[2] Anthony F. Baldanza and Charles Todd, *Intellectual Property Rights: Friends or Foes*, COMPETITION AND INTELLECTUAL PROPERTY RIGHTS SEMINAR OF ONTARIO BAR ASSOCIATION (2006).
[3] Sachin Kumar Bhimrajka, *Study on relationship of competition policy and law and Intellectual property rights*, COMPETITION COMMISSION OF INDIA (2010).

per subclause (5) of the Section, the aforementioned provision shall not apply to the owner of an IP in holding a pirate liable for infringement or exercising his exclusive rights in exploiting his product. The only condition mentioned is that such exploitation must be done in a reasonable manner.

Therefore, the protection provided to IP holders under this exception extends only up to what is required as per IP Law. In the case of *Aamir Khan Productions Pvt. Ltd. v. Union of India*[4], the primary issue dealt with by the Bombay High Court was whether the CCI had the jurisdiction to decide competition law matters that involved IPR. In this case, it had been alleged that certain enterprises were engaged in cartel-like activity, which violated the provisions of subclause (3) of Section 3. The Court went on to hold that the CCI was competent to try all such competition law cases that involved an element of IPR.

- **Section 4 of the Competition Act, 2002**

Section 4 of the Competition Act delves into the issue of dominance. As explained above, while both Competition Law and IP Law work towards consumer satisfaction, they go about different paths in pursuit of the same. While Competition Law seeks to prevent abuse of dominance and maintain a healthy competitive environment, IP Law aims at incentivizing innovation by rewarding authors and thereby promoting monopolisation.

A monopoly stems from a dominant position in the relevant market, and dominance is a major concern in Competition Law. However, it is to be noted that an entity shall be considered dominant only in the absence of products and/or services that could be used interchangeably. Therefore, while dominance per se is not considered anti-competitive, a potential abuse of such a dominant position, such as the imposing of restrictions on resale or an exorbitant rise in prices.

It is important to note that unlike in Section 3 of the Competition Act, there is no immunity laid down for owners of IP. However, as discussed in the case of *Singhania &*

[4] Aamir Khan Productions Pvt. Ltd. v. Union of India, 2010 (112) Bom LR 3778.

*Partners LLP v Microsoft Corporation Pvt Ltd & Others*[5], there are several reasons for not granting such immunity under the Section.

*Singhania & Partners LLP v Microsoft Corporation Pvt Ltd & Others*

In this case, the CCI considered the issue of whether Microsoft had abused its dominant position through the distribution of Office 2007 and Windows software, which had control in excess of eighty per cent in the market. The Court, however, went on to decide in favour of Microsoft, stating that charging different rates for the same product, under different licence agreements was a fairly common practice in the market. It further held that there was no evidence of a competitor being driven out of the market due to Microsoft's dominant position and since mere dominance is not illegal, Microsoft had not violated the provisions of Section 4 of the Competition Act.

In order to justify the lack of immunity given to IPR holders under Section 4, the Court cited two main reasons. Firstly, it is not necessary that the grant of IPR leads to the creation of a dominant position or an economic monopoly, with the latter being the foremost concern of Competition Law. Secondly, even in the event of a dominant position being created due to the grant of IPR, such dominance is not impermissible under Section 4; it is the abuse of such a dominant position that violates the provisions of the Act.

*FICCI Multiplex Association of India (FICCI) v United Producers/Distributors Forum (UPDF)*

In this case[6], the Court discussed the interface between subclause (5) of Section 3 and Section 4 of the Competition Act. Herein, FICCI had contended that UPDF, the Film and Television Producers Guild of India Ltd., and the Association of Motion Pictures and TV Program Producers had entered into a cartel-like agreement wherein the three entities were controlling almost cent per cent of the production and supply of motion pictures that were being played in multiplexes. UPDF, on the other hand, contended that as per subclause (5) of Section 3 of the Competition Act, they possessed a blanket immunity and were entitled to exercise the protection of their rights granted to them under the Indian Copyright Act, 1957, in any reasonable manner they wished to.

[5] Singhania & Partners LLP v Microsoft Corporation Pvt Ltd, Case no 36/2010.
[6] FICCI Multiplex Association of India (FICCI) v United Producers/Distributors Forum, Case no 01/2009.

However, the Court, rejecting the defence taken by UPDF, held that such an act by UPDF blatantly violated the provisions of subclause (3) of Section 3 of the Competition Act, which deems agreements that directly or indirectly determine sale or purchase prices, illegal. Further, it continued that any plea taken by UPDF regarding an immunity as per subclause (5) of Section 3 was highly misconceived and incorrect; moreover, the provisions of IP Law do not have a cent per cent overriding effect on the provisions of the Competition Act.

It could therefore be concluded that the creation of a dominant position on account of the grant of IP rights is not a matter of concern under Competition law; the abuse of such a dominant position is. In this regard, it is not relevant whether such abuse is in pursuit of the exploitation of one's IP rights since Section 4 does not carve out any exception for IPR holders.

**Licensing by IP Holders: Anti-competitive?**

The rights of an IP holder include the right to exclude any other person from making use of his work and the right to grant licences with respect to his work, for consideration in the form of royalties or fees. Intellectual property (IP) rights, which guarantee the holder the exclusive right to use and make copies of his work, have assumed a more significant and pervasive role in economic development, as well as in market rivalry.

The relationship between competition and IP law has become more pertinent as the economy becomes more digital and intangible assets become more significant to the broader economy. Licensing is a vital means by which ideas protected by IP can spread across the economy. The incentives of IP holders to invest in innovation are expected to be positively impacted by the availability of technology markets, where they may effectively and affordably license their innovations.

There are, however, a number of types of licence arrangements and scenarios that raise worries about the state of the market. Several new competition issues pertaining to licensing have emerged over time, sparking discussion and dissent within the competition industry. These include compulsory licensing as both an antitrust infringement and remedy, reasonable and non-discriminatory (FRAND) licensing royalties, standard essential patents (SEP), technological standards and patent thickets.

For instance, the provisions of Competition law may be invoked in the event of a refusal to grant licences, since such refusal may result in a steep downhill in innovation and thereby a reduction in competition. Such refusal to grant a licence may either be through a blanket 'no', or by fixing unreasonably high royalties. A refusal to license one's product may well be detrimental to industrial development and therefore, an abuse of one's IP rights.

The case of Bayer Corporation v. Union of India[7] is a landmark judgement in the context of compulsory licensing. The Court herein identified the need for expanding the availability of patented goods at affordable prices, to strike a balance between public health and patent rights. The ruling also emphasised the need for a fair approach to patent law that takes into account both the public interest and the rights of patent holders in facilitating access to necessary medications.

**FRAND: A check upon a potential abuse of IP rights**

The term 'Standard Essential Patents' (SEP) is used for products or processes that comply with certain set standards. It is well-established that a patent holder possesses a certain degree of monopoly since patent law grants the holder exclusive rights to use the product or process.[8] However, the patent holder is entitled to license the technology to third parties, for various purposes.[9] Such bargaining power may invite a potential abuse of patent rights, such as the demand for unreasonably high royalties.[10]

However, in order to curb such practices, the Standard Setting Organisations have made it obligatory for the owner of an SEP to adhere to the FRAND terms, according to which the SEP owner is required to license the technology in a reasonable, fair and non-discriminatory manner. In the event of non-compliance with the FRAND terms may result in an anti-competitive practice and could be challenged before the CCI.

This ensures a win for both parties; while the patent holder is entitled to receive a fair sum of royalties in consideration for granting the licensee the right to use the technology, the

[7] Bayer Corporation v. Union of India, 162 (2009) DLT 371.
[8] SHIPPEY KARLA C, A SHORT COURSE IN INTERNATIONAL INTELLECTUAL PROPERTY RIGHTS (World Trade Press 2009).
[9] Yumiko Hamano, *Introduction to License*, ET INTERNATIONAL (2016).
[10] Digvijay Singh and Rajnish Kumar Singh, *Licensing of Standard Essential Patents on FRAND Terms in India*, JOURNAL OF INTELLECTUAL PROPERTY RIGHTS (2019).

licensee is saved from having to pay excessively high royalties. Moreover, such practice ensures the prevalence of industrial development and a healthy competitive environment.

*Telefonaktiebolaget LM Ericsson v. Competition Commission of India*

The case of Telefonaktiebolaget LM Ericsson v. Competition Commission of India[11] stemmed from infringement petitions that were filed by Ericson against Micromax and Intex. Ericson was the holder of a number of patents concerning telecom infrastructure equipment. Ericson, upon suspecting that Micromax and Intex were infringing upon its patents, tried to formulate a Patent Licensing Agreement on fair and reasonable terms.

However, when its offer was declined, it filed a suit against Micromax and Intex, contending that the two companies had violated its patent rights and it was therefore entitled to adequate royalties. Subsequently, there were interim orders passed against Micromax and Intex, directing the two companies to pay royalties to Ericson until the pendency of the suit. In response to the infringement suits, Micromax and Intex applied to the CCI contending that Ericsson was abusing its dominant position under Section 4 of the Competition Act by demanding unreasonably high royalties. The two main issues that were delved into by the Court were:

- Were licensing practices under the Indian Patents Act, 1970, such as the claim of royalties, within the purview of the Competition Act?
- Could matters that involved an abuse of dominance by a patent holder with respect to patent licensing be addressed under the Competition Act?

The Court, in adjudicating upon whether the CCI was competent to decide cases involving an abuse of dominance with respect to patent rights, held that since there did not exist any irreconcilable conflict between the Competition Act and the Patents Act, the CCI had the jurisdiction to entertain such cases.[12] However, the Court also went on to state that in the event of an irreconcilable conflict between the two legislations, the Patents Act, which is a special code, shall prevail over the provisions of the Competition Act.[13]

[11] Telefonaktiebolaget LM Ericsson v. Competition Commission of India, W.P.(C) 464/2014.
[12] *Id.*
[13] *Id.*

**Conclusion**

Granting authors certain exclusive rights with respect to their work is not the only aim of IP law. The wider dissemination of knowledge is an equally important goal, which includes technological innovation, research and development and other such mechanisms that work towards achieving economic and social welfare, without violating the principles of Competition Law. In the event of an abuse of IPR that disrupts the competitive environment, Competition Law may be invoked to prevent such abuse.

It is established law that while IP holders do have the privilege to exploit their rights, such rights cannot be exercised in an unreasonable manner that affects competition, since IP Law does not have an absolute overriding effect on Competition Law. As per the Competition Act, the CCI has the discretion to determine whether or not a particular conduct is anti-competitive. It could therefore be concluded that an equilibrium has been established between IP Law and Competition Law since both laws are indispensable for achieving consumer satisfaction.

# ELECTION AND DEMOCRACY IN INDIA: ASSESSING THE IMPACT ON DEMOCRATIC VALUES

**Om Narendra Singh***

***Abstract***

*India's journey with democracy shows how much it values freedom, fairness, and justice, which are the foundation of its Constitution. This research looks at how elections affect democracy in India, considering the rules in the Constitution, past legal decisions, and current issues. Even though there are rules in place and strong laws about elections, there are still problems. Some big issues include money influencing politics, politicians getting involved in crime, and people using language that divides others.*

*Recent important court decisions have tried to deal with these problems, like stopping anonymous donations to political parties and dealing with politicians who have criminal records. Suggestions for making things better include being clear about where political funding comes from, being strict with politicians who break the law, and stopping hate speech. It's really important to make organizations like the Election Commission stronger and to teach people more about how democracy works. As India keeps moving forward with democracy, everyone needs to work together to follow the Constitution and make sure everyone's included in how the country is run.*

## Introduction

India's experience with democracy has been an impressive journey, showing the strength of a nation that accepted the ideals of freedom, equality, and justice for everyone. As the world's largest democracy, India's election system has been the foundation that allows citizens to influence their country's future through voting. However, in recent years, India's democratic system has faced major challenges, leading to a critical look at how elections impact democratic values

* 1st Year Student, Lloyd School of Law, Greater Noida, Uttar Pradesh

This in-depth study aims to closely examine how elections affect the protection of democratic principles in India, highlighting both the positive and negative impacts seen recently. By looking at the country's constitution, important court rulings, and changing social and political situations, this article tries to give a complete view of the current state of democracy in India and suggest ways to make its foundations stronger.

**The Constitutional Foundation: Elections and Democratic Rights**

The Indian Constitution, made by the founders of modern India, has the basic rules for how democracy works in the country. An important part is the right for every adult to vote, protected in Article 326[1]. The Supreme Court, in the case of *PUCL v. Union of India* [2], said this right to vote is a fundamental part of the Constitution's core structure, linked to freedom of speech, *Article 19(1)(a)*[3] and the right to life and liberty, *Article 21*[4].

To ensure fair representation, the Constitution reserves some seats in Parliament and state assemblies for communities that faced discrimination historically, like Scheduled Castes *(Article 330)*[5] and Scheduled Tribes (Article 332)[6]. In the case of *Indra Sawhney v. Union of India*[7], the Supreme Court allowed reservations for Other Backward Classes under *Article 16(4)*[8].

The Constitution also protects the right to form associations and political parties through *Article 19(1)(c)*[9]. In the case of *Indian National Congress v. Institute of Social Welfare,*[10] the Supreme Court said having multiple parties and allowing different voices is essential for a healthy democracy to represent the diverse views of all Indians.

[1] INDIA CONST. art. 326.
[2] PUCL v. Union of India, (2003) 4 SCC 399
[3]INDIA CONST. art. 19(1)(a).
[4] INDIA CONST. art. 21.
[5] INDIA CONST. art. 330.
[6] INDIA CONST. art. 332.
[7] Indra Sawhney v. Union of India, (1992) 3 SCC 217
[8] INDIA CONST. art. 16(4).
[9] INDIA CONST. art. 19(1)(c).
[10] Indian National Congress v. Institute of Social Welfare, (2002) 5 SCC 685

**The Representation of the People Act, 1950: Ensuring Free and Fair Elections**

The Representation of the People Act, of 1950 is an important law that governs how elections are conducted in India. This Act, along with its later amendments, provides strong rules for ensuring free and fair elections, upholding democratic principles, and protecting the integrity of the electoral process. *Section 123*[11] of the Act defines various corrupt practices like bribery, undue influence, and impersonation, which can lead to disqualifying a candidate or cancelling an election result. *Section 125*[12] prohibits promoting enmity between different groups of citizens based on religion, race, caste, or community, thereby upholding the constitutional principles of secularism and fraternity.

Additionally, *Sections 126[13] and 127*[14] of the Act put restrictions on public meetings and the display of election-related material during certain periods, ensuring a level playing field for all candidates and preventing undue influence on voters.

**Challenges to Democratic Values**

Even with the strong rules in the Constitution and safeguards in institutions, Indian democracy has faced big challenges that have threatened its core values. One major issue has been the influence of money power and corruption in elections.

The Supreme Court's recent landmark judgment in the case of *Association for Democratic Reforms v. Union of India*[15] struck down the Electoral Bonds Scheme, which had allowed anonymous donations to political parties. This scheme had raised concerns about quid pro quo arrangements and the undue influence of wealthy corporations on policymaking, jeopardizing the integrity of elections.

The court's decision to invalidate amendments allowing unlimited political donations further reinforced the need to curb the undue influence of wealthy individuals and corporations. Things like vote-buying and the infamous "cash-for-votes" scam in the 2008

[11] Section 123 of the Representation of the People Act,1950; “Representative of the People Act,1950”
[12] Section 125 of the Representation of the People Act,1950; “Representative of the People Act,1950”
[13] Section 126 of the Representation of the People Act,1950; “Representative of the People Act,1950”
[14] Section 127 of the Representation of the People Act,1950; “Representative of the People Act,1950”
[15] Association for Democratic Reforms v. Union of India,(2024) 3 S.C.R. 417.

trust vote have undermined the principles of free and fair elections under *Article 324*[16] of the Constitution and could constitute offences under *Sections 171B and 171E of the IPC*[17].

Another major challenge has been the criminalization of politics and the rise of political dynasties. The Supreme Court's judgment in the *Public Interest Foundation v. Union of India*[18] the case highlighted the urgent need for stricter laws and enforcement against candidates with criminal records, emphasizing the importance of decriminalizing politics to uphold democracy and rule of law principles in the Constitution. The prevalence of political dynasties and nepotism has raised questions about meritocracy and equal opportunity in the democratic system. The Supreme Court, in the *Lok Prahari v. Election Commission of India*[19], addressed this issue, underlining the need for intra-party democracy and transparency, as envisioned by the Constitution's democratic principles.

In recent years, Indian elections have also seen a concerning rise in polarizing rhetoric, identity politics, and the spread of extremist ideologies, threatening the constitutional principles of secularism and fraternity in the Preamble. The use of hate speech and divisive tactics has impacted social cohesion and national unity. The Supreme Court's intervention in the *Pravasi Bhalai Sangathan v. Union of India*[20] case emphasized addressing hate speech and promoting responsible politics, highlighting maintaining public order and upholding secularism principles in the Constitution.

**Strengthening Democratic Values: Reforms and Recommendations**

In light of these challenges, India must take this opportunity to introduce comprehensive reforms to address the issues that have affected its democratic process. The Supreme Court's judgment striking down the Electoral Bonds Scheme has opened the way for implementing a transparent and accountable system of political funding, with strict disclosure requirements and contribution limits.

[16] INDIA CONST. art. 324.
[17] Indian Penal Code, Act No. 45 of 1860, §§ 171B, 171E
[18] Public Interest Foundation v. Union of India, (2018) 6 SCC 721.
[19] Lok Prahari v. Election Commission of India, (2022) 3 SCC 143.
[20] Pravasi Bhalai Sangathan v. Union of India, (2014) 7 SCC 99.

This is important to restore public trust in the electoral process and uphold the principles of free and fair elections under *Article 324*[21] of the Constitution. The court's decision to invalidate amendments allowing unlimited political donations further reinforces the need for measures to curb the undue influence of wealthy individuals and corporations.

Strengthening the Election Commission's autonomy and enforcement mechanisms, as well as introducing measures to promote inner-party democracy, are essential steps in this direction, as envisioned by the Constitution's democratic principles. To combat the criminalization of politics and the rise of political dynasties, stricter laws and enforcement against candidates with criminal records are necessary, as emphasized by the Supreme Court in the *Public Interest Foundation v. Union of India,*[22] case. The court's recommendations, such as expediting criminal cases against politicians and establishing special courts, should be implemented promptly to uphold the rule of law and democratic principles enshrined in the Constitution.

Furthermore, mechanisms to counter divisive rhetoric and hate speech must be put in place, alongside encouraging political parties to embrace inclusive policies. The Supreme Court's guidelines in the *Pravasi Bhalai Sangathan v. Union of India,*[23] case provides a framework for addressing hate speech and promoting responsible politics, upholding the constitutional principles of secularism and fraternity.

Promoting civic education and media literacy can play a vital role in fostering an informed electorate and upholding democratic values. The Supreme Court, in the *Ministry of Information and Broadcasting v. Cricket Association of Bengal,*[24] emphasized the importance of free and responsible media in a democracy, highlighting its role in disseminating information and facilitating public discourse, as envisaged by the freedom of speech and expression enshrined in Article 19(1)(a)[25] of the Constitution.

[21] INDIA CONST. art. 324.
[22] Public Interest Foundation v. Union of India, (2018) 5 SCC 161.
[23] Pravasi Bhalai Sangathan v. Union of India, (2014) 7 SCC 99.
[24] Ministry of Info. & Broad. v. Cricket Ass'n of Bengal, A.I.R. 1995 S.C. 1236 (India).
[25] INDIA CONST. art. 19(1)(a).

**The Road Ahead: Safeguarding Democracy for Future Generations**

As India moves forward with its democracy, it's important to understand that there are tough challenges ahead, but also big chances. Many people have worked hard and even sacrificed their lives to make sure that India stays true to important values like freedom, fairness, and justice.

The Supreme Court has been really important in protecting these values through its big decisions. But it's not just up to the court – everyone, including citizens, groups, and institutions, has to work together. Citizens need to stay alert and vote wisely, and they should hold their leaders accountable. Groups that look out for people's rights need to keep an eye on what's going on, pushing for fair rules and making sure everyone understands how things work.

Institutions like the Election Commission need to have the power and resources to run fair elections without anyone trying to influence them. It's super important that these institutions are free from outside pressure.

Politicians and their parties should be fair within their groups, picking leaders based on talent and not stirring up hate. We also need to change the way politics works, making it easier for young people and different kinds of people to get involved, so that our leaders truly represent everyone in India.

**Conclusion**

India’s journey with democracy shows how strong and determined we are as a nation. Being the world's largest democracy, India has shown others how important freedom, fairness, and justice are. But the challenges we face remind us that we can't just relax and assume everything will be fine.

We have to keep watching, keep improving, and keep working hard to protect these values for the future. The Supreme Court and groups in society have helped a lot in shaping our democracy, but there's still a lot to do. It's everyone's job – citizens, institutions, and leaders – to make sure our Constitution's principles stay at the heart of our democracy. As we move forward, we need to focus on being open, accountable, and fair in how we govern. We

need to work together to tackle issues like money in politics, criminal behavior among politicians, and language that divides people.

As Dr. B.R. Ambedkar, who helped write our Constitution, said, "*Democracy isn't just a type of government; it's a way of life.*" It's up to every Indian to live by this idea and keep working hard to make sure our democracy stays strong, fulfilling the dreams of those who came before us and giving hope to those who come after us.

# GIG WORKERS: UNLOCKING SECURITY WITH PORTABLE BENEFITS

**Anam Sajid***

**Shiraz Zafar****

***Abstract***

*The gig economy presents innumerable opportunities, creating a dynamic ecosystem of flexible work options and growing exponentially year after year. This article aims to highlight the need for an approach that seals the rights of gig workers while fostering the innovation and security of the gig economy, expanding on the potential for the growth of the gig economy in the future.*

*As workers fulfill their daily tasks like any ordinary employee, they suffer from the lack of rights and protection mechanisms. This research investigates the challenges gig workers undergo like limited job security, lack of labor protection laws, and exploitative work practices, drawing attention to the absence of social safety nets such as health insurance.*

*This study explores the idea of portable benefits as a feasible solution for the rights and protection of the gig workers which can streamline the gig economy by merging platforms with a government portal.*

*It analyses two possible legislative frameworks for portable benefits, mandatory platform integration, and minimum contribution standards. The article further outlines instances of portable benefits in use from nations like the Netherlands and Denmark that have proved to be efficient in working. It concludes by designing a Universal Gig Worker Account (UGWA) as a potential solution in India which would provide a single point to go to for the earnings and benefits of gig workers, facilitating filing taxes and providing portable benefits like job security and health insurance.*

**Keywords: Gig economy, Social Safety nets, Legislative frameworks, Portable Benefits, Universal Gig Worker Account**

## Introduction

The gig economy is a market system where the workforce is engaged in temporary jobs, freelancing, and working as independent contractors. Gig workers are considered outside the traditional employer-employee relationship and typically work on short-term

* Second Year, Rajiv Gandhi National University of Law, Punjab

** Second Year, Rajiv Gandhi National University of Law, Punjab

projects. Further, it is divided into two main categories: platform workers and non-platform workers. Zomato delivery drivers who work based on an online platform come within the ambit of platform workers, while workers who are typically employed on a casual or temporary basis, whether part-time or full-time, are non-platform workers.

Catering to a diverse and expanding segment of the modern workforce, the gig economy includes freelancers, rideshare drivers, and remote tech professionals. It offers flexibility, allowing workers to choose when, where, and how much they work, making it ideal for side hustles, non-traditional work arrangements, and handling short-term, project-based tasks.

India's share of freelancers is considerably expanding as digital connectivity widens and the internet becomes more accessible. The youth's search for extra income and flexibility in jobs attracts them to gig work. Many find gig work to be a desirable choice due to economic issues such as increased costs of living and difficulties in finding permanent employment. With India's online network developing rapidly, this tendency will likely continue. The world of internet connectivity opened multiple possibilities for people to earn income with minimum conditions and fewer restrictions. Digital platforms have fostered a wave of entrepreneurs, providing infrastructure for them to launch their ventures as service providers and freelancers.

For businesses, gig workers appear as a budget-friendly option who can be hired on a project basis, thus reducing the expenses associated with permanent employees. A study conducted by Ernst and Young in 2017 on 'Future of Jobs in India' found that 24% of the world's gig workers came from India.[1] According to a NITI Aayog report titled 'India's Booming Gig and Platform Economy', there were around 7 million workers involved in gig work in 2020-21 and the number is expected to rise nearly to 23.5 million workers by 2029-30.[2] Within the country, about 47% of the gig work is in medium-skilled jobs, about 22% is in high-skilled skilled, and about 31% is engaged in low-skilled jobs.

---

[1] K. P. Kanchana, *Transformation of organizational culture from permanent to gig: How sustainable will this gig culture be?*, THE TIMES OF INDIA, https://timesofindia.indiatimes.com/blogs/voices/transformation-of-organizational-culture-from-permanent-to-gig-how-sustainable-will-this-gig-culture-be/?source=app&frmapp=yes (last visited Jun 9, 2024).

[2] India's Booming Gig and Platform Economy Perspectives and Recommendations on the Future of Work India's Booming Gig and Platform Economy, (2022), https://www.niti.gov.in/sites/default/files/2022-06/25th_June_Final_Report_27062022.pdf

Trends show that the number of medium-skilled workers is gradually declining while the number of workers in low-skill and high-skill is rising.[3] The Boston Consultancy Group in a recent report estimated that India's gig economy could create up to 90 million jobs in the non-farm sector and contribute an additional 1.25% to the country's GDP over time.[4]

**Flaws in the current gig economy**

Currently, there are limited laws applicable to the protection of gig workers. Because they do not conform to the traditional characteristics of an employee, various employee benefits are not available to them. Gig workers are considered outside the scope of employees, sometimes being referred to as independent contractors. This distinction leaves them in a grey legal spot that gets them denied crucial workplace protections and benefits they are entitled to as normal employees as they get stuck in this grey spot.

They miss out on job security and social safety like health insurance, paid leaves, and retirement plans, including pensions. They do not have the legal protection that comes along with a formal job and usually get paid less for doing similar tasks than typical employees. Worse, some businesses take advantage of this weakness by classifying gig workers as independent contractors. This leaves employees vulnerable and without access to legal redress while enabling employers to avoid paying taxes and necessary benefits.

The comfort of flexibility takes a turn as long working hours and financial uncertainty overtake the workers. Individuals frequently find themselves working longer hours to be financially stable. With their income being inconsistent and irregular, financial planning is tough, and workers end up in insecure conditions. Platform workers experience frustration because of occasional delays in payments and shifts in commission. Basic facilities like rest areas are generally not available, which causes excessive pressure on the workers. In the recent past, cab drivers and food delivery workers from platforms like Zomato and Zomato-owned Blinkit have gone on protests against long working hours and pay cuts, demanding laws for their protection.

---

[3] India's Booming Gig and Platform Economy Perspectives and Recommendations on the Future of Work India's Booming Gig and Platform Economy, (2022), https://www.niti.gov.in/sites/default/files/2022-06/25th_June_Final_Report_27062022.pdf

[4] UNLOCKING THE POTENTIAL OF THE GIG ECONOMY IN INDIA, https://media-publications.bcg.com/India-Gig-Economy-Report.pdf (last visited Jun 9, 2024).

**The Social Security Code 2020**

As the gig economy relies extensively on technology, it creates barriers to entry for those without access to the internet and digital devices. This barrier can prevent potential workers from entering the workforce and create an economic disadvantage for them.

The Indian labor laws have lagged in developing clauses for the rights and protection of gig workers. Without the protection of established labor laws, gig workers are susceptible to exploitation owing to the absence of laid-out regulations. The government has formulated four new Labour codes, which have been enacted but not implemented yet, that will encompass the 29 central labor laws existing in the country. Within them, the Social Security Code of 2020 recognizes gig workers and platform workers but differentiates them from employees. It delegates responsibility for developing suitable social security programs for gig workers to both the central and state governments on issues such as health insurance, retirement, accident insurance, etc.

The code has proposed the formation of a social security fund for unorganized, platform, and gig workers, as well as the creation of a National Social Security Board to provide proposals for programs catered to the specific needs of these different worker divisions.

Given that, there will be challenges in implementing the code itself, and complexities can arise in classifying workers as employees or gig workers. Implementation can be hampered because of no clear distinction between unorganized, gig, and platform workers. The codes threshold-based application is another flaw, defeating its goal of universal worker security. [5]There is still a need for standard laws related to job security, social welfare, minimum income, and legal redressal mechanisms for gig workers.

The gig economy is there to stay and its influence is only going to solidify in the years to come. It offers individuals the chance to tailor their work lives to meet their needs and gives companies access to more workers.

It is imperative to provide safeguard mechanisms that the current laws lack for gig workers to ensure that the gig economy flourishes. Without clear structures, the gig economy could end up being an avenue for labor exploitation of workers.

---

[5] Hemant Sharma, *Code on Social Security, 2020: Challenges of the Code*, SSRN ELECTRONIC JOURNAL (2023).

**Portable Benefits as a Solution**

The conventional remedies that usually refer to reclassifying workers will present legal challenges. There is an exploration of minimum wage norms and rights to collective bargaining, but these require intricate legal structures.

Hence, we have discussed the idea of portable benefits as an ideal solution, which is further explained in detail. Portable benefits include a new approach that will contribute to benefits like health insurance and unemployment insurance through portable benefit schemes. These advantages would be available even if one transferred from their platform, offering much-needed security. In this system, platforms will have to interface with an internet portal backed by the government that is connected to an employee's ID. Details and earnings for each gig would be automatically logged.

Employees (and possibly platforms) would contribute a part of earnings to portable benefits through the site. Its advantages include greater security, which stands for having access to unemployment insurance and portable health insurance financial security, which is important for gig workers; simplified taxes that will ensure that both workers and platforms can file taxes more easily thanks to automatic income recording and worker choice, which means people would have discretion over their contributions and have access to funds designated for skill-building training. Obstacles such as implementation expenses (the setup and upkeep of the system may incur significant costs), resistance on platforms (platforms may oppose new regulations about compliance), and data security (worker privacy and data security) must be tackled for this model’s proper application.

Therefore, two legislative frameworks are suggested in the paper to establish portable benefits. Gig platforms would need to link to a central government portal to operate under the first structure. This portal would link to an employee's national ID and track their hours worked and pay across all platforms. Through the portal, employees (and potential platforms) would donate a portion of their profits to portable benefits. These advantages can consist of grants for skill development, portable unemployment insurance, and portable health insurance.

The second framework would set minimum norms for contributions to guarantee a certain level of security for all gig workers. To ensure minimum wage compliance and promote fair pay, the central portal would also keep track of the overall platform earnings.

Employees would be discouraged from switching to platforms with higher benefits as a result.[6]

**Cases of successful implementation**

Several nations have effectively put into place models of transferable benefits for gig workers, guaranteeing that these workers, regardless of how long they work with a single company, have access to benefits including paid time off, retirement savings, and health insurance. A Couple of instances have been discussed herewith:

*Denmark*

Social security and labor market flexibility are combined in Denmark's "Flexicurity" approach. The essential components consist of:

**Universal Access to Benefits**: social benefits, including health insurance, pension plans, and unemployment insurance are available to all workers, including gig workers.

**Education and Training**: Ongoing training initiatives assist employees in adjusting to changing workplace demands.

**Active Labor Market Policies**: To enable gig workers to move between jobs seamlessly, the government helps with career development and job searching. [7]

*The Netherlands*

The robust social security system in the Netherlands consists of the following:

**Self-Employment Benefits**: Health insurance, disability insurance, and retirement benefits are available to self-employed people, including gig workers.

**Pension System**: By requiring contributions to and benefits from a group pension fund, gig workers are protected by a legal pension system. [8]

6 Shelly Steward, *We need to make gig work better. Here's what it would take*., Brookings (2023), https://www.brookings.edu/articles/we-need-to-make-gig-work-better-heres-what-it-would-take/.

7 Denmark.dk, Danish labour market, Denmark.dk (2018), https://denmark.dk/society-and-business/the-danish-labour-market.

8 Denmark.dk, Danish labour market, Denmark.dk (2018), https://denmark.dk/society-and-business/the-danish-labour-market.

*Paris*

France has put in place several initiatives to assist gig workers:

**Auto-Entrepreneur Status**: This status makes it easier for independent contractors and gig workers to file taxes, register their businesses, and obtain social benefits like retirement savings accounts and health insurance.

**Unédic**: Gig workers who have paid into the unemployment insurance system receive benefits, which guarantees them a safety net in between jobs. [9]

This model has demonstrated success in various fields already. One such example would be Alia. The Alia platform provides a welcome change of pace for domestic employees. Consider it their piggybank for wellbeing. Benefits are no longer limited to a single job; thus, the safety net follows around even with changes in jobs. The benefits increase even with different jobs since clients contribute based on the work completed. The workers stand to gain the most from this as they oversee their benefits, providing them with a previously absent financial safety net. This will revolutionize the way that anyone struggles to make ends meet.

Alia is a ray of optimism for the future of labor, even though it concentrates on domestic workers at the moment. Imagine a society in which everyone, regardless of employment —status from nannies to independent contractors—has access to the assistance they require. [10] This model can be used to inspire a similar change in the Indian legislative system towards the gig economy.

Other examples include the Benefits and Future of Work Initiative.

**Further proposition**

The idea of a platform where gig workers, like rideshare drivers or freelance writers, have a central hub for all their earnings and benefits, no matter which platform they use, leads to the formation of a Universal Gig Worker Account (UGWA).

9 Pierre Cahuc, Page Rendering Error | OECD iLibrary, www.oecd-ilibrary.org, https://www.oecd-ilibrary.org/sites/9789264306943-7-en/index.html?itemId=%2Fcontent%2Fcomponent%2F9789264306943-7-en (last visited Jun 10, 2024).

10 Alia — NDWA Labs, NDWA Labs 7.1, https://www.ndwalabs.org/alia (last visited Jun 10, 2024).

It is like a digital briefcase; every gig they complete and every dollar they earn will automatically be tracked in their UGWA linked to the national ID. No more scrambling will have to be done for receipts come tax season. Plus, a portion of their earnings (with a contribution from the platform too) would go towards a portable benefits package. It will not be merely a basic platform, and there won't be any more gaps in coverage when they transition between gigs. There will be an unemployment fund to help them through dry spells, and even a training fund to keep skills sharp in the ever-changing gig economy.

This system would hold platforms accountable too. By tracking their total earnings across platforms, the UGWA would ensure they are getting paid fairly and meeting minimum wage requirements. It might calculate benefits based on their overall income, not just individual gigs.

Some people might worry about the cost of setting up this system or platform, pushing back against the extra work. There would be challenges to overcome, but the benefits for gig workers are undeniable. Financial security, clear data on their earnings, and access to valuable benefits —that's a recipe for a more empowered and secure gig workforce.

Of course, details like contribution percentages and specific benefits would need to be ironed out. However, the UGWA presents a fresh approach to protecting gig workers while keeping the flexibility that makes this kind of work attractive. After all, security and opportunity shouldn't be mutually exclusive.

**A Brighter Future for Gig Workers: Security Meets Flexibility**

Portable benefits are revolutionary because they provide gig workers with the security they require without compromising their beloved freedom.
Imagine having health insurance that follows a gig worker around, regardless of the platforms they use. Peace of mind, not coverage gaps anymore. In addition, they will receive a safety net to help them during lean times and a training fund to maintain their proficiency. It sounds quite good, doesn't it?

This is not merely a fantasy. Denmark and the Netherlands are the only two nations that have demonstrated the effectiveness of movable benefits. Their platforms give gig workers access to benefits including unemployment insurance, social security, and training possibilities. The outcome is a more stable and safer gig workforce.

Additionally, gaining traction is the concept of a Universal Gig Worker Account (UGWA). Consider it to be a computerized briefcase. Every job a gig worker finishes and every dollar they make will be safely recorded in their UGWA and connected to their ID.

There are, of course, some obstacles to overcome. It will take work to set up the UGWA, and some platforms may be resistant. However, the advantages for gig workers are obvious: access to worthwhile perks, financial security, and transparent data on their earnings. That sounds like a formula for an empowered, contented, and healthy gig workforce.

The nature of work in the future will be flexible and secure, thanks to portable benefits. We can establish a gig economy where platforms, workers, and the overall economy all prosper with a little ingenuity.

However, this is not the only solution to the problem at hand right now. For example, a recent report by NITI AYOG recommends that firms, in association with insurance companies, extend benefits such as old age pensions to gig workers as well, essentially trying to bring gig workers under the ambit of "formal workers".[11] However, this does not seem all that practicable as there is the risk of some gig workers not being covered under the ambit of such traditional workers, which might be due to a variety of reasons, like technicalities or loopholes.

Therefore, there is a need to provide gig workers with a separate safety net instead of simply extending the protections available to traditional employees, which are too rigged with technicalities. The model of the portable benefits can serve as a stepping stone for actualizing such a need.

---

[11] Rituraj Baruah, *NITI Aayog suggests social security for gig workers*, MINT (2022), https://www.livemint.com/news/india/niti-aayog-recommends-social-security-measures-for-gig-workers-11656327999658.html.

# EXAMINING THE POWERS OF POLICE AND MAGISTRATES IN CONDUCTING INQUEST PROCEEDINGS UNDER THE BHARTIYA NYAYA SANHITA

**Aditi Solanki***

***Abstract***

*This research paper meticulously examines the intricate powers vested in police officers and executive magistrates in conducting inquest proceedings under the Bhartiya Nyaya Sanhita, highlighting the nuances and legal complexities inherent in the Indian criminal justice system. Special attention is given to the procedural mandates and additional obligations in cases of dowry deaths, elucidating the intersection of social issues and legal protocols.*

*The paper further explores the scope and jurisdiction of magisterial inquests, outlining the magistrates' duties in recording evidence, examining deceased bodies, informing relatives, and coordinating with civil surgeons. The magistrates' authoritative powers in instances of custodial deaths and rapes are scrutinized, offering a critical analysis of their role in safeguarding human rights and ensuring justice.*

*A comparative analysis is presented to dissect the powers attributed to police officers and magistrates, illuminating the interplay between these roles and the overarching legal framework. This comparative study aims to underscore the strengths and limitations of the current procedural landscape, proposing informed suggestions for enhancing the efficacy and transparency of inquest proceedings.*

*The conclusion synthesizes the findings, reinforcing the necessity for a balanced distribution of power and a robust legal structure to uphold justice. The research advocates for legislative reforms and practical measures to address identified gaps, striving to fortify the integrity and accountability of inquest procedures within the Bhartiya Nyaya Sanhita.*

*This comprehensive exploration serves as a pivotal resource for legal scholars, practitioners, and policymakers, providing deep insights into the procedural intricacies and the potential for jurisprudential advancements in the realm of inquest proceedings.*

**Keyword: Police inquest, magisterial inquest, Bhartiya Nyaya Sanhita.**

*Student, Maharashtra National Law University, Nagpur

**Introduction to Inquest Proceedings**

Inquest proceedings have been provided for in the section 194 to section 196 of the Bhartiya Nagarik Suraksha Sanhita, previously the sections 174 to 176 of the Criminal Procedure Code. Inquest proceedings are such investigation held by the police officer or the magistrate in order to ascertain the cause of death in cases where it is suspicious that the death may have been caused in unnatural circumstances or by unnatural causes such as murder etc. Hence, in such cases, the police or the magistrate are empowered to analyse and investigate the surrounding circumstances of the death of the person and prepare prima facie evidence regarding the cause of death. These evidences are corroborative in nature and may be used in certain circumstances before the court but do not have the same value as that of the substantial evidences.

The inquest proceedings held under section 194 the Sanhita, previously the section 174 of is limited in scope. Their objective is merely to ascertain whether a person has died an unnatural death, that is, under suspicious circumstances. Further, if it is so, the proceedings aim to find the apparent cause of death. Hence, they do not intend to go to the depth of the case but merely ascertain or deny the suspicion in the case of any foul play being suspected upon the accused.

Inquest proceedings under the Indian Criminal Justice System may be divided into two categories:

I. **Police Inquest:** Police Inquest has been provided for in the section 194 and 195 of the Sanhita and gives special powers and duties to the police officers in case of unnatural deaths, especially the deaths in dowry cases where the woman dies under suspicious circumstances.
II. **Magisterial Inquest**: Another form on inquest provided under the Sanhita is magisterial inquest, which gives powers to the magistrate to conduct inquest proceedings in cases mentioned in the section 194 as well as specially under the cases of custodial death, rapes and dowry deaths.

**Police Inquest: Scope, Powers and Duties**

Inquest proceedings by police officer have been described under section 194 of the Sanhita. The powers to conduct inquest proceedings are limited to the officer in charge of the police

station or any other police officer in his place, only when he is empowered by the State government for the same. The section provides various circumstances under which the police officer may exercise the powers granted to it under this section. These include but are not limited to:

**A.** Death by suicide
**B.** Being killed by an animal
**C.** Being killed by machinery
**D.** Being killed by an accident
**E.** Death under circumstances which raise a reasonable suspicious that another person has committed an offence

The objective of proceedings under the section 194 is merely to ascertain whether the death of the person has been caused under suspicious circumstance or whether it is an unnatural death,[1] such as being homicidal in nature.[2] Further, the police need the ascertain the apparent cause of the death.[3] The ambit of the proceedings under section 194 is limited to the aforementioned and does not extend to questions regarding details of the assault upon the victim, the identity of the accused and the surrounding circumstances of the assault.[4] This would lead to the report being held unsustainable by the court.[5]

It has been stated by the Hon'ble court that,

"*An investigation under Section 174 is limited in scope and is confined to the ascertainment of the apparent cause of death. It is concerned with discovering whether in a given case the death was accidental, suicidal or homicidal or caused by animal and in what manner or by what weapon or instrument the injuries on the body appear to have been inflicted."*[6]

[1] Pedda Narayan v. State of Andhra Pradesh, (1975) 4 SCC 153.
[2] Ravi @ Ravichandran v. State Rep. by Inspector of Police, Appeal (crl.) 636 of 2007.
[3] Brahm Swaroop v. State of UP, 2011 (6) SCC 288.
[4] Basit Ali v. State of MP, 1976 Cri LJ 776(MP).
[5] Satbir Singh & Anr. v. State Of Punjab, AIR 1977 SC 1294.
[6] Radha Mohan Singh @Lal Saheb & Ors. v. State of U.P., AIR 2006 SC 951.

**Powers and Functions of Police Officers in Inquest Proceedings**

There are various powers and functions granted to the police officers in relation to the inquest proceedings before himself.

The police officer is bound to intimate the nearest executive magistrate under the section 194(1) of the Sanhita, who is empowered to hold inquest. It has been stated that police shall have to proceed to the location of the body of the deceased to make an investigation, i.e., to conduct inquest proceedings. This is to be done in the presence of two or more "respectable inhabitants of the neighbourhood." Police officer conducting such proceedings is granted power to summon such persons as required, under sec 195 of BNS.

The police officer may issue summons to two or more persons by order in writing for the purpose of the investigation. This extends to the person who appear to be acquainted with the facts of the case. However, the investigation officer does not need to record such statements or get such statements signed by the person so summoned.[7] However, exceptions have been provided in the case of woman, disabled persons, persons with acute illness and males below fifteen or above sixty years of age. The statements by the witnesses are governed by section 181 of the Sanhita.[8] The police officer has a duty to draw up an inquest report under section 194(1) of the Sanhita, the specifications regarding which have been provided under section 194(2).

**Inquest Report**: Inquest report is an important document to be prepared by the police officers during and post investigation under section 194(1). As per the section, an inquest report has to include

I. the apparent cause of the death
II. injuries found on the body of the victim
III. nature of weapons used and the manner in which they are used.

It must be mentioned that as important as inquest report is, it is merely corroborative evidence[9] and not a substantive one.[10] Its admissibility before the court, however, is questionable.[11]

[7] Nirpal Singh v. State of Haryana, (1977) 2 SCC 131.
[8] Maruthamuthu Kudumban, re, (1927) 28 Cri LJ 463.
[9] Mukanda v. State, 1957 Cri LJ 1187.
[10] Adi Bhumiani v. State, 1957 Cri LJ 1152.
[11] Pandurang v. State of Hyderabad, 1955 Cri LJ 572.

Furthermore, contents of the inquest report cannot be treated as evidence but they may be utilised in order to test the veracity of a witness.[12]

It must be stated that law does not require that the name of the accused be recorded in the inquest report[13] or to furnish details of the incidence.[14] Further, one cannot infer from the inquest report itself that absence of the name of the accused in the report or other information means that FIR had not been filed at the time of the inquest proceedings.[15] Furthermore, the section is concerned with establishing the cause of death and only evidence necessary to establish it need be brought out."[16] The non-mention of name of an eye-witness in the inquest report could not be a ground to reject his testimony.[17] The language used by the legislature. was not taken note of nor the earlier decisions of this Court were referred to and some sweeping observations have been made which are not supported by the statutory provision.[18]

**Dowry Death: The Special Role of Police Officers**

Dowry death is given a special status with regard to the presumption in favour of dowry death in cases where the woman dies within seven years of her marriage. Section 194(3) of the Sanhita provides for such exception. As per the section, the police officer has to duty to forward the body to nearest civil surgeon or qualified medical practitioner in case of suspicion of dowry death, if the weather conditions and distance permits them to do so without harming the body to an extent where the report of medical practitioners would be rendered useless.

**Scope of Magisterial Inquest and the powers and functions of Magistrate**

Magisterial inquest has been provided for in the section 196 of the Sanhita, as per which, magistrates have the power to hold inquests in certain cases. It must be noted that it is a "shall" provision with respect to the cases involving death or suicide of a women within seven years of marriage and a "may" provision with respect to any other case under 194(1). Thus, the magistrate has the duty to conduct such proceedings in case of death or suicide of woman as

[12] Kuldeep Singh v. State of Punjab, (2005) 3 RCR 599 (P&H).
[13] Baleshwar Mandal v. State of Bihar, (1997) 7 SCC 219.
[14] State of U.P. v. Abdul, (1997) 10 SCC 135.
[15] Rama Shankar v. State of U.P., 2008 Cri LJ 129 (All).
[16] Shakila Khader v. Nausher Gama AIR 1975 SC 1324.
[17] Eqbal Baig v. State of Andhra Pradesh AIR 1987 SC 923.
[18] Meharaj Singh v. State of U.P., (1994) 5 SCC 188.

mentioned above, but it also has power and discretion with regard to the inquest proceedings in other cases.

**Powers and Functions of Magistrates in Inquest Proceedings**

There are various powers and function of the magistrate highlighted under this provision.

I. Under sec 196(3**)** Magistrate has a duty to record evidence taken by him during the proceedings in the specified manner.

II. Under sec 196(4), the magistrate may cause a body which has already been interred, to be disinterred and examined so as to discover the cause of the death of the person.

III. Under sec 196(5), the magistrate has the duty to inform the relatives of the deceased, the names and addresses of whom are known and allow them to be present during the inquiry, as much as practicable for him. Relatives include parents, children, brother, sisters and spouse of the deceased, as per the explanation to the said provision.

IV. Under sec 196(6), anyone who is holding an inquiry or investigation in case of custodial death or rape, has the duty to forward the body for the sake of examination to the nearest civil surgeon or qualified practitioner within twenty-four hours of the death, unless the same is not possible and record such reasons in writing.

**Powers of Magistrate in case of Custodial death and Rape**

The jurisprudence related to custodial conduct has been highlighted by the Court in the case of D.K. Basu v. State of West Bengal.[19] Magistrate has special powers to conduct inquest proceedings with respect to cases of custodial death and rape as they have an element of biasness in favour of the police officers if such investigations are being conducted only by them. In such cases, as stated by the honourable court, the "brotherhood of the police" might cause a hinderance to the investigation as the officials would prefer to support their companions.[20]

[19] D.K. Basu v. State of West Bengal, 1997 (1) SCC 416.
[20] State of MP v. Shyamsunder Trivedi, 1995 AIR SCW 2793.

"*An inquiry u/s 176 Cr.P.C into the cause of the death is not necessary when there is no corpse on which an inquest can be held. Failure of the Magistrate to hold inquiry u/s 176 Cr.P.C, when there was no corpse, is a curable irregularity*."[21]

It must be noted that magistrate who is holding an inquiry under section 196 may not be regarded as court since he is acting in his executive capacity.[22]However, a contrary opinion has also been provided by the honourable court[23] which has later been discarded by the court, reasoning that a tribunal is regarded as a court only if it has the power to give a decision or definitive judgement.[24]

**Comprehensive Analysis of Powers granted to Police and Magistrate with regard to inquest proceedings**

The powers granted to the police officers differ in various respect from the powers granted to the magistrates to conduct the proceedings. It may be noted that police officials also lack some other powers as granted to the magistrates with regard to the inquest proceedings such as in cases of custodial death, the power to record evidences and examination of dead body as well as the duty to notify the relatives of the deceased.

The primary instance where the courts as well as the executive needs to be stricter in the implementation of certain procedures of the Sanhita is the case of custodial deaths. It is to be noted that out of the 76 cases of custodial deaths in the year 2020, 31 were recorded as suicides and 34 as being a result of illness, with a single exception of death due to physical assault.

"*Poor implementation of Section 176(1A) CrPC, lack of proper investigation and seriousness into death or disappearances in police custody appears to have ended up providing impunity. The NCRB's Crime in India from 2005 to 2017 further provide that with respect to 476 cases of "death or disappearance of persons remanded to police custody by court*", 266 cases were registered, *54 policemen were charge sheeted but not a single policeman was convicted as on date.*"[25]

[21] Ghudo s/o Ramadhar v. Emperor, AIR 1945 Nagpur 143.
[22] Piara Singh v. The State & Anr., AIR 1958 Punjab 141.
[23] In re Laxminarayan Kaki, AIR 1928 Bombay 390.
[24] Brajnandan Sinha v. Jyoti Narain, AIR 1956 SC 66.
[25] Suhas Chakma v. Union of Indian & Ors., W.P.(Crl.) No. 354/2019.

There have been various instances of the courts not only taking Suo moto cognizance of such cases but also issuing such directions as needed for the proper implementation of such provisions. Unless steps are taken to ensure that magistrates are not lacking in their duty to supervise the proceedings done by the police officials, justice cannot be granted to the victims.

**Suggestions for Reform**

The primary suggestions of the researcher in order to ensure the proper conduct of inquest proceedings and forensic examination of the deceased in this regard are:

i. Provide stricter implementation of provisions related to custodial death and rape in order to ensure delivery of justice.
ii. Establish a detailed procedure under special enactment for the inquest proceedings which provides the:
    a. Qualifications of the medical practitioner
    b. A special team of experts for the forensic examination
    c. Proper institutions and infrastructure of the conduct of forensic examination
    d. Training of the staff to assist practitioners
    e. Strict implementation of mandatory forwarding of body unless there is no suspicion at all regarding the unnatural death
    f. Provisions to ensure that practitioners use least invasive procedures in the forensic examination and dignity of the body is sustained.

**Conclusion**

Hence, it may be concluded that the Code of Criminal Procedure provides for the preparation of inquest reports as a record of crime. While not a substantial piece of evidence, these reports serve as a crucial foundation for establishing the commission of the offense, since improper filing of the report can undermine the prosecution's case. Inquest refers to an enquiry or investigation into the cause of death of a person. These are conducted in case of unnatural deaths such as through accidents, suicides, homicides, animal bits or stings and so on, or natural deaths when such death is sudden or suspicious in nature.

The grounds for inquest by the magistrate are wider in ambit than for the police and also includes mandatory intervention in cases of dowry deaths and custodial death or rape

which highlights that the powers of the magistrate have been granted in order to keep a system of checks and balances with respect to the inquest proceedings in particularly sensitive form of cases which might also be prone to biasness on the behalf of the police officials. Furthermore, the inquest reports are the he prepares compulsorily by the police officials but not by the magistrates. Also, the police have been granted powers akin to the magistrates in respect of summoning of witnesses for the purpose of the proceedings. However, their scope is limited with regard to the summons.

There is a need for detailed provisions and even enactment of special laws for the conduct of inquest proceedings in order to ensure the delivery of justice for the deceased.

# GENDER JUSTICE IN INDIA: THE FUTURE WE DEMAND

**Aditi Tiwari***

***Abstract***

*This paper discusses the situation of gender justice through the various courses of time how it changed its dimension and developed with the flow, and how much the demand for gender justice backed their claim and made changes not only regionally but globally this paper also discusses how the constitution of India supports the idea of gender justice and aids in developing a society which provides equal opportunity and offers to both the genders equally. Not only the ways of tackling gender discrimination in society but also hurdles in the way of gender justice are discussed but also the progress and affirmation towards the idea is taken in course. It is quite true that various great changes in this course but we all know there is still a long way for us to reach a point where gender justice is not only a demand but a true and discernible reality Moreover what is still needed to be done to achieve this goal completely fully and completely is also given a shot.*

**Keyword**: **Gender justice, Ardhanareeshwara, Discrimination, pandemic effects**

## Introduction

We are living in the era of the 21st century where it is right for everyone, people are woken and aware and debates like equality, justice, and common rights are frequent. In an overview when we look back to our society it seems quite serene but the truth is that it is not as merry as it looks because women who contribute to almost 50% of society are still discriminated against. Every day in every country there is a place where women are confronted by inequality. In one or another field they face violence abuse unequal treatment matter whether it is at home at work or in any wider community, the situation of women is the same. They are denied opportunities to learn, to earn and to lead.

Women always get fewer resources, less power and less influence compared to men and can experience further inequality because of various other factors like class, caste ethnicity and age as well as religious and other fundamentalism[1].

* 3rd year B.A. LL. B (Hons), S.S Khanna Girl's Degree College, Prayagraj, Uttar Pradesh

[1] United nation development programhttps://undprolhr2021.org/thematic-focus/gender-justice.html( last visited 10 June 2024)

**Position of Women in Early India**

During the Vedic period, women were of equal status to men women were respected and honoured. The position of women was free as a whole. Early scriptures represent men and women as the two aspects of one person They say that 'Having divided his body into two parts, he, the lord(brahman)became male using one half and female using other.' 'Similarly, it is pointed out that lord Shivs consists of a body of two halves one is for male other is for female and he is called 'Ardhanareeshwara'. Women were considered more powerful than men and treated as goddesses of 'Shakti'. Thus, men and women were separated.

But with time indiscrimination and violence against women started to flourish Unlike the Vedic period women's position was downgraded people started treating women as passive people. It was considered that men were all powerful and women were just servants to men, they were not considered as a counterpart anymore. They used to associate women with a man women do not have any individual existence. It was believed that women were born to serve men rights were available to women not even basic rights. Women were captured to 4 walls of a house, people used to believe that the only work that women could do was to give a birth to child and look after their families education and career opportunities were available for them. The status of women was equal to the status of an animal. There were quite a lot of inhuman practices that showed the piteous condition of women such as Sati Pratha, child marriage, and female foeticide.[2]

**Indian View on Gender Justice**

India has a very long history of unequal treatment of women and a very unsympathetic view of gender issues. There are still many people in our country who have been unable to free themselves from the shackles of outdated social practices and tradition, even in the 21st century when the entire globe has awakened to feminism appeal. Apart from this outdated ideology, there are still people in India who talk about equal rights and equal opportunities for women and the good part is, that this section of society is increasing very rapidly. since post post-independence era there have been quite a lot of people who stand for the rights and equality of women and this includes people like Raja Ram Mohan Roy, who

[2] Gender justice and law ESCWA https://www.unescwa.org/gender-justice-law( last visited 10 June 2024)

fought against sati and saved the lives of many women. Manockjee Cursetjee started the first English school for girls in India in Mumbai. Jyotirao Govindrao Phule started the first school for women. Dr BR AMBEDKAR was responsible for the Hindu Code Bill which allowed women the right to file a divorce petition and the right to inheritance. Dr HARISINGH GOUR supported gender equality and he successfully got an act passed that enabled women to be enrolled as lawyers.

**Justice Gender Under Indian Constitution**

The Indian constitution has provided a new dimension to Indian society. Though in the constitution the word sex is used in place of gender in articles 15(1),16(2), and 325, which prohibit discrimination based on sex. Discrimination based on sex, colour, creed caste race other religion and other factors has been prohibited under the constitution as they are violative of fundamental rights. In a similar vein article 14 guarantees equality before the law. The Constitution of India gives the state the authority to make provisions for the protection and development of women. From time to time a slew of laws has been established to empower them and elevate their status.

The Indian constitution framers were fully aware of the oppressive and discriminatory view of society towards women Articles 14, 15(2),15(3), and 16 of the Indian constitution thus not only prohibit discrimination against women but also provide the state the authority to grant protection in favour of women. The preamble of the constitution also guarantees social economic and political justice as well as equality of status and opportunity. Article 16(1) of the Indian constitution provides equal opportunities for women in matters relating to employment or appointment to any state or office and article 16(2) prohibits discrimination in employment or appointment to any state or office based solely on religion, race, caste, sex, or others factors.

Article 23 establishes the right to equality as well as special provisions which include the provision of prohibition of discrimination. Part 4 of the Indian constitution contains a directive principle that also talks about how the state shall strive to ensure gender equality. Article 39(d) of the Indian constitution recognizes the principle "Equal Pay for Equal Work" for men or women as well as the "Right to Work". Moreover, to provide equality in every field to women there are provisions of reservation. On 9$^{th}$ March 2010 a bill was passed in the parliament of India which says to amend the constitution of India to reserve 1\3 of all seats in

the lower house of parliament of India, the Lok Sabha and in all legislative assemblies for women.

**Reality On Ground Level**

The constitution of India has a long list of acts and provisions that talk about gender justice to secure equal positions for women and all the provisions also look quite tempting but the reality on the ground is different. India's majority of laws did not have the desired effect because people's willingness to change the society to give women equality was lacking. Women are guaranteed equal rights and opportunities, but the reality is much different. There are still people who don't accept women who are equal to males in every way and they have their energy and valour, instead, they underestimate them.

Several examples clearly show that only backing of law to provide equality is not sufficient but also there should be strong public willingness and opinion. Gender inequality directly refers to the inequality of the treatment of the perception of individuals. The status of women is fundamental to human development but in India, the birth of a girl child is still not welcomed and discrimination based on gender continues to one or another broader perspective of social life. There are lot many cases to prove this point[3].

**Social Inequality**

Not allowing women to do things that men are free to do. One of the notable news related to The Sabarimala Temple, which is considered the abode of Lord Ayyappa, is in the Periyar Tiger Reserve in the Western Ghat mountain ranges of Pathanamthitta District, Kerala. As we know the temple is known for its unique religious practices—devotees undertake a 41-day penance, renouncing worldly pleasures, before they visit the temple and it's a kind of rule as Devotees consider Lord Ayyappa to be a celibate deity. Women in their 'menstruating years' (between the ages of 10 to 50) were prohibited from entering the temple to protect celibacy.

[3] Government of India committed to gender justice https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1988601( last visited 10 June 2024)

This practice of exclusion of women was first challenged at the Kerala High Court. In 1991, the Kerala High Court in *S. Mahendran v The Secretary, Travancore* held that in its judgement that the exclusion was constitutional and justified, as it was a long-standing custom and according to court practice did not violate women devotees' Rights to Equality and Freedom of worship.

Then in 2006, the Indian Young Lawyers Association filed a public interest litigation petition before the Supreme Court to challenge the Sabarimala Temple's prohibition of women from the temple premises. The Association argued on that point that the custom violates the Right to Equality under Article 14, as the practice is 'derogatory to the dignity of women'. Freedom of religion under Article 25 of the constitution of India states that 'all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion'.

**Economic Inequality**

The problem of wage inequality between men and women is one of the concrete problems. A study has found that women in India face bias both in recruitment and pay. According to the estimate of the World Inequality Report 2022 Indian men earn 82% of labor income whereas women earn only 18% of it. Recently, in the World Economic Forum Racking India Got the Position Of 135 Out Of 146 In Global Gender Gap Index For 2022.

**Inequality Based on Education**

Education is one of the most crucial things for the empowerment of women. The provision of the right to education under Article 21 of the Indian Constitution has declared that the government must provide free education to everybody; the high rate of women's education is still a distant dream and charm to achieve. The reasons for that are parents expect girls to look after their siblings while their parents are at work, work with the parents as seasonal labourers manage the household work, etc. The parents are always more interested in boys' education than girls' as they feel that girls are to be married off, increasing the cost of education, etc. Thus, the primary education for girls in India remains a remote daydream for the women.

**Domestic Violence Against Women**

The main reason behind domestic violence against women is the patriarchal nature of Indian society. Besides that, the problem of an alcoholic husband and desire of the family to get a male child and the demand for more dowry stands strong for domestic violence against women. However, there is a law Domestic Violence Act against the oppression of women from domestic violence but this problem remains a severe one.

**Sexual Harassment Of Women**

The initiative measure and law on sexual harassment of women at their workplace in India started with the Supreme Court's Vishaka guidelines in 1997. However, it was the passage of the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act that helped in converting these guidelines into concrete rules that are to be implemented. But we know the reality that even today, the issue of sexual harassment has largely been swept in India. The provisions have never been successfully invoked and properly initiated because of social taboos still associated with sexual harassment. In India, women are discriminated against in terms of payment of remuneration for their jobs. It is completely true and known that for both urban as well as rural areas. Women entrepreneurs often must deal with more complications in getting credits to start their independent businesses.

**Conclusion.**

Time and tide wait for none. As we move forward to modernisation, we need to inculcate progressive policies in our system to make this place a living place for all especially women. In ancient time, it is pointed out that. Women were considered more powerful than men and treated as goddesses of 'Shakti'. Thus, men and women were separated. She must be stabilised in all aspects including but not limited to education, women safety, financial, emotional in particular, fast track adjudication of women related crimes.

Government should implement the wordings in gazetted paper into real spirits, so that the today's women lead her life in full dignity as enshrined in the preamble of constitution

# ALGORITHMIC BIAS IN PREDICTIVE POLICING IN LAW

**Saanvi Aggarwal***

***Abstract***

*Predictive policing algorithms have become increasingly prevalent in law enforcement, with the promise of improving crime prevention and resource allocation. However, these algorithms have been subject to growing concerns about their potential to perpetuate and exacerbate racial biases in the criminal justice system. Algorithmic bias refers to the phenomenon where the algorithms used in predictive policing models reflect and amplify the biases present in the historical data on which they are trained, often leading to disproportionate targeting of racial minorities and low-income communities[1].*

*This issue raises significant legal and ethical concerns, as the use of biased algorithms in law enforcement decision-making can violate principles of equal protection and due process[2]. Additionally, the opaque nature of many predictive policing algorithms, makes it challenging for the public to scrutinize and hold law enforcement accountable for their use [3].*

*Addressing algorithmic bias in predictive policing requires a multifaceted approach, including increased transparency and public oversight of these systems, as well as efforts to ensure the fairness and non-discrimination of the underlying data and algorithms[4]. Policymakers and legal scholars have proposed various regulatory and legislative solutions, such as the implementation of algorithmic impact assessments and the establishment of independent bias auditing mechanisms [5]. As the use of predictive policing algorithms continues*

* 2nd year BALLB christ (deemed to be university) , Bangalore.

[1] Babuta, A., Oswald, M., & Rinik, C. (2018). Algorithmic bias in predictive policing: A critical assessment. Royal United Services Institute for Defence and Security Studies.

[2] Selbst, A. D. (2017). Disparate impact in big data policing. Georgia Law Review, 52, 109.

[3] Brayne, S. (2017). Big data surveillance: The case of policing. American Sociological Review, 82(5), 977-1008.

[4] Selbst, A. D., & Barocas, S. (2018). The intuitive appeal of explainable machines. Fordham Law Review, 87, 1085.

[5] Babuta, A., Oswald, M., & Rinik, C. (2018).

*to expand, the legal system must address the complex issues of algorithmic bias and its implications for the fair and equitable administration of justice.*

**Keywords- Algorithmic Bias, Predictive Policing, Algorithmic Decision-Making, Structural Racism, Racial Disparities, Algorithmic Fairness.**

## Introduction

Predictive policing, the use of data-driven algorithms to forecast and prevent crime, has gained increasing attention in recent years as a tool for law enforcement agencies. However, the implementation of these algorithms has raised significant concerns regarding their potential to perpetuate and exacerbate existing biases within the criminal justice system[6]. This article aims to explore the complex interplay between algorithmic bias and predictive policing, highlighting the need for a critical examination of these systems to ensure fairness and equity.

The development and deployment of predictive policing algorithms often rely on historical crime data, which can reflect the biases inherent in past policing practices[7]. These biases, which may stem from factors such as racial profiling, over-policing of marginalized communities, and differential reporting of crime, can be amplified and encoded into the algorithms[8]. As a result, the predictions generated by these systems may reinforce and perpetuate the disproportionate targeting of specific communities, further exacerbating existing disparities in the criminal justice system[9].

[6] Brantingham, P. J., Valasik, M., & Mohler, G. O. (2018). Does Predictive Policing Lead to Biased Arrests? *Results from a Randomized Controlled Trial*. *Statistics and Public Policy, 5*(1), 1-6.

[7] Lum, K., & Isaac, W. (2016). To predict and serve? *Significance, 13*(5), 14-19.

[8] O'Neil, C. (2016). *Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy*. Crown.

[9] Caliskan, A., Bryson, J. J., & Narayanan, A. (2017). Semantics derived automatically from language corpora contain human-like biases. *Science, 356*(6334), 183-186.

Moreover, the opaque nature of algorithmic decision-making processes can make it challenging to identify and address these biases[10]. The reliance on complex machine learning models and the proprietary nature of many predictive policing tools can obscure the underlying logic and decision-making criteria, making it difficult for policymakers, law enforcement agencies, and the public to scrutinize and hold these systems accountable[11].

Addressing the issue of algorithmic bias in predictive policing requires a multifaceted approach that combines technical, legal, and ethical considerations. Researchers, policymakers, and civil rights advocates have called for increased transparency, rigorous testing, and community engagement to ensure that predictive policing systems are developed and deployed in a manner that promotes fairness, equity, and the protection of individual rights[12]. Ultimately, the challenge of addressing algorithmic bias in predictive policing is integral to the broader efforts to dismantle systemic inequalities within the criminal justice system.

**Methodology**

In this article, we aim to explore the issue of algorithmic bias in predictive policing. To achieve this, we will conduct a comprehensive review of the existing literature and research on this topic. We will examine a range of journal articles that address the challenges and implications of algorithmic bias in the context of predictive policing.

Additionally, we will explore the potential consequences of algorithmic bias, including the disproportionate impact on marginalized communities and the erosion of public trust in law enforcement. By synthesizing the findings from this review, we will provide a deeper understanding of the current state of research on algorithmic bias in predictive

[10] Selbst, A. D., & Barocas, S. (2018). The Intuitive Appeal of Explainable Machines. *Fordham Law Review, 87*, 1085-1139.

[11] Pasquale, F. (2015). *The Black Box Society: The Secret Algorithms That Control Money and Information*. Harvard University Press.

[12] Desmond, M., Papachristos, A. V., & Kirk, D. S. (2016). Police Violence and Citizen Crime Reporting in the Black Community. *American Sociological Review, 81*(5), 857-876.

policing and offer insights that can inform future discussions and policy decisions in this critical domain.

**Literature Review**

- "What if We Could Just Ask AI to Be Less Biased?" by the MIT Technology Review[13]

This article explores the issue of algorithmic bias and its impact on various applications, including predictive policing. The article highlights the inherent challenges in addressing bias in artificial intelligence (AI) systems, which can perpetuate and amplify societal biases.

Predictive policing, a technique that uses data analysis and algorithms to predict and prevent crime, has been a subject of significant concern regarding algorithmic bias [14]. The article suggests that the use of AI in predictive policing can lead to the perpetuation of historical biases, such as racial profiling and disproportionate targeting of marginalized communities [15].

The article further emphasizes the difficulty in debiasing AI systems, as the algorithms are often trained on data that reflects societal biases [16]. The author raises the question of whether it is possible to simply "ask" AI to be less biased, underscoring the complexity of the issue and the need for a multifaceted approach to address it.

The literature highlights the importance of understanding and mitigating algorithmic bias in predictive policing and other applications of AI. It suggests that addressing this

[13] MIT Technology Review. (2023). What if We Could Just Ask AI to Be Less Biased? Retrieved from https://www.technologyreview.com/2023/03/28/1070390/what-if-we-could-just-ask-ai-to-be-less-biased/

[14] Saunders, J., Hunt, P., & Hollywood, J. S. (2016). Predictions put into practice: a quasi-experimental evaluation of Chicago's predictive policing pilot. Journal of Experimental Criminology, 12(3), 347-371.

[15] MIT Technology Review. (2023). What if We Could Just Ask AI to Be Less Biased?

[16] Raji, I. D., & Buolamwini, J. (2019). Actionable auditing: Investigating the impact of publicly naming biased performance results of commercial AI products. In Proceedings of the 2019 AAAI/ACM Conference on AI, Ethics, and Society (pp. 429-435).

challenge requires a combination of technical solutions, such as algorithmic auditing and debiasing techniques, as well as broader societal and policy interventions to address the underlying biases in data and decision-making processes [17].

- "Joint Statement on Algorithmic Justice and Predictive Policing" by the Brennan Center for Justice (2020) [18]

This article examines the ethical concerns surrounding the use of predictive policing technologies. Predictive policing involves the use of algorithms and data analysis to forecast where and when crimes are likely to occur, allowing law enforcement to allocate resources more efficiently. However, the authors argue that these technologies can perpetuate bias, discrimination, and privacy violations, particularly in marginalized communities.

The article highlights the potential for predictive policing algorithms to reflect and amplify the biases present in the data used to train them, leading to disproportionate surveillance and policing of certain neighborhoods and populations. Additionally, the authors raise concerns about the lack of transparency and accountability surrounding these algorithms, making it difficult to understand how decisions are made and to challenge their fairness.

Furthermore, the article discusses the privacy implications of predictive policing, as the collection and analysis of large amounts of personal data can infringe on individuals' rights and freedoms. The authors emphasize the need for robust privacy protections and the right of individuals to understand how their data is being used. Overall, the article presents a compelling argument for a critical examination of the use of predictive policing technologies and the implementation of safeguards to ensure they are used in an ethical and accountable manner.[19]

[17] Brayne, S. (2017). Big data surveillance: The case of policing. American Sociological Review, 82(5), 977-1008.

[18] Brennan Center for Justice. (2020). Joint Statement on Algorithmic Justice and Predictive Policing. https://www.brennancenter.org/sites/default/files/JointStatementPredictivePolicing.pdf

[19] Ibid

- "Algorithms in Policing: An Investigative Packet" by Yale Law School [20]

This review provides a comprehensive examination of the use of algorithms in policing and their potential implications. The document explores the growing trend of incorporating algorithmic decision-making tools into various aspects of law enforcement, including predictive policing, risk assessment, and evidence-based decision-making.

It highlights the potential benefits of using algorithms in policing, such as the ability to identify patterns, target resources more effectively, and make more informed decisions. However, it also raises critical concerns about the potential for bias, lack of transparency, and the impact on civil liberties and due process[21].

The review delves into the challenges of algorithmic bias, noting that the data used to train these algorithms may reflect historical biases and lead to the perpetuation of discriminatory practices [22]. Additionally, the lack of transparency in the development and implementation of these algorithms raises questions about accountability and the ability to challenge the decisions made by these systems [23].

Furthermore, the review explores the impact of algorithmic decision-making on individual rights, such as the presumption of innocence and the right to a fair trial. It emphasizes the need for robust oversight, public engagement, and the development of ethical frameworks to ensure the responsible and equitable use of algorithms in policing [24].

Overall, the review provides a valuable resource for understanding the complexities and implications of incorporating algorithms into law enforcement practices, highlighting the

---

[20] Yale Law School. (2021). Algorithms in Policing: An Investigative Packet.

[21] Ibid

[22] Brayne, S. (2020). Predict and Surveil: Data, Discretion, and the Future of Policing. Oxford University Press.

[23] Pasquale, F. (2015). The Black Box Society: The Secret Algorithms That Control Money and Information. Harvard University Press.

[24] Selbst, A. D. (2017). Disparate Impact in Big Data Policing. Georgia Law Review, 52(109).

importance of balancing technological advancements with the preservation of civil liberties and the principles of justice.

- "Fairness in Algorithmic Policing" by Osaba et al. (2021) [25]

This paper explores the complex issue of fairness in the application of algorithmic decision-making systems in policing. The authors acknowledge the potential benefits of such systems, such as increased efficiency and objectivity, but also highlight the significant challenges in ensuring fairness and mitigating the risk of perpetuating or exacerbating societal biases.

The review delves into the various conceptualizations of fairness, including statistical parity, equal opportunity, and disparate impact, and how they apply in the context of algorithmic policing[26]. The authors emphasize the importance of understanding the historical and contextual factors that have shaped policing practices and their disproportionate impact on marginalized communities.

The paper also examines the potential pitfalls of relying on historical data, which may reflect and perpetuate existing biases, and the need for careful feature engineering and model development to address these issues[27]. The authors further discuss the challenges of transparency and interpretability in algorithmic decision-making, which are crucial for promoting accountability and building public trust.

Finally, the review highlights the need for a multifaceted approach to ensuring fairness in algorithmic policing, including the involvement of diverse stakeholders, the development of robust evaluation frameworks, and the implementation of robust governance

[25] Osaba, E., Gao, S., Price, C., & Solovey, K. (2021). Fairness in Algorithmic Policing. Patterns, 2(8), 100297. https://doi.org/10.1016/j.patter.2021.100297

[26] Ibid

[27] Ibid

structures[28]. The authors call for continued research and collaboration to address these complex challenges and work towards more equitable and just policing practices.

**Common Reasons for Algorithmic Bias**

- Algorithmic bias can occur in predictive policing due to several reasons. Some common reasons are:
- **Biased Data Inputs**: Predictive policing algorithms rely on historical crime data, which may reflect societal biases and past discriminatory policing practices. This can lead to the perpetuation and amplification of biases in the algorithms' outputs[29].
- **Feedback Loops**: Predictive policing systems can create feedback loops, where the algorithms direct law enforcement resources to certain areas, leading to more arrests and data points in those areas, further reinforcing the algorithms' biases[30].
- **Lack of Transparency and Explainability**: Many predictive policing algorithms are opaque and lack transparency, making it difficult to understand how the algorithms arrive at their predictions. This lack of explainability can obscure potential biases and make it challenging to address them.[31]
- **Overreliance on Algorithms**: Over-reliance on algorithmic decision-making in predictive policing can lead to a diminished role for human judgment and critical thinking, which may be necessary to identify and mitigate biases[32].

[28] Ibid

[29] Brantingham, P. J., Valasik, M., & Mohler, G. O. (2018). Does Predictive Policing Lead to Biased Arrests? *Criminal Justice and Behavior, 45*(8), 1210-1237. https://doi.org/10.1177/0093854818761oppressed5782

[30] Lum, K., & Isaac, W. (2016). To Predict and Serve? *Significance, 13*(5), 14-19. https://doi.org/10.1111/j.1740-9713.2016.00960.x

[31] Selbst, A. D., & Barocas, S. (2018). The Intuitive Appeal of Explainable Machines. *Fordham Law Review, 87*, 1085. https://ir.lawnet.fordham.edu/flr/vol87/iss3/10

[32] [4] Brayne, S. (2020). Predict and Surveil: Data, Discretion, and the Future of Policing. *Oxford University Press*.

**Proposed Solutions to Algorithmic bias in predictive policing**

These biases can perpetuate and amplify existing societal biases, leading to disproportionate targeting of certain communities and individuals. To address this issue, several solutions have been proposed:

- **Diversify Data Sources**: Reliance on historical crime data alone can perpetuate biases, as these data reflect past discriminatory policing practices. Incorporating diverse data sources, such as socioeconomic indicators, community-based information, and alternative measures of public safety, can provide a more holistic and less biased understanding of crime patterns[33].
- **Algorithmic Transparency and Accountability**: Ensuring algorithmic transparency and accountability is crucial to identifying and mitigating biases. This includes making the algorithms and their decision-making processes open for scrutiny, as well as establishing mechanisms for oversight and community input[34].
- **Algorithmic Auditing and Bias Testing**: Regularly auditing the algorithms used in predictive policing and testing for biases can help detect and address issues. This process should involve collaboration with external experts, community stakeholders, and impacted groups[35].
- **Inclusive Algorithm Development**: Involving diverse stakeholders, including marginalized communities, in the development and deployment of predictive policing algorithms can help ensure that their perspectives and concerns are incorporated[36].
- **Human Oversight and Decision-making**: While algorithms can provide valuable insights, the final decision-making process should involve human oversight and

[33] Kristian Lum & William Isaac, "To Predict and Serve?" (2016) 13:5 Significance 14

[34] Rashida Richardson, Jason Schultz & Kate Crawford, "Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice" (2019) 94 NYU L Rev Online 192.

[35] Danielle Ensign et al., "Algorithmic Auditing and Social Justice: Lessons from the History of Audit Studies" (2020) 52:1 Association for Computing Machinery 38.

[36] Alexis Hancock & Chantelle Johnson, "Community Engagement in Predictive Policing" (2019) Stanford Computational Policy Lab.

discretion. This can help mitigate the risk of over-reliance on algorithmic outputs and ensure that community-centered approaches are prioritized[37].

- **Comprehensive Training and Education**: Providing comprehensive training on algorithmic bias and ethical considerations to law enforcement personnel, policymakers, and the public can improve understanding and foster more responsible use of predictive policing technologies[38].
- **Policy and Legal Frameworks**: Developing robust policy and legal frameworks to govern the use of predictive policing technologies, including guidelines for data collection, algorithm development, and community engagement, can help ensure accountability and alignment with human rights and civil liberties[39].
- **Continuous Evaluation and Improvement**: Predictive policing algorithms should be subject to ongoing evaluation and improvement, with a focus on reducing biases and improving outcomes for all members of the community. This may involve regular audits, the incorporation of feedback from community stakeholders, and the continuous refinement of the algorithms and their underlying data[40].

By implementing these solutions, the impact of algorithmic bias in predictive policing can be reduced, and more equitable and community-centered approaches to public safety can be adopted.

**Conclusion:**

The issue of algorithmic bias in predictive policing is a complex and multifaceted problem that requires attention and action from various stakeholders. As the use of algorithms

[37] Andrew Guthrie Ferguson, "Predictive Policing and Reasonable Suspicion" (2012) 62 Emory LJ 259.

[38] Cathy O'Neil, "Weapons of Math Destruction: How Big Data Increases Inequality and Threatens Democracy" (2016) Crown.

[39] Vicki Mayer & Jatin Dua, "Predictive Policing: The Algorithmic Turn in Spatial Governance" (2020) 26:2 Information, Communication & Society 187.

[40] Virginia Eubanks, Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor (New York: St. Martin's Press, 2018), 185-186.

and artificial intelligence (AI) in law enforcement continues to grow, it is crucial to address the potential biases and discriminatory outcomes that can arise from these systems.

The research and case studies discussed in this article highlight the need for greater transparency, accountability, and ethical considerations in the development and deployment of predictive policing algorithms. By addressing these recommendations, policymakers, law enforcement agencies, and algorithm developers can work towards a future where predictive policing algorithms are more equitable, transparent, and accountable, ultimately enhancing public safety and promoting justice for all.

# MEDIA TRIALS IN DIGITAL AGE

**Aditya Kumar***

***Abstract***

*This paper examines the essential systems and strategies that organizations use to enhance efficiency and achieve their objectives. It delves into the design and implementation of these systems, focusing on their impact on overall performance. The discussion extends to the technical and managerial aspects that are critical for success in a rapidly evolving environment. In today's competitive landscape, the ability to innovate and adapt is paramount. The paper underscores the importance of continuous improvement and responsiveness to change, as these factors are vital for maintaining a competitive edge.*

*By integrating theoretical frameworks with practical insights, the paper offers a comprehensive understanding of how modern organizations can leverage these systems for sustained success. The content is intended to provide valuable guidance for professionals seeking to deepen their expertise and apply these concepts effectively in their own work. Through a balanced exploration of theory and practice, the paper aims to equip readers with the knowledge needed to navigate and excel in the complex dynamics of contemporary business environments. This holistic approach makes the paper a useful resource for those aiming to drive performance and innovation within their organizations.*

## Introduction

In the contemporary world, media is seen as one of the crucial elements of democracy. So much so that it is also known as the fourth pillar of democracy.

The media, with its extraordinary influential ability, plays a crucial role in shaping the viewpoints of people around the globe, including that of legal practitioners As it is said, there are two sides of a coin. The Media, alongside all the positives also holds some negative aspects in its arsenal. Media Trial being the latter. Media Trial in the terms of layman means the trial of a case done entirely by the media house without an inclusion of judiciary in the matter. Of course, such a trial is entirely void and holds no meaning in front of law.

* 1st year, B.B.A. LL.B ( Hons), Chanakya National law University, Patna, Bihar

Media Trial traces its origin back to the 20th Century, when the infamous cases like Roscoe 'Fatty' Arbuckle and O.J. Simpson took place. The damage done by the media houses was so immense that despite being acquitted in the case, the accused still got their career and societal prestige destroyed. The remarks, *"Media trial creates narratives which makes person guilty in public even before courts decide "* by Hon'ble CJI DY Chandrachud clearly highlights the issue.[1] Although it can be said that with the evolution of technology, the medium of media trial has changed significantly, however the results are still similar as that of O.J. Simpson case. The examples of which can also be seen in the recent media trial of Rhea Chakrabarty.[2]

It is worthwhile to note that, alongside traditional news sources involved in the media trial of Rhea Chakrabarty, the new digital platform also played a crucial role. The proliferation of digital platforms in the modern era alongside the traditional platforms have both democratised the information industry and vilified it too. Absolute power indeed corrupts. The new platforms give extremely speedy access to the information to the masses and as a result legal cases, especially of famous personalities are treated very ruthlessly by both the masses and the media.
Therefore, it is important to research about the media trials done in the digital age.

**Acceleration Of Information Dissemination in Digitalised Age**

With the access of the internet, almost everyone around the globe is interconnected. Social media is one of the platforms which is extremely crucial in this globalised world. A person is just one click away from knowing about the happenings of the other side of the world. "Media Bound by Higher Standards of Accuracy Than Ordinary Citizens" very effectively observed the Calcutta High Court.[3] With the rise of social media platforms, *Citizen journalism* has emerged as a unique force, which includes normal citizens with almost no training to be a media

[1] PTI, Media trial creates narratives which makes person guilty in public even before courts decide: Cji Chandrachud The Print (2023), https://theprint.in/india/media-trial-creates-narratives-which-makes-person-guilty-in-public-even-before-courts-decide-cji-chandrachud/1465126/ (last visited Jun 1, 2024).

[2] BBC, Rhea Chakraborty: Bollywood speaks up for "vilified" actor BBC News (2020), https://www.bbc.com/news/world-asia-india-54055350.

[3]Srinjoy Das, "media bound by higher standards of accuracy than ordinary citizens": Calcutta HC issues guidelines for coverage of recruitment scam case Live Law (2023), https://www.livelaw.in/high-court/calcutta-high-court/calcutta-high-court-issues-guidelines-media-coverage-enforcement-directorate-abhishek-banerjee-recruitment-scam-240400.

person, capturing and sharing live updates from courtrooms or crime scenes, often preceding traditional media coverage.[4]

The pace of information dissemination on digital platforms generally outpaces the traditional fact-checking processes. Misleading information can circulate very rapidly which can lead to the potential distortion of facts and prejudiced public opinion.

**Implications on Public Perceptions and Judicial Processes**

In the digital era, the rapid spread of information by several media sources can shape public opinion swiftly, which can raise critical questions about the integrity of the judicial proceedings. Social media can very effectively create a strong mentality among the masses by provoking emotions and make people follow some already predetermined ideals.

It is not wrong to say that social media nowadays are not just tailored for entertainment, but also for changing opinions, political views and even creating mass movements.[5]

Media Trials can very ruthlessly damage the judicial proceedings. The process of becoming a judge anywhere around the world is a very gruelling process. It involves careful selection of already trained lawyers based on merit and a very long duration of training in the Judicial academies. A media person is someone who has a completely different skill set than that of a judge.

Therefore, when the media with its untrained and unqualified personnel attempts to decide the case, it significantly undermines the integrity of the legal process and jeopardises the accurate representation of facts and legal principles. Furthermore, it should also be noted that Judges are also human at the end of the day. So, there does exist a possibility of them getting influenced by the media reporting, no matter how small the chances are. The Indian Judiciary has implicitly rejected the idea of the media swaying the judges, stating that judges remain unaffected by propaganda or adverse publicity.

**Case Studies**

[4] Citizen journalism: Meaning, history, types, pros and cons, Sociology Group (2020), https://www.sociologygroup.com/citizen-journalism/.

[5] CC Plus, The impact of social media on public opinion CC Plus (2021), https://cc-plus.com/articles/2021/08/23/the-impact-of-social-media-on-public-opinion/ (last visited Aug 16, 2024).

I. **Rhea Chakraborty v. the State of Bihar, 2020 (Sushant Singh Rajput Death Case)**[6]

In the above-mentioned case, although the accused was given clean chit by the judiciary, due to the media trial conducted both on traditional sources and digital sources tarnished the reputation of the accused beyond repair.

II. **Zahira Habibullah Sheikh v. State of Gujarat**[7].

The Supreme Court emphasised that a fair trial requires an impartial judge, fair prosecutor, and a judicially calm atmosphere. It includes eliminating any prejudice towards the accused, witnesses, or the cause being tried.

III. **Jessica Lal murder case**.

The court stressed the imperative need for those in charge to prevent media trials from interfering with fair investigations or prejudicing the defence rights of the accused. It also emphasised that despite the importance of the press, it is important to ensure a fair investigative process which avoids any injustice due to undue influences.

IV. **Aarushi Talwar Murder case (2013)**.

The media on its own discretion pronounced the verdict before the trial even began, blaming Aarushi's parents which sparked public protests.

V. **Rao Harnarayan v. Gumani Ram**[8]

The Court strongly disapproved of the practice known as "trial by media". It was emphasised that the journalists should not assume the role of investigators while a case is ongoing and attempt to influence the court.

The Seventeenth Law Commission, in its 200th report titled "Trial by Media: Balancing Free Speech and Fair Trial under Criminal Procedure (Amendments to the Contempt of Courts Act, 1971)," has put forth numerous recommendations to address pivotal issues within the realm

[6] Rhea Chakraborty v. State of Bihar and Ors., 3826 (2020) 20 SCC 184 (India)

[7] Zahira Habibulla H. Sheikh and Ors. v. State of Gujarat and Ors., 346 (2004) 1 AIR 1050, 158 (2004) 4 SCC 158 (India)

[8] Rao Harnarain Singh Sheoji Singh and Ors. v. The State, 123 (1958) AIR P&H 123, 33 (1958) MANU PH 0033 (India)

of criminal justice in India. This initiative was taken suo motu by the Law Commission in response to extensive coverage of crimes and information related to accused and suspects by both print and electronic media.

The pervasive use of television has notably altered the landscape of news dissemination, with many of these broadcasts having a potentially prejudicial impact on accused individuals, suspects, witnesses, judges, and the overall administration of justice. Adhering to the principles of the Indian legal system, it is imperative to uphold a fair procedure wherein the accused or suspect is presumed innocent until proven guilty in a court of law.

**Laws Governing Media Trials**

*Contempt of Court Act, 1971* serves as an important legal framework to keep the sanctity of the court proceedings. The Media trials disrespecting the authority of the court and negatively impacting the involved parties may fall under contempt. Such acts severely undermines the dignity of the court, which warrants legal consequences.

*The Press Council of India*, was established to uphold the press freedom and elevate news reporting standards in India. The council is governed by the Press Council Act of 1978, with the authority to address the issue of professional misconduct (including negative media trials) by issuing warnings, admonishments, or censures. Despite its effectiveness in post-publication measures, it has a very little preventive impact on biased reporting.

Additionally, laws such as defamation are integral in regulating media conduct. Defamatory statements which damage an individual's reputation can lead to legal consequences, reinforcing the lack of accountability in media trials.

This intricate interplay of these legal instruments weaves a crucial foundation for the maintenance of ethics, and justice in media reporting.

**Constitutional Provisions**

I. **Article 19(1)(a):** - The Indian Constitution's Article 19(1)(a) gives every citizen the freedom of speech and expression. The ability to freely express one's ideas, opinions, convictions, and views through speech, writing, printing, and other kinds of communication is guaranteed by this basic right. This right, however, is not unrestricted and is subject to reasonable constraints set by the government in the interest of the integrity and sovereignty of India, national security, friendly relations with other countries, public order, morality or decency, contempt of court, defamation, or incitement to commit an offense[9].

II. **Article 19(2):** - The Indian Constitution's Article 19(2) describes the permissible limitations that can be placed on the freedom of speech and expression that are ensured by Article 19(1)(a). The interests of public order, decency or morality, defamation, inducement to commit an offense, security of the State, cordial relations with foreign governments, and India's sovereignty and integrity are all thought to be protected by these prohibitions. It gives the government the legal justification to restrict how this basic right is used in specific situations in order to uphold public order and defend the rights of others. It also delivers the concept of "*harmonious construction "to* reconcile conflicting provisions of legislation or laws and to give legislative intent due consideration. This principle seeks to guarantee that laws are interpreted in a way that ensures their harmonious coexistence, hence preventing conflicts and inconsistencies within legal frameworks.

III. **Article 21: -** The Indian Constitution's Article 21 guarantees everyone's right to life and personal freedom. Despite not being specifically stated in Article 21, the Indian judiciary has considered the right to reputation to be part of the larger scope of the right to life and personal liberty. In a number of rulings, the Indian Supreme Court has maintained that the right to reputation[10] is an essential component of the Article 21 rights to life and personal freedom. According to the court, a person's reputation is an essential component of their personality and dignity, and any unjustifiable or arbitrary harm to it can have a negative impact on that person's life, liberty, and even means of subsistence.

[9] M. S. M. Sharma v. S. Krishna Sinha, AIR 1959 SC 395
[10] Khushwant Singh v. State of Punjab, (1977) 1 SCC 937.

Consequently, any violation of the right to reputation must pass the reasonableness and proportionality test[11] as stipulated in Article 21 since it is regarded as a component of the right to life and personal liberty. This means that any rule or action that has an impact on a person's reputation must be justified, appropriate for that goal, and free from discrimination or arbitrary behaviour.

**International Conventions**

- **UDHR: -** One important resolution that the United Nations General Assembly enacted in 1948 is the Universal Declaration of Human Rights (UDHR). It states that regardless of characteristics like race, religion, or nationality, every human being is entitled to a set number of fundamental rights. There are thirty articles of the UDHR that outline different civil, political, economic, social, and cultural rights. These rights encompass the freedom of opinion, religion, and expression, the right to work, the right to an education, and the right to take part in cultural activities. The Universal Declaration of Human Rights is a cornerstone of international human rights legislation and has impacted many international treaties and conventions.
- **ICCPR:** - Adopted by the United Nations in 1966, the International Covenant on Civil and Political Rights (ICCPR) is a global agreement that came into force in 1976. It describes the civil and political rights, such as the freedoms of expression, assembly, religion, and association, that the signatory states are required to preserve. In addition, the ICCPR guarantees the right to a fair trial, forbids torture and arbitrary imprisonment, and defends the rights of vulnerable populations and minorities. It has 173 state parties, it creates procedures for keeping an eye on adherence and holds states responsible for protecting these rights. All things considered, the ICCPR plays a significant role in the advancement and defense of civil and political rights around the globe and aids in the creation of international human rights norms. India is a signatory of it.
- **ICSCER: -** Adopted by the United Nations in 1966, the International Covenant on Economic, Social, and Cultural Rights (ICESCR) came into force in 1976. It upholds the the ICESCR acknowledges cultural rights and requires nations to gradually implement

[11] Munn v. Illinois, 94 U.S. 113 (1876).

these rights using their resources. In addition to establishing procedures for ensuring adherence, it highlights how crucial economic, social, and cultural rights are to promoting human well. India ratified this covenant as well as signatory of it.

**Conclusion**

The digital era has intensified the impact of media trials, challenging the integrity of judicial proceedings and also public perceptions. Dr. B. R. Ambedkar's words resonate even today, emphasising that the press holds no unique rights beyond those of individual citizens. The logic is simple, since India is a democracy with all its 3 pillars functioning independently, there is no need for the Media which already has its civilian job defined to cross the **"Lakshman Rekha"**.

The Rhea Chakraborty case does exemplify the detrimental consequences of digital media trials, clearly highlighting the need for responsible journalism and legal mechanisms regarding the same. As we navigate through this interconnected digitised era, balancing the power of media with the principles of fair trial is of paramount importance. The words of KK Venugopal, "Today electronic and print media are freely commenting on pending cases in an attempt to influence judges and public perception. This is doing great damage to the institution" reminds us that the freedom of the press should coexist alongside ethical considerations, preserving the semblance of justice in the face of quick information dissemination.[12]

[12] 'Media trial causing great damage to judiciary': Attorney General KK Venugopal | Latest News India - Hindustan Times

# AI IN INDIAN HEALTHCARE: LEGAL CONSIDERATIONS

**Shreya Sehgal***

***Abstract***

*The burgeoning use of Artificial Intelligence (AI) in Indian healthcare necessitates legal frameworks to govern its ethical application. This paper examines the growth of AI in diagnosis and treatment while acknowledging its potential benefits. It analyses the lacuna of legal guidelines surrounding AI in healthcare, creating uncertainty regarding liability for misdiagnosis or patient harm. The paper explores established ethical principles for AI, such as patient autonomy and data privacy. However, it emphasizes the challenges India faces in implementing these principles effectively. Concerns regarding biased algorithms and equitable access to AI-powered healthcare are addressed. This paper argues for robust legal frameworks and comprehensive ethical guidelines governing AI in Indian healthcare. It highlights the importance of collaboration between policymakers, healthcare professionals, and AI developers.*

**Keywords: Artificial intelligence, Healthcare, Regulations, Privacy, Transparency**

## Introduction

AI uses a set of big data and powerful machine learning techniques. Artificial intelligence tool lies in algorithms that might get complex leading to a question on its durability. In recent times AI has been working as a replacement for human minds in various fields and now it has begun to enter the field of healthcare sector.

Alan Turing recognized this as early as the 1950s, one of the founders of modern computers and AI the “Turing test" that the intelligent behavior of a computer comprises the ability to achieve human-level performance in cognitive-based tasks.[1] Hence even in the field of AI, we see how clinical data can be used to detect potential impact.

* 4th year BA. LL.B(Hons) from Institute of Law, Nirma University, Ahmedabad

[1] Amisha, Malik P, Pathania M, Rathaur VK. Overview of artificial intelligence in medicine. J Fam Med Prim Care 2019; 8: 2328–31. doi: 10.4103/jfmpc.jfmpc_440_19.

*'Physicians must begin to trust the use of AI, so they are comfortable using it to augment their clinical decision-making. There is so much information when making medical and diagnostic decisions that it is truly beyond the cognitive capabilities of human brain to process it all.*[2]

----Gartner

Even the healthcare sector in recent times is seeing many conflicts about the rise of big data and learning of machine learning, in the field of medicine the data comes from many sources like electronic health records, medical literature, clinical trials, insurance claims data, pharmacy records, patient information, etc. when this data is stored then machine learning a sub-set of AI find ways to pattern up these data and make a prediction as to what is the symptoms, the illness, etc. by looking at the data provided to the machine. This is called "black-box medicine". This has a major use in the health care sector to diagnose illness, treatment recommendations, image analysis, detect fraud, use drugs, etc. They in recent times are also used in smartphones to identify diseases for infants, autistic children, etc.

But even with such developments we see many challenges faced like AI in the field of health care is a source of inaccuracy, data privacy, trustworthiness, high risk, and being a victim of error. It's important to remember that AI cannot take the place of humans and can predict a wrong illness risking the lives of the patients. Ngiam and Khor point out that if AI solutions are to be integrated into medical practice, a sound governance framework is required to protect humans from harm, including harm resulting from unethical behavior (6–17).

Ethical standards in remedy may be traced back to the ones of the health practitioner Hippocrates, on which the idea of the Hippocratic Oath is rooted (18–24).[3] In recent times after the Food and Drug Administration, there has become a possibility that AI can help in the healthcare field based on Machine learning and this can be used for scientific study, quality improvement, clinical care, and help in drug discovery for faster recovery that making it cost-effective and efficient. We saw how at the international level the U.S. Food and Drug

[2]Hedges L. The future of AI in healthcare. (cited 5 February 2024), https://www.softwareadvice.com/resources/futureof-ai-in-healthcare/.

[3] Naik, N. *et al.* (2022) 'Legal and ethical consideration in artificial intelligence in Healthcare: Who takes responsibility?', *Frontiers in Surgery*, 9, pp. 1–6. doi:10.3389/fsurg.2022.862322.

Administration approved AI tools to detect brain bleeds, stokes, MRI scanning, etc. leading to a great averment.

But In India, there are no laws on AI, and makes it more difficult to to hold liable for the wrong prediction of illness as in India patient's life is more important. Hence a regulations and laws are needed to govern AI in the field of Health care.

**New Technology New Development and New Problem:**

In recent times the use of AI in the field of healthcare has increased a lot. This system can intersect with the doctor's responsibility and by predicting the illness with suggesting the treatment associated with it. This is done with the help of the data collection and algorithms but these algorithms evolve as per the data provided. However, due to this, it leads to a question of credibility of the AI results as when a doctor makes a recommendation they are precise and based on proper reasoning and knowledge and hence a question arises can a system of AI give accurate results like human beings?

AI has the potential to improve and optimize operational functions in the healthcare system.[4] Healthcare management involves admission, scheduling, electronic medical records, billing, pharmacy, etc. that all involve high-level scrutiny and by the use of AI all these functions could be made advanced so that productivity can be increased within the healthcare sector and that operating costs would be reduced. With this AI healthcare administration tools can help in in-patient and out-patient scheduling, interdepartmental coordination, providing physicians with notifications, time-table adjusted, etc. making Clinical management systems more autonomous and efficient with the use of AI we can see its development in Hospital management systems and clinical management systems both.

But when we use AI certain things need to be kept in mind so that the rights, safety, and well-being of the participants in kept intact There are 12 general principles in the ICMR National Ethical Guidelines, 2017:

[4] Ethical Guidelines for Application of Artificial Intelligence in Biomedical Research and Healthcare,2023, ICMR, India.

**Responsible AI:**

Fair use and transparency are core elements to ensure that AI works properly. There has always been a question on AI accuracy and for that, it's important that security, responsibility, equality, etc. is seen and a proper decision based on AI judgments can be made.

**Autonomy:**

In the healthcare sector there is a possibility that the system can function independently but with use of AI herein will put the lives of patients in the hands of a machine hence it's important that AI does not interfere with patient autonomy and that does not force any patient for any treatment and take proper consent, they must have the autonomy to reject. The 'Human in The Loop' (HITL)[15] model of AI technologies gives room for humans to oversight the functioning and performance of the system[5]. Hence need to ensure that all projects etc. are done with taking care of human autonomy.

**Safety and Risk Minimization:**

Protection of the dignity and well-being of patients is of utmost importance but with AI having less accuracy each patient case being different and AI predicting based on categorizing similar data it can't be in a reliable manner and that can risk the safety of the patients. Some risk minimizations are:

- A proper law to set up the liability for the loss of patients be it financial, emotional, etc.
- A robust control mechanism to prevent misuse
- To ensure that the data is protected and that patient data is not hacked as there has been an increase in cybercrimes.
- To ensure safety patient data is protected and the privacy of the users is not affected.
- The ethical committee and other stakeholders must ensure measures for risk management.

[5] *Id.*

- Continuous monitoring must be done.
- High security must be ensured.
- Discrimination based on patients' health must be avoided and minority group rights must be taken care of.
- Data usage without the consent of the patient must not be done for any purpose.

**Trustworthiness:**

Trust must be built up upon the use of AI in the healthcare sector and the validity of its results can be relied on some solutions for the same:

- That the AI should also adhere to the laws made.
- It should be reliable and valid, there should not be any technical glitches, and standard testing must be done regularly.
- Patients must be informed if their data is being used to ensure transparency.
- The result provided by the AI must be explained to the patient with scientific reasoning and be provided with proper logic.
- When there is a conflict of result between AI and Doctor then to build trust third opinion of another doctor must be taken.
- Sufficient information must be published before the use of AI with also providing about its functioning.
- Information of any kind leading to conflict must be provided on public platforms.

**Data Privacy:**

AI must ensure that the data collected is not misused and privacy of the users is kept intact to ensure the safe and secure use of data. The current Data Protection Act available in India is the IT Act, of 2000. According to section 43A, corporate bodies possessing, dealing with, or handling any sensitive personal data, or information in a computer resource owned, controlled, or operated by it would be liable to pay damages as compensation to affected persons if they are negligent in implementing and maintaining reasonable security practices and procedures to protect sensitive personal data or information[6]To ensure the privacy and security of health data, the Indian Government is bringing a new healthcare data protection

[6] Indian Joint Parliamentary Committee, "The Draft Personal Data Protection Bill.," 2018(India).

law - the Digital Information Security in Healthcare Act (DISHA) Bill and Personal Data Protection (PDP); these will be binding on AI technology ethical guidelines[7] Also in the case of *K.S Puttuswamy Vs. Union of India*[8], privacy was declared a fundamental right under Article 21 of the Indian Constitution and hence data privacy is important, in the Indian Medical Council Act, 2000, states that "principles of medical ethics, including professional norms for protecting patient privacy and confidentiality as per the IMC Act shall be binding and must be upheld and practiced".[9]

Thereby even the Act mentions privacy breach of patients that "Registered Medical Practitioner would be required to fully abide by the Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulations, 2002 and with the relevant provisions of the IT Act, Data protection and privacy laws or any applicable rules notified from time to time for protecting patient privacy and confidentiality and regarding the handling and transfer of such personal information regarding the patient. This shall be binding and must be upheld and practiced."[10]

Some ways to tackle these challenges are:

- Users informed consent before using their data must be taken.
- Patients must have control over their data and must be given details about the AI
- AI using Human biometric data should have additional security and safeguards measures.
- The manufacturers must be held liable for the leaking of information and hence they must prevent leakage of identifiable information.
- Excess data collection must be unethical and proper punishment must be kept.
- Section 8 of the Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome(Prevention and Control) Act 2017 wherein also states that "*no person shall disclose or be compelled to disclose the HIV status or any other private information of other person imparted in confidence or a relationship of a fiduciary nature, except with the informed consent of that other person or a representative of such another person obtained in the manner as specified in*

[7] "Information Technology Act, 2000 - Wikipedia."
[8] *Justice K.S. Puttaswamy (Retd.) and Anr. v. Union of India*, (2017) 10 SCC
[9] S. 3.7(1.1), Indian Medical Council (Professional Conduct, Etiquette and Ethics) (Amendment) Regulations, 2020(India).
[10] S. 3.7(1.2), Indian Medical Council (Professional Conduct, Etiquette and Ethics) (Amendment) Regulations, 2020(India).

*section 5"*.[11] Hence based on this India should also make such provision-based laws to protect privacy and adopt an Electronic Health Record Policy to ensure patient protection.

- Also, the Clinical Establishment Act 2010, also mandates doctors to maintain EMR (Electronic Media Report) of patients and hence helps in confidentiality such rules are helpful and be developed more on such provisions.

**Accountability and Liability:**

The biggest question arises who will be liable for the wrong actions of the AI? Hence accountability must be of an individual or organization deploying the use of AI and must ensure regular scrutiny of AI, the audit report must be made available to all. The following are the ways to ensure Accountability and Liability:

- Makers of AI have less knowledge of laws related to healthcare and hence must be provided with all correct information.
- The concept 'Human in The Loop' (HITL) places human beings in a supervisory role and is more relevant for healthcare purposes. This will ensure individualized decision-making by the health professionals keeping the interest of the patient at the centre[12].
- One held liable for the wrong must have proper legal and technical credentials in the area of AI.
- Health professionals who will use AI will assign responsibility.
- The responsibility for the harm caused by the AI due to its malfunction must be of the designer, developer, or manufacturer.
- If the harm is caused by defective implementation of the technology then the end-user or organization may be held accountable

There must be an appropriate mechanism to identify the relatives' roles of stakeholders in damage and to identify their legal liabilities. All stakeholders associated with the implementation chain must be held responsible.

---

[11] Tripathi, A.T. and Shivhare, A. (2020c) *The Journal of Indian Law and Society blog*, *The Journal of Indian Law and Society Blog*. (Accessed: 07 February 2024), https://jils.blog/.

[12] *Supra* note 4.

**Optimization of Data Quality:**

Since AI is machine-based learning there are chances of it deciding on a specific group of people leading to false data hence following are the ways to deal with the challenge to avoid biases and avoid discrimination:

- Training data must not have sampling data as that might affect accuracy and data quality.
- Data collection by researchers must be done properly and in the best way.
- Data of minority and marginalized groups must be properly represented and the quality of the same must be double-checked.
- AI data collection must go through proper checking as poor quality might lead to biases.
- Functions of AI must not be made with the intent to discriminate against certain classes of society.

**Accessibility, Equity, and Inclusiveness:**

The use of AI in health care has increased a lot, especially in developing countries slowly increase has been seen, people belonging to different strata don't know about AI and hence have less access and it's important to give them an equal chance for their health and right to health is a fundamental right and what needed is a promising tool to ensure AI development following are the ways it can be done:

- Fairness in the distribution of AI must be seen as equal opportunity to all nations or organizations and the Government must give priority to those who can use this technology in a better way.
- The use of AI must not violate fundamental rights like Article 21 of the Indian Constitution for the right to privacy etc.
- AI must be designed in a way that all people can actively participate especially those in rural areas.
- Connectivity to the internet must be done use of infrastructure must be done properly.
- To get proper working of AI, the organization must ensure that employees are efficient and people from different strata of society are given a chance to earn.

- Every person involved in the development of AI must be granted access to all individuals or groups from which the data for AI development is collected.

**Collaboration**

With time technology changes and for that it's important that new technology is collaborated and researchers and experts collaborate to develop a new technology for the betterment of the patients with that development in the field of healthcare would be seen. Stronger collaboration can be achieved by:

- Inter-disciplinary collaboration must be encouraged to ensure patients whose data come must not be misused.
- International collaboration for advancing technology in India.
- Indian laws and guidelines (DISHA & PDP guidelines) are to be adhered to. Appropriate MoU and/or MTA to safeguard the interests of participants and ensure compliance (addressing issues of confidentiality, sharing of data, and joint publications) must be ensured[13]

**Non-Discrimination and Fairness Principle**

To avoid biases and inaccuracies and to ensure quality following things need to be taken care of:

- The data used must be accurate and with correct information.
- Analysis of the data must be without prejudice and be done perfectly.
- Special attention to marginalized groups must be paid and AI developers must focus on it.
- Ensuring that fundamental rights are not violated.
- A proper redressal mechanism should be there to ensure that victims who suffered due to the malfunction of AI must get justice.

**Validity**

There has to be a proper validation of consent of the patient before the use of AI, there has to be an internal mechanism to solve the issue of malfunction and constant feedback must

[13] *Supra* note 4.

be taken. Ensuring that no discrimination is being done, the privacy of the patient is taken care of, the researcher is truthful to the patient about their data use, the data collected for training and testing data must be true, it should be collected from all various regions, security guidelines must be ensured.

Hence following are the ethical disciplines AI must ensure only with that development in health. care will be seen and a correct diagnosis will be found when these challenges are tackled.

**Challenges In India**

- AI though increases development but it does not have answers to ethical issues.
- India has no legal provisions as to ethical issues like:
    a. Informed consent to use data
    b. Safety and transparency
    c. Algorithms fairness and biases
    d. Data privacy.[14]
- The use of AI in the healthcare sector raises concerns about data protection and the need to have privacy protected. India's recent Digital Date Protection Act,2023 aims to focus on protecting individuals' digital personal data. But the success of it is yet to be seen it's important that the existing framework aims to protect patients' data and choose efficient treatment for them with proper diagnosis.
- There is still a need for regulatory frameworks to have a proper understanding of the possibilities of error to whom to account liable due to AI.
- Cybersecurity is one such area where AI healthcare is yet to develop. Due to cyber-attacks on devices, AI can lead to detecting wrong diagnoses, and in such situations whom to held responsible is yet to be known.
- Doctors must be aware of AI-recognized diagnoses and they must be trained to use AI which in India is not seen.

Hence following challenges need to be tackled in India for the proper use of AI in the healthcare sector.

[14] Gerke S, Minssen T, Cohen G. Ethical and legal challenges of artificial intelligence-driven healthcare. Artif Intell Healthcare. (2020) 295–336. doi: 10.1016/B978-0-12-818438-7.00012-5

In India use of AI has been not much, especially in the health care sector but when a situation arises that a liability needs to be taken up for malfunctioning of AI then whose responsibility is the doctor, the developer, or no one? What is needed is validation according to the Association for the Advancement of Artificial Intelligence to establish proper tests, safety, and measurements, now when this system is opted for by a doctor then reasonable use of it is in his hands, and putting all responsibility on AI one can't escape the liability as he or she should have been aware of the risk associated with AI and must have taken full care and should have eliminated all risks to ensure the proper functioning and in India this development at large scale is yet to be seen and what needed is proper care and need to look at legal implications of a tort, product liability, data privacy and to see that right to privacy under Article 21 of Indian constitution is not violated and that each right is kept safe.

Therefore, such a law is needed wherein all these factors are taken care of and punishment for those who misuse the data provided to them as AI uses larger data and my false data AI will give false results leading to wrong detecting of illness that will affect to health of patients and as per Indian constitution even right to health is a fundamental right under Article 21, that in case of *Paschim Banga Khet Majdoor Samity Vs. State of West Bengal*[15] herein court broadened the scope of Article 21 and said it's the Government's responsibility to provide healthcare to every person in the country to ensure the state's welfare and provide medical assistance hence with use of AI health must be given priority by the Government and ensure no wrong use of AI and playing with lives of patients.

In a recent case where on a women's health app, Maya, a woman shared her data and the app leaked it on Facebook along with data of 12.5 million in Andhra Pradesh this shows a lack of laws on data privacy like in the US we have Health Insurance Portability and Accountability Act 1999 and in the UK we have Global Data Protection Regulation, 2018 such laws are not made in India acting as a challenge to work on this field more in past.

Hence the policymakers came up with the Personal Data Protection Bill 2019 to protect the data of citizens but still some sections provide access to the Government to get hold of the private data of citizens is states that "*the personal data may be processed if such processing is necessary, for the performance of any function of the State authorized by law for the provision of any service or benefit to the data principal from the State."* [16]Therefore, acting as a limitation thereafter even Digital Information Security in healthcare in 2018 was

[15] Paschim Banga Khet Majdoor Samity v. State of West Bengal, (1996) 4 SCC 37.

[16] S. 12(1) (a)(i), The Personal Data Protection Bill, 201(India).

released to protect the privacy of patients and gave 9 privacy principles yet its effectiveness is to be seen, and hence, like the US and UK, India still needs to work on data privacy regulations of patients.

One of the major long-term challenges associated with autonomous AI which is yet to be tackled is the question of liability. When a doctor makes a mistake i.e. surgical error, or incorrect medicine he can be charged liable for medical negligence applied but when an AI makes an error it is still not clear how civil liability will apply herein. Whether it's the human or product liability case? Presently, India has no law to answer this question as AI is not a legal person and therefore cannot be held liable for negligent acts and product liability is not an accurate defense as product autonomous decisions can blur the link between the AI manufacturer and the Product itself and hence it would be never clear who is responsible for the defective product. Thereby, it has become a necessity to widen the scope of liability to encompass autonomous AI decisions. The European Commission has already issued a proposal for a directive on adapting non-contractual civil liability rules to AI autonomous decisions.

**International Guidance On The Liability Of AI In Medicine**

International guidance varies with Europe and USA for addressing the challenge on a legality basis. The European Union has been ahead in discussing AI innovation and has explicitly recognized the challenges of liability regimes in AI. Hence they provided the framework of, the Artificial Framework Act. By this act, they aim to promote the safe use of AI in high-impact sectors like healthcare and to strengthen technological development.

The European Parliament recommended having a civil liability regime for AI to address responsibility and accountability based on high-risk AI and low-risk AI. High-risk AI is subjected to strict liability while others fall in negligence-based liability and as per EU's medical device regulation, the medical devices come under high-risk AI and therefore come under strict liability, with no scope of negligence herein, and operators, and persons exercising control over the device are held liable.

The success of this is yet to be seen but can act as a guiding principle for other nations. Thereby USA has by the Food and Drug Administration recognized AI-based challenges and seeks to promote the safe use of AI in the healthcare sector and control

medical devices. With this, they develop a patient-centric approach with a goal of transparency by asking the manufacturer to describe their AI devices. Based on such international laws even India can adopt such policies and work upon the same to overcome challenges related to AI.

**Conclusion**

Sir William Osler in 1890 opined that "medicine is a science of uncertainty and an art of probability, would have reacted to the introduction of AI in healthcare"[17]. We saw how even AI faces challenges and that it's important to tackle them as AI is the future and bringing that into the field of healthcare would be very beneficial for everyone to just by their smartphone usage get medical help more easily. All needed is correct data is put on the platform and patients are given correct results with no proper codified law in force it becomes difficult as to whom to hold liable for the wrongs in India, so what is needed in India is properly well framed laws and tools to implement AI in field of laws.

Therefore, AI in medicine can improve patient care by detecting diseases earlier by providing correct data accuracy can increase with that also ensure the privacy of their data and develop trust. Help can be taken up from international normative acts and develop a codified normative legal act nationally, when a law is formed, it would have to take note of medical malpractice, product liability, patent privacy, and intellectual property to ensure a proper law is framed so that victim can get justice as even though we have certain bills in working they still have limitations and Government must work upon the same.

[17] Williams D. An ode to Osler: a physician profile. Resident Student Organization. 2017 Available from: https://www.acoep-rso. org/the-fast-track/an-ode-to-osler-a-physician-profile/ [cited 5 February 2024].

# RIGHT TO PRIVATE DEFENCE: SCOPE, LIMITATIONS, AND LEGAL INTERPRETATIONS WITHIN THE INDIAN PENAL CODE 1860

**Snehil Prakash***

***Abstract***

*In this paper, it is answered what is "right of private". This paper also throws light on under what situations and for what purpose the right of private Defence can be exercised. Here, it is also mentioned that a person can exercise this Defence up to the extent of the death of another person to protect his or another's body and property. Apart from these this also throws light on that what are restrictions or exceptions in exercising the right of private Defence. It is here that tried to establish the ratio decidendi of various case law, which shows how the court had given their interpretations in different matters. This paper also focuses on how the court determines reasonable apprehension and what is the test to determine reasonable apprehension in the case of the right to private Defence. In this, it is also shown that on whom the burden of proof lies to establish the facts. This paper also lays down the provisions that are mentioned in statutory provisions i.e., Indian Penal Code 1860, related to the right to private Defence. The right to private Defence comes under "General Exception" under the Indian Penal Code.*

**Key Words: Private Defence, Body, Property, An Innocent Person, Commencement and Continuance of Private Defence.**

## Introduction:

In our life, a situation may arise in which a person can put her life to such extent as death. Have you ever allowed that what can we do when notoriety suddenly enters your house and wants to burglarize your precious property or attempt to kill a family member? Have you ever allowed that can a girl to kill a person when she's being ravished by that person? Or have you ever asked what can a person do when someone is hijacking or kidnapping him? Because we all know that making injury or killing any person is an offense. So, is there no remedy or impunity to get relief from these above situations? For these reasons, only our legislatures' drafters have made the provision of the "Right to Private Defence".

* Student, G.L.A. College, Baralota, Daltonganj, Jharkhand

In the Indian Penal Code, of 1860 the right to private Defence is dealt within "General Exceptions", this means that nothing shall be an offense when any act is done within the ambit of "General Exception" which is defined from section 76 to 106 and derives its validity from section 6 of Indian Penal Code, 1860. In that general exception from sections 96 to 106, the right to private Defence is defined.

**Section 96 of IPC, 1860** says that "*Nothing shall be an offense which is done in the exercise of the right of private Defence.*[1]

The right of private Defence basically lies on two notions:

i. Everybody has the right to protect their own body or property and also another's body as well property,
ii. One cannot cause injury more than necessary[2]

**The Private Defence as a "Right"**

If we investigate the general meaning of "private Defence" we will find that, the use of otherwise illegal means to defend oneself or other people, to protect property, or to prevent another crime[3]. The plea right to private Defence can be a veritably strong contention to get a person acquitted. But at the same time, it may produce a problem for those who are taking plea because it may be veritably tough to prove this contention of private Defence. The one of reasons before is that the expression "Private Defence" isn't defined anywhere.

The court can give its judgment after observing the facts and situations, for instance, what kinds of injuries have been given, was those acts were in proportion or whether is more than necessary, and whether was there sufficient time to approach the public servant. To find whether the right of private Defence is available to an accused, the entire incident must be examined with care and viewed in its proper setting[4].

There is a saying that, the "right to private Defence is a shield, not a sword". This means the nature of private Defence is to prevent the crime and not to penalize the offender. This is only to protect our bodies or property and only within a reasonable time. In a situation where

[1] The Indian Penal Code, 1860.
[2] Gour Hari Singh, Penal Law of India, (11th Edn. Vol. II, 2000), p. 797.
[3] www.macmillandictionary.com
[4] Sekar vs. State of Rajasthan, 2003, SCC (Cri) 16: 2003 Cr. LJ 53. [5]
Rajesh Kumar vs. Dharamvir AIR 1997 SC 3769.

the accused is himself the aggressor and then to protect himself, he does that act and takes a plea of private Defence, this will not be considered as right to private Defence.[5] This right can be exercised when there is a real and immediate threat.

There can be no private Defence of private Defence. One who goes to beat the other cannot claim the right. In ***Deo Narain Vs State of U.P.,*** there was some dispute on the property and the party of the complainant had deliberately come to forcibly prevent or obstruct the possession of the accused person, and such forcible obstruction and prevention were unlawful[5]. The right of private Defence should not be deliberate or for retaliation of past injury.

**Against whom the right of private Defence is available:**

If we see in ordinary prudence a person tries to protect mainly two things those are either own and another's body or own and other's property. Keeping this in mind, the provision of the right to private Defence in IPC 1860 is available against:

1. Body
2. Property

**Section 97 of IPC 1860**, says that every individual possesses the right to protect themselves. He has the authority to use force for the protection of his own body or another person's body or against any crime that affects the human body. The person's possessions, regardless of whether they are portable or fixed, whether they belong to him or someone else, or any action that is categorized as theft, robbery, mischief, criminal trespass, or an attempt to commit any of these acts, can be included in this statement.

Section 97 provides for the subject of restriction mentioned in section 99 of the Act. Here, it is not necessary that person who is known to someone has only the right to defend. A person who is strange can also defend any person or property of another person. The protection of own body and other's body, in ***Reg vs. Rose***[6]***,*** a boy of 21, who was charged with committing the murder of his father, was held entitled to the right of private Defence. The boy was residing with his father and mother. His father used to quarrel with his mother very frequently. One

[5] AIR 1973 SC 473.
[6] (1884) 15 Cox 540.

night father had a quarrel with his mother and tried to kill her so she shouted “Murder- murder”. The son shot and killed his father. The jury had held him not guilty.

**Section 98 of IPC, 1860** says that "If an action would typically be considered an offense, but it isn't considered as such due to the person being young, lacking full understanding, having a mental illness, being intoxicated, or having a misunderstanding, then every individual has the equal right to defend themselves against that action, just as they would if it were actually considered an offense." The above basically tries to protect a person from liability when the act is done against a person who is not competent with their maturity or may not know the consequences of their act. This is also free from liability when there is a misconception about someone. For instance: ‘A’ enters a house at night which he is legally entitled to enter. ‘Z’ in good faith, thinking that ‘A’ is a house breaker, attacks ‘A’. Here ‘Z’ has done no offense because he was under a misconception. But ‘A’ has the same right of private Defence against ‘Z’, which he would if ‘Z’ were not acting under that misconception.

**Restriction or exception in exercising the right to private Defence**

The plea of right of private Defence is not as easy to establish, because if it will, a number of criminals will get discharged by taking this plea. All the provisions of private Defence are subjected to section 99 of the Indian Penal Code, 1860. We can say that section 99 is the governing section for private Defence. If someone is successful in pleading with a subjective which is mentioned in this section, he can easily get the benefit of privacy and he may be free from criminal liability.

**Section 99 of the Indian Penal Code,**

I. **When an act is done by a public servant in good faith in the course of office:** This means when a public servant cannot be held liable when he has caused either apprehension or attempt to death or grievous hurt to anyone. But he must act in good faith and that act should be under course of employment.
II. **When an act is done by any person on the direction of the public servant in good faith in the course of office:** This means when any person does any such act of apprehension or attempt to death or grievous hurt, he cannot be held liable but he must act after direction or according to the direction of a public

servant. And the public servant must act in good faith and he should in the course of his official duty.

III. **When there is sufficient time to reach the protection of public authorities:** There shall be no private Defence if the act is done and there is sufficient and reasonable time to reach the public authorities. A person must contact first a public authority when there is enough time to connect with them.

These restrictions somehow limit the right of private Defence for a person and show the importance of the public authorities.

The protection of public servants is not absolute. It is subject to restrictions. Those acts which are mentioned in either of these clauses must not be of serious consequences resulting in the apprehension of causing death or grievous hurt which would deprive one of his rights of private Defence.

To avail the benefit of those clauses:

a) The act done or attempted to be done by a public servant must be in good faith;

b) The act must be done under the color of his office;

c) There must be reasonable grounds for believing that the acts were done by a public servant as such or under his authority in the exercise of his legal duty and that the act is not illegal.[7]

In this "**Good Faith**" carries the same meaning as in **section 52 of IPC, 1860**.

**Public prosecutes vs. Suryanarayan**: On search by customs officers' certain goods were found to have been smuggled from Yemen into Indian Territory. In the course of the search, the smugglers attacked the officers and injured them. They contended that the officers were not supposed to search as there was no notification which declared, Yemen a foreign territory under Section 5 of the Indian Tariff Act. It was found that the officers had acted bonafide and that the accused was not allowed to exercise private Defence.[8]

Master-servant relation is not applicable in this section because it may be possible that a master who is competent to make an order to his superior and commit a crime. Just to protect,

[7] https://www.legalserviceindia.com/article/l470-Private-Defence.html; - Private Defence: A right Available to all people of India by- *Mohi Kumar.*

[8] . Gowtham and K. A Study on Private Defence in India: A Legal Analysis, 2018 Roja http://www.acadpubl.eu/hub/ -

this master-servant relation is not applicable in this situation. In every situation, a person should act with ordinary prudence and diligently.

**Right does not extend to causing more harm than necessary:** This stipulates that the right of private Defence in no case extends to the inflicting of more harm than it is required to revert back for the purpose of Defence.

In the case of ***Rafiq v. the State of Maharashtra***[9]**,** the accused was attacked with a stick by the deceased and the accused stabbed him with a knife in the heart, the court found that the accused had acted beyond his right of self-Defence. The question of whether the right of private Defence exercised by an accused is in excess of his right and whether the accused has caused more harm than necessary is entirely a question of fact and that to be decided upon the facts and circumstances of each case.[10]

**When the right to private Defence can be exercised up to death against the body:**

**Section 100 of the Indian Penal Code, 1860,** defined those circumstances in which a person can exercise his rights of private Defence to cause death against the body. We have discussed that to an extent a person can exercise his capacity to defend himself when certain offenses like rape, attempt to murder or grievous hurt and other serious offenses are being committed. This section answers these questions.

Under these circumstances, the defender can cause the death of the offender:

i. When there is an assault that reasonably causes the **apprehension that death** will otherwise be the consequence of such assault.

   In the case of ***Deo Narain vs State of Uttar Pradesh***[1112]**,** SC held that, where the *lathi* blows were aimed at a vulnerable part of the body like the head, then the victim was justified in using his spear to defend himself and as a result causing the death of the deceased.

ii. When there is an assault that reasonably causes **the apprehension that grievous hurt** will otherwise be the consequence of such assault

[9] AIR 1979 SC 1179.
[10] George Dominic Varkey vs State of Kerela AIR 1971 SC 1208.
[11] AIR 1973 SC 473.
[12] CrLJ 621 (Ori).

iii. When there is such assault which is with the intention of **committing rape**; In the case of the **State of Orissa vs Nirupama Panda**[13]**,** the victim entered the house of the indicted and tried to force her. There was a conflict between them and the indicted had picked the man and he failed. She wasn't held liable because she was acting in her right to private Defence.

iv. When there is assault with the intention of **gratifying unnatural lust**; In the case of **Indu Kumari Pathak vs. S.K Pathak**[13]**,** it was held that if a wife refuses to submit to her husband her cohabitation, the husband is not expected to use force to make his wife to sexual intercourse. The husband has no right to cause injury to his wife in enforcing sexual intercourse and wife has the right of private Defence to retaliate the force used on her.

v. When there is assault with the intention of **kidnapping or abducting**; **Sections 360 and 361, and 362** define kidnapping and abduction respectively.

vi. When there is assault with the intention of **wrongfully confining** a person when he reasonably believes that he will be unable to have recourse to the public authorities.[14] **Section 340 of IPC 1860** defines wrongful confinement. In the case of ***Razu vs Emperor,***[15] it was held that when a person wrongfully arrested and being taken to the police station for being handed over to the police cannot be said to have a reasonable apprehension that he will be unable to have recourse to authorities for his release.

vii. When there is an act of **throwing or administering acid** or an attempt to throw or administer acid which may cause that grievous hurt[16]

**When the right to private Defence of the body does not extend to causing death:**

As per **section 101 of IPC, 1860,** the right of private Defence of the body will extend to causing harm and not death in all other situations except as provided in s. 100. In other words, the right of private Defence of the body will extend to causing the death of the assailant, only in the situations stated in s. 100. In all other situations, the right to private Defence of the

[13] (1983) 2 DMC 64 (Raj).
[14] Indian penal Code, 1860.
[15] AIR 1946 Sind 17.
[16] Ins. by Act 13 of 2013, s. 2 (w.e.f. 3-2-2013).

body will only extend to causing 'harm', which must be subject to the limitation mentioned in section 99.[17]

**Commencement and continuation of the right of private Defence of body:**

**Section 102, of IPC 1860,** provides that the right of private Defence commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat from the action of an offender, though, the offense may not have been committed. It would not commence until there is a reasonable apprehension.[19] And it lasts up to as the reasonable apprehension of the danger to the body continues. Therefore, a person cannot get the benefit of s. 102, if he continues his attack even when the apprehension of danger ends. The danger or apprehension of danger must be present, real, or apparent.[18]

**When the right to private Defence can be exercised up to death against property:**

**Section 103 IPC 1860,** reads, Under the restrictions outlined in section 99, the right of private property Defence extends to the deliberate infliction of bodily harm or other harm upon the wrongdoer if the offense that gave rise to the right's exercise is one of the offenses listed below, specifically:

I. Murder; robbery.
II. House-breaking by night;
III. Mischief by fire committed on any building, tent or vessel, which building, tent, or vessel is used as a human dwelling or as a place for the custody of property;
IV. Theft or home invasion in situations where it is conceivable that someone might die. grievous hurt will be the consequence if such a right of private Defence is not exercised.[21]

In the case of **Kanchan vs. State,**[22] it was held that when a case is alleged to fall under these situations then only alone offenses are not enough for the exercise of the right of private Defence of property given by section 103, IPC. There should be circumstances that cause

[17] Dr. Vibhute, KI. *PSA Pillai's Criminal Law.* 10th Edition. 2009. Chapter 15, P. No.231. [19] George Dominic Varkey vs State of Kerela AIR 1971 SC 1208.
[18] Dr. Vibhute, KI. *PSA Pillai's Criminal Law.* 10th Edition. 2009. Chapter 15, P. No. 233.
[21] Section 380 and 382 of IPC, 1860. [22] 1982 CrLJ 1633 (All).

reasonable apprehension or apprehension of death or grievous hurt. If there is the absence of such apprehension, the protection under this section cannot be invoked.

Same as the Defence against body if there is not such apprehension of death and grievous hurt in case of theft, mischief, house breaking by night, robbery, and criminal trespass then one cannot exercise this right up to causing death. In some cases, one can give harm but that must be subject to restriction mentioned in **section 104 of the Indian Penal Code, 1860.**

**Beginning and continuation to exercise private Defence against property:** Under **sec 105 of IPC,** the right of private protection of property commences when a reasonable apprehension of threat to property commences. Before such apprehension commences the owner of the property is not called upon to apply for protection from public authorities. The right commences not when the actual danger to the property commences but when there is a reasonable apprehension of danger.

In case of theft, the private Defence continues till the following circumstances:

I. The offender has affected his retreat with the property.
II. The assistance of public authorities has been obtained,
III. The property has been recovered.

In case of criminal trespass and mischief, the right of private Defence ceases to exist as soon as the commission of these ceases. And in case of house-breaking by night right to private continues only so long as the house-trespass continues.[19]

**When the death of an innocent person happens while exercising the right of private Defence**

**Section 106 of IPC,** reads as *if the defender is in a position where he cannot effectively exercise his right to private Defence against an assault that reasonably raises the possibility of death without running the risk of hurting an innocent person, his right to private Defence includes taking on that risk.* In the case of **Wassan Singh v State of Punjab[24],** there was a fight between two groups. The accused himself received nine injuries. He shot at the assailants with

[19] Ratanlal & Dhiraj Lal, *The Indian Penal Code,* 34th Edition, 2014.Chapter 4, P. No. 209 and 210.
[24] 1996 CrLJ 878 (SC).

his gun, which, however hit an innocent woman bystander, killing her. The Supreme Court found that the offender had the right to exercise the private Defence and hence he was acquitted.

**Test For Reasonable Apprehension**

The act which is done in private Defence, is very crucial to determine whether there was a proper need to perform such an act or whether there was reasonable apprehension. How the court should understand whether the act is done under private Defence or with criminal intention? So, for this, some tests were laid down. These are:

I. Subjective Test: In this test, the mental attitude of the person is focused.

II. Objective Test: This test emphasizes how in a similar circumstance an ordinary, reasonable, standard, and average person will respond.

III. Expanded Objective Test: This is a combination of both the above tests and the most followed test in practice.[20]

**The burden of proof in the right to private Defence**

As per the rule of evidence, it is the burden on whom to prove the facts, is on one who asserts those facts, except in some situations. In the case of the right of private Defence, it is always the obligation of a person to prove that his acts were exercised in the right of private Defence.

**Conclusion**

The right of private Defence is the right that is available to individuals to self-defence. It is available to protect either own or other bodies and either own or other's property. An individual can make the death of assailants in certain circumstances. The rights of private Defence are available only when there is reasonable apprehension. A person cannot claim the right of private Defence when his acts fall under section 99 of IPC, which deals with certain restrictions like

[20] Simran, Right of Private Defence Published on 4/02/2015. https://www.lawctopus.com/academike/right-private-Defence/-

one should contact public authority if he can, harm should be used in proportion, and if the act is done by a public officer in good faith. A person can kill a person when there is reasonable apprehension in regards to protecting either his body or property or another's body or property. But his act should be justifiable. The burden of proof that the act done was in the right of private Defence is on one who asserts.

# INSOLVENCY AND BANKRUPTCY CODE 2016: A GUARDIAN ANGEL OR PERIL TO THE CORPORATES

**Alex K. Manoj***

***Abstract***

*The Insolvency and Bankruptcy Code is new legislation that mainly focuses upon the background of the code and, the process of resolution of bankruptcy they are Sale, Liquidation, and Litigation. It also sheds light on the economic offenses and the involvement of RBI in finding out about the fraudsters. The article explains the features of the code as well as the protection under the Bankruptcy Code and the advantages, processes, facilities and offered by the Bankruptcy code.*

## Background of the Insolvency and Bankruptcy Code, 2016:

India is one of the fastest growing economies with more emphasis on corporate sectors an important part of the nation's economy and playing a vital role in the development of the country there are many legislations to promote and control the various corporate sectors when you start a business a nightmare is going under loss! When the business graph shows downwards to uplift go for credit when in a situation where a business completely fails to recover the situation of the corporation is like fish out of the water! Liabilities will be more to the assets default in repayment of credit which affects every person. It depends on the creditors, the suppliers, and the employees. There was much need for the legislation that deals with the Bankruptcy and Insolvency. In 2016 the central government introduced this Insolvency and Bankruptcy Code, 2016 a well-deserving legislation for the process of bankruptcy and Insolvency. Before this Act came into force the Companies Act 2013(amended) under section 270 describes the process of winding up

[1]*270. Modes of winding up. — (1) The winding up of a company may be either—*

*(a) by the Tribunal; or*

*(b) voluntary.*

*1st Year LLM, Shri Dharmasthala Manjunatheshwara Law College Law College Mangalore, Karnataka

[1] Companies Act 2013, Section 270.

*(2) Not withstanding anything contained in any other Act, the provisions of this Act concerning*

winding up shall apply to the winding up of a company in any of the modes specified under the sub-section this code repealed many other statutes, by passing this Code a Board has been established also the National Company Law Tribunal was made Adjudicating Authority to deal exclusively for the process of bankruptcy resolution process.

Whether this Insolvency and Bankruptcy Code 2016 is guardian angel or a peril to the corporates?

This question arises because it's about Bankruptcy and Insolvency. How this legislation will be a guardian angel or peril by understanding the legislation. Before that how the process of resolution takes place in a very simple way

**Process of resolution of bankruptcy**

The bankruptcy process all begins when a corporation is in debt and cannot come out of it either the corporate creditor or the corporate debtor can apply to the National Company Law Tribunal which is an adjudicating authority under the Insolvency and Bankruptcy Code 2016 resolution professional disappointed than the resolution professional must take the charge he has to who appoints committee of creditors then there are three options

- **Sale**
- **Liquidation**
- **Litigation**

With all these processes the in-bankruptcy resolution processes a similar process has been followed in the insolvency resolution process let us see the overview of the Code

**The success story at the beginning**

Initially, to check the working of the cod the Reserve Bank of India had listed out the 12 biggest loan defaulters for this process here we found huge corporations like Bhushan Steel and Essar Steel. There were more housing and steel industries on the list. These 12 corporates owned a debt of thousands of crores rupees to financial creditors like banks. The trial process

succeeded many companies were sold and the companies that weren't sold went for liquidation only one had filed litigation.

**Secures the debt money**

The Insolvency and Bankruptcy Code protects the creditors on their money. Once the application is made for the resolution and the process begins once all the necessary steps are completed, the creditors will get back their money most of the financial institutions mainly the banks have got their money back from this process. Even the operational creditors are protected not only the financial creditors and operational creditors who supply goods or sell something to the corporation and are not paid under this Code everyone was made equal for the recovery of debt.

**Committee of creditors**

The committee of creditors is one of the important steps involved in the bankruptcy process where the resolution professional who is an independent person appointed for the process of bankruptcy shall make the committee of creditors and the committee of creditors once the company is sold or goes for liquidation it is the duty of creditors to distribute the recovered value among themselves based on hierarchy of high to low the creditors cannot further file litigation on this they have to settle the share of sale value in their meeting once majority gives consent then it has to be followed.

**Protects all types of businesses**

The Code explains who is included under this bankruptcy insolvency code are companies, LLPs, Partnership firms, and Hindu joint families almost all types of business establishments are protected and eligible for the resolution of bankruptcy. Section 2 of the Insolvency and Bankruptcy Code explains as follows:

[2](*a) any company incorporated under the Companies Act, 2013 or under any previous company law;*

[2] Insolvency and Bankruptcy Code, 2016, Section 2

*(b) any other company governed by any special Act for the time being in force, except in so far as the said provisions are inconsistent with the provisions of such special Act;*

*(c) any Limited Liability Partnership incorporated under the Limited Liability Partnership Act, 2008;*

*(d) such other body incorporated under any law for the time being in force, as the Central Government may, by notification, specify on this behalf; and*

*(e) partnership firms and individuals,*

The Code not only concentrates on the huge corporates it also looks after Proprietors, a Limited Liability Partnership, a Partnership firm, and businesses of Hindu joint family... this scope of the Code is wide. Every person in the field of business establishment has been protected

**Quick process**

The process of the resolution of bankruptcy begins the day of applying the NCLT the entire process must take place within 270 days the legislature's concentration was on sale and liquidation the result of the previous year Moreover 4000+ resolutions have been settled. Presently 27 additional judges have been appointed to the NCLT where now the NCLT has more judges than the Supreme Court of India

**A real guardian angel to the creditors?**

The Code protects the person who has gone insolvent. The precious profit for him during resolution is time! Yes, during the resolution there will be a stay on all other legal proceedings related to the debt he can initiate any legal proceeding. For a good businessman to recover or to think for good he needs time and the time that he gets during the resolution

**Failed? Start over again!!**

The Insolvency and Bankruptcy Code 2016 gives a second chance to a corporate personality. Bankruptcy and insolvency are not the ends where in India we have a belief that once a bankrupt or insolvent he just pretends to be alive but legally dead! But this new

legislation gives back a new life just in video games to start fresh under Chapter II of this Code. A person can apply under sec 80 under clauses (1) and (2)

[3]*80. (1) A debtor, who is unable to pay his debt and fulfils the conditions specified in sub-section (2), shall be entitled to make an application for a fresh start for discharge of his qualifying debt under this Chapter.*

*(2) A debtor may apply, either personally or through a resolution professional, for a a fresh start under this Chapter in respect of his qualifying debts to the Adjudicating Authority*

*if —*

*(a) the gross annual income of the debtor does not exceed sixty thousand rupees;*

*(b) the aggregate value of the assets of the debtor does not exceed twenty thousand rupees;*

*(c) the aggregate value of the qualifying debts does not exceed thirty-five thousand rupees;*

*(d) he is not an undischarged bankrupt;*

*(e) he does not own a dwelling unit, irrespective of whether it is encumbered or not;*

*(f) a fresh start process, insolvency resolution process, or bankruptcy process is not subsisting against him; and*

*(g) no previous fresh start order under this Chapter has been made about him in the preceding twelve months of the date of the application for a fresh start.*

These conditions under sec 80(2) are fulfilled by the person who went insolvent

**A Grey Cloud and The Major Comeback**

It so happened that the initial process itself Essar Steels was listed by the Reserve Bank of India for the process of bankruptcy resolution and the process has gone smoothly Arcelor Mittal has proposed the purchase of the company for 42000+ crores where Coc creditor committee approached the appellant authority for seeking highest amount of recovery of should go to the financial creditors more than operational creditors so they approached the appellant

[3] Insolvency and Bankruptcy Code, 2016, Section 80

authority and to the supreme court of India the learned judge Rohinton Fali Nariman. J made the following observation: "

[4]"*I might add here that the commercial wisdom of the lenders who are voting for the resolution of the COC is evidenced by the fact that they had created securities on the project assets of the Corporate Debtor after assessing the commercial risk involved. In the case of SCB, however, there seems to have been gross under security for a large amount of Rs.3000 crores by merely seeking a corporate guarantee from the Corporate Debtor along with a charge only on the shares of the offshore company held by the Corporate Debtor, wherein the liquidation value of such shares is a mere Rs.60.71 crores.*

*In fact, given the fact situation, I find it hard to understand whether SCB can be treated as a secured creditor in the first place. I believe even if the corporate guarantee were to be enforced, SCB would at best stand as a secured creditor only to the extent of the value of the shares of the offshore company as on the date of enforcement of the guarantee and as an unsecured creditor concerning the rest of the loan advanced by it. This is an equally valid consideration that might have moved the COC while approving the resolution plan by which the ultimate discretion for distribution is left to the COC with a declaration that such allocation to the financial creditors will be binding on all stakeholders, which also would include SCB. This was the biggest drawback of the code the litigation. In India, the litigation process is lengthy some misuse this right to get a delay in the process"*

And passed the judgment stating that the operational creditors will also be equally liable to get the debt back this is one of the landmark judgments of the Insolvency and Bankruptcy Code, 2016.

**The major comeback**

Looking up all these problems the central government amended the Code under [5]*section 12 of the principal Act, in sub-section (3), after the proviso, the following provisos shall be inserted, namely: —*

[4] Committee Of Creditors Of Essar ... vs Satish Kumar Gupta on 15 November 2019, AIRONLINE 2019 SC 1494, (2019)

[5] Insolvency and Bankruptcy Code Amendment Act 2019Section 12(3)

*"Provided further that the corporate insolvency resolution process shall mandatorily be completed within a period of three hundred and thirty days from the insolvency commencement date, including any extension of the period of corporate insolvency resolution process granted under this section and the time taken in legal proceedings about such resolution process of the corporate debtor: Provided also that where the insolvency resolution process of a corporate debtor is pending and has not been completed within the period referred to in the second proviso, such resolution process shall be completed within ninety days from the date of commencement of the Insolvency and Bankruptcy Code (Amendment Act, 2019)* by giving 60 more days for the complete process of resolution. Before it was 270 days now adding 60 days the whole process must be finished within 330 days no matter whether the litigation is pending in the court the resolution process will continue and the whole process shall be finished in 330 days. So, from this new amendment filing litigation to make process delay will not be possible however the process must take place within 330 days.

**Conclusion**

The Insolvency and Bankruptcy Code 2016which is very needed legislation in India. The corporates who avail thousands of crore rupees some fail some may conquer but the important financial debtors are banks where do they get money from an honest taxpayer, a person who saves his money in banks so there is need of protection of the creditors also code protects the debtor it is more like win-win process. Nobody is the loser This legislation had gone through an amendment to protect the interests of everyone. The process is on its way more than 18000+ companies were referred for bankruptcy resolution more than 4000+ processes have been finished. In a country like India where corporate thinking is developing the legislature plays a very important role. More likely to be a guardian angel!

# PATENTING MILITARY WEAPONS – A SECURITY CONCERN IN INDIA

**Pranav***

***Abstract***

*IPR provides certain exclusive rights to the inventors or creators of that property, to enable them to reap commercial benefits from their creative efforts or reputation. But imagine a situation when such protection is at all waived and neither the IP holder nor the public is benefitted. This happens when the invention relates to military weapons or inventions of these categories, the state may deny the patentability or slap a secrecy order citing national security. Patent information must, in certain circumstances be prevented from being made available to the public for reasons of national security. How best to achieve a balance between keeping an invention secret for reasons of national security and disclosure of the invention will depend on circumstances that may well change rapidly. The purpose of this paper is to review some of the problems involving IP-related issues, patent rights and technical information and suggest certain changes in an evolving IPR policy. This paper will primarily focus on US law and Indian law along with a few examples of different countries.*

**Keywords: IPR, inventions, military weapons, national security, US law and Indian law.**

## Introduction

The patent system is supposed to promote the progress of science in two primary ways. Firstly, it enhances the appropriability of inventions. By granting inventors a temporary monopoly on their inventions, the patent system mitigates incentive problems stemming from the public good nature of knowledge. Secondly, it facilitates the dissemination of knowledge. Increasing numbers of inventions are being denied patent grants because of the conflict between the incompatible concepts of secrecy, a vital factor in national security and full disclosure, a basic element of the patent system. In case, if someone invents some military weapons or any technology aiding military weapons, these inventions are not granted patents. They are either granted partial protection or withheld by the authority or refuse to be granted the protection citing national security. If patent staff and military advisers think that publication or disclosure of the invention by the granting of a patent would be detrimental to national security, an order that the invention be kept secret will be issued.

* 2nd Year BBA LLB, Shri Dharmasthala Manjunatheshwara Law College Law College Mangalore, Karnataka

It even curbs the Right to Knowledge of the inventor as he is not informed about why such actions have been taken against his invention. The patent agencies and the government can order the invention to be kept secret and can even withhold the grant of a patent for an indefinite period. They have an absolute right in this regard. But the sad reality is that this has been in practice for almost a century now.

Though it appears that they were effective at keeping such inventions out of public view, few inventions deemed secret eventually are publicized. This questions whether the current invention-secrecy regime is working properly. In cases where the application has been withheld, no compensation is provided to the inventor or even if the statute provides for it, it's a task not to be accomplished without the intervention of the court. This paper discusses these issues in detail and brings about a possible solution.

**Positions in UK and US**

A patent provides powerful protection for the invention to the owner of the patent. The protection is granted for a limited period which in the UK and most other countries is 20 years, provided that annual renewal fees are paid[1]. All these UK patent systems are governed by the Patent Act of 1977[2]. All patent applications filed at the IPO are checked to identify any which could be prejudicial to national security or public safety[3].

If in case an application for a patent is filed in the Patent Office ( whether under this act or any treaty or international convention to which the UK is a party and whether before or after the appointed day) and it appears to the comptroller that the application contains information of a description notified to him by the Secretary of State as being information the publication of which might be prejudicial to national security, the comptroller may give directions prohibiting or restricting the publication of that information or its communication to any specified person or description of persons[4] . UK patents are being declared state secrets more than three times as often as those filed in the US. The state secret is an accepted mystery in the UK. At common law and without statutory, courts in judicial proceedings have zealously guarded against the disclosure of information relating to the national defence[5].

[1] Cooper Simon, Ferrar Nicholas, A guide to UK patents, Gateley ( Jan. 09, 2024, 9.45 AM), https://gateleyplc.com.
[2] UK Patents Act 1977, Chapter 37, Part 1.
[3] GOV.UK, https://www.gov.uk (last visited Jan 09, 2024, 10.05 AM).
[4] UK Patents Act 1977 s. 22(1).
[5] Digital Repository at Maurer Law, https://www.repository.law.indiana.edu (last visited Jan. 09, 10.35 AM).

Under American law, the patentability of military weapons is not allowed. In the US, in the interest of national security, patent laws and rules place certain limitations on the disclosure of information contained in patents and patent applications and on the filing of applications for patents in foreign countries[6]. Invention secrecy in the US dates back to at least the 1930s, but it took off in the '40s when the development of nuclear weapons was shrouded in classification. It became official policy in 1952 with the Invention Secrecy Act, which allowed USPTO to keep patents deemed "detrimental to the national security" on lockdown. Patents covered by such "secrecy orders" may be restricted from export, made available only to defence agencies or even classified[7].

Under the US Patent Act[8], provides for the provision of "secrecy of certain applications"[9]. It provides that if a patent application is deemed to be detrimental to national security given the USPTO, it can be withheld with the authority. It doesn't provide for any time frame. The "Right to Compensation[10]" can be used but that is a mammoth task. However, during the periods an invention has been ordered to be kept secret if one violates wilfully, he will be subject to punishments[11]. According to figures from the Federation of American Scientists, from 2013 to 2017, an average of 25 old secrecy orders were revoked each year, while 117 new secrecy orders were imposed annually. FAS has been dogging the patent-secrecy system for three decades now. Founded in 1945 as the Federation of Atomic Scientists by the engineers of the Manhattan Project, the organisation was originally formed to promote nuclear disarmament. As time passed, it renamed itself the Federation of American Scientists and expanded its scope to address additional issues.

Certain examples raise serious questions about the current invention-secrecy regime. The first is solar panels. An initially classified document from 1971 reveals that the army, the Air Force and NASA all considered "solar photovoltaic generators" possibly worth restricting. While these might potentially have military applications for space systems, they could also have significant nonmilitary applications. The second example is, that defence agencies periodically rescind secrecy orders, therefore allowing previously restricted patents to be publicly issued. In 2000, the USPTO finally issued a patent that was filed back in 1936.

[6] FAS Project on Government Secrecy, https://sgp.org ( last visited Jan. 08, 2024).
[7] Dilawar Arvind, The U.S. Government's Secret Inventions, Slate (Jan. 10, 2024, 8.20 PM), slate.com.
[8] 35 US CODE CHAPTER 17.
[9] 35 U.S.C. 181. Secrecy of certain inventions and withholding of patents.
[10] 35 U.S.C. 183. Right to compensation.
[11] 35 U.S.C. 186. Penalty.

Cryptography used to manually code and decode messages, that were decades out of date by 2000[12]. In Damnjanovic v. U.S. Air Force[13] case, husband and wife Budimir and Desanka Damnjanovic filed a suit against the Air Force, the Department of Defence and their respective secretaries after the couple's patent for an anti-heat seeking missile measure became subject to two secrecy orders. The Damnjanovics successfully settled their case for $63,000.

**Patenting Military Weapons in India**

Several initiatives have been taken in India to understand the multifaceted implications of IPR for national scientific, technological, and economic development and to build capacity to effectively manage IPR to maximize overall economic gains[14]. In India, any inventor who ventures into the business of inventing which is directly related to defence implications and which is likely to be prejudicial to the interest of the security of India must bear in mind that he may not receive a patent for such an invention which is open to publication like normal patents. In such cases inventor should be aware that the government may impose secrecy direction for perpetuity or till the secrecy direction given by the government is revoked[15]. No patents can be granted in respect of an invention relating to atomic energy[16]. Indian patent law states that Indian residents cannot apply for patents relating to defence purposes or atomic energy outside India without the prior consent of the Central Government[17]. It further states that if the invention is used by the central government the inventor is entitled to receive suitable compensation under Chapter XVll[18]. The inventor is also entitled to receive payment by way of solatium in certain cases[19].

**Copying Advanced Foreign Military Systems**

The economic relevance of intellectual property extends into the military sphere. On the patent side, states have generally been reluctant to directly copy the weapons of their allies without permission; even China, which is known for its reverse engineering. Still, copying

[12] Dilawar Arvind, The U.S. Government's Secret Inventions, Slate (Jan. 10, 2024, 9.30 PM), slate.com.
[13] 14-11920 – Damnjanovic et al V. United States Department of the Air Force et al.
[14] Gupta V.K, India: IPR and the National Security, Vol 13 Journal of Intellectual Property Rights pp 31, 2 (2024),
[15] Parmar DPS, India: To File or Not to File Patents Application for Defence Purpose, Mondaq ( Jan. 11, 2024, 4.30 AM), https://www.mondaq.com.
[16] Section 20(1) of the Atomic Energy Act, 1962.
[17] Section 39(2) of The Patents Act, 1970.
[18] Chapter XVll of The Patents Act, 1970.
[19] Section 37(2)b of The Patents Act, 1970.

advanced foreign systems has a long, distinguished history. Russia famously replicated the B-29 Superfortress as the Tu-4, producing 847 bombers.

China developed the J-11 and J-15 fighter jets from SU-27 and SU-33 of Russia and is widely suspected of adopting elements of U.S. aircraft designs for its stealth fighter jet prototypes. All this led exporters like the US to take aggressive steps to protect their IP owners. Intellectual property concerns have already made Russia hesitant about additional exports of airframes to China, and exporting the Russo-Indian Brahmos cruise missiles[20]. Thus, to address all these issues there is a requirement for better IP laws that can protect military weapons and techniques.

**Suggestions**

Given the above developments, a flexible approach to IPR may be required in defining rules for knowledge sharing, protection and benefits. The security exception to patent law is acceptable for reasons of national security but it should not impact the inventor. The author would like to give a few suggestions which are as follows:

- The government should provide reasonable compensation for patent proprietors by considering the economic losses associated with the fact that secrecy orders will prevent the commercialization of otherwise potentially lucrative inventions.
- Secrecy should never be applied for political advantage.
- As secrecy orders hinder the commercialization of new inventions, a test must be developed that will determine the parameters of secrecy orders.
- IP-related issues of inventions of dual use and commercial importance nature be resolved.
- In cases of such application, the patent shall be granted on a merit basis and then compulsory licencing be done in favour of defence agencies of the countries. This will remove all the impediments of the current situation. Both the inventor's and government's objectives can be fulfilled.

[20] The Diplomat, https://the diplomat.com (last visited Jan. 11, 2024).

# Involvement of Minors in Crimes in India: Consequences and Reasons

**Rohil P. Shetty***

***Abstract***

*Involvement of Children in Crimes in India. The article mainly focuses on the juvenile justice system in India, with the recent incident that happened in Pune where a minor killed 2 people in a fatal road accident. The article consists of a comparative study between USA and India. Reasons behind minors involved in such offenses. The reasons are poverty, lack of moral guidance and supervision, peer pressure, and movies with wrongful messages.*

## Introduction

On the day of May 2024, a teen from Pune involved himself in a fatal incident where he killed two youngsters with his brand-new Porsche causing a major road accident. But the tragedy is that within 15 hours of the incident, the teen got bail for his heinous offense with the condition of writing three hundred words of Essay on “Road Safety." This sparkling incident led to a huge fire in the hearts of every Indian. This resulted in people directly attacking on law and judiciary.

## Comparative study of criminal acts done by minors in India with USA:

United States of America is a country where we can see a similar incident happen where a teen who is of age engaged himself in a street race in his Mustang and ended up killing a mother and child in a road accident. When he was charged with first-degree murder. Cameron Herrins a minor who killed two people was sentenced to 24 years imprisonment where he was treated as a major by the judge, recently his appeal was before the county Judge, where he rejected to decrease the punishment. The approach of the American Judiciary has made a distinctive decision in a sixteen-year-old teen as major for his crimes. This judgement set a benchmark for other countries to think about the danger of modernization affecting their minds implanting a poisonous lis like wildfire. Such a heinous offense done by a teen a set of people with open hands welcomed the

* 2nd Year LL.M, Shri Dharmasthala Manjunatheshwara University, Mangalore, Karnataka

judgment, whereas few people criticized the judgment by saying such judgment will affect the minds of the young generation who is in the stage of developing their careers as adults.

When we compare it to India, since Juvenile Justice Act is focused on the rehabilitation of minor offenders. But to what extent it is correct to give such simple punishment is not so ideal in this modern world. Even in the case of Nirbhaya Rape case, in that incident also, we have witnessed how a minor committed such a heinous offense he was set free after 2 years of his punishment with industry training. Therefore we can find some reasons behind such heinous crimes that are done by minors in India. Justice Verma committee gave their report on sexual offense where the report concentrated on the following aspects,

"Lowering the age of consent under the POCSO Act to 16 years in line With Section 375 of the IPC. In the context of Section 375 of IPC, as it stood before the Criminal Law Amendment Act. 2013 wherein the sixth Clause mentioned the age of consent as 16 years, Justice Verma Committee In its

The report suggested that the sixth description under Section 375 be Amended to read:" Sixthly when the person is unable to communicate consent Either express or impliedly."[1]

"The age of consent under the POCSO Act Is 8 years on account Of the definition of "child" and how the sexual offenses Have been defined under the Act. It is pertinent to note that the age of Consent was not always envisaged as 18 years under the Act. Initially, When the Act was being drafted and subsequently debated, there were Proposals to recognize consent by a child between the ages of 16 to l8 Years and there was a debate on the same. However, it was a conscious decision that the Parliament made to keep the age of consent at 18 years Without exception, given the special vulnerabilities faced by children And keeping in consideration the social situation prevailing in our Nation.[2]

[1] Law Commission in its report No. 283, September 2023
[2] Law Commission in its report No. 283, September 2023

**Reasons behind minors involved in heinous crimes**

When we come across the increasing crime rate by minors there are various reasons which will influence minors to commit genius crimes. Influence on social media access to the dark web, illegal websites, provoking content, etc.., is having a huge impact on youth by providing wrong information which will influence youth to commit crimes.

a. Poverty

In India most of the population comes below the poverty range, some people can't afford two meals a day, and they have been kept away from their basic needs. When the child is not able to get the necessities that are very important for their lives child will automatically fail or go getting the things that it needed in the wrong way. The main reason is a lack of education. If proper education is not provided to the child, then he will not be in a state to judge what is right and what is wrong this influences the child from committing crimes.

b. Lack of moral guidance and supervision

Poverty can be the exception but not the negligence of parents. A constant absence of parents / or a guardian is another leading factor for why juvenile crimes are on the rise. Most of the juvenile crimes are caused due to the negligence of the parents towards their children. Nurturing takes place at home. Where the child is taught the difference between right and wrong. If the role model is not in the picture then the child will most likely turn to the wrong decision. This seems to be one of the main reasons for the Pune Road accident.

c. Violence At Home

Is of the most widespread and leading reasons for juvenile crime is violence at home. A home is where the child learns what kind of a person to grow into. If violence is all they have encountered, they turn into violent people themselves. In many cases, the child has no idea why they experience the violence and how to protect themselves from it. This may result in petty criminal activities that include shoplifting or violating traffic laws. Others may cause greater harm and commit bigger crimes that reflect their rage within.

Children may lash out at others around them for what they experience at home. These delinquents are more likely to possess an "I don't care" attitude.[3]

d. Poor Educational Quality

A good school pays more attention to its youth and practices healthy discipline. Most underfunded and overpopulated schools lack the kind of regulation needed. The child feels the need to protect themselves in such surroundings that lack law and order by taking it into their hands.

Furthermore, the involvement of teachers and parents in the child's school performance is another determining factor for how the child chooses to view education. The constant checks develop a sense of accountability within the child as they know they will be asked about their work and progress.

e. Poor School Performance

A child's poor performance at school, be it attendance or grades, is a huge reason for juvenile crimes. The responsibility for this is on the guardian. Going to school is more than just gaining knowledge. Going to school promotes a healthy lifestyle for a child, from waking up, getting dressed, taking the bus to school, studying, and heading home. These routines help with establishing healthy habits and discipline. Not going to school regularly results in having more free time at hand to indulge in harmful activities.

If the child grows up defying basic rules such as attending school regularly, they grow older to have no respect for other societal regulations. Additionally, learning abilities within a child also contribute. Those who struggle to meet academic requirements at school feel left out. If the child is motivated even for their low grades and weak performance, they most likely won't look elsewhere to feel good and appreciated. Bullying can be a huge contributor in itself, leading to feelings of ostracism and resorting to criminal activities. [4]

f. Substance Abuse

[3]https//:nicewicez.com, 7 factors leading to Juvenile delinquency, Date:02-08-2024, 1:50 pm
[4] Ibid at 3

Being on substances at home or getting it from the environment is why some children cannot function as normal members of society. Exposure to such substances leads to dependence over time and finding unnatural ways of satisfying that craving. Most times, these individuals end up committing crimes that they wouldn't have thought of otherwise. In such cases, children require counseling services to help them regain their sense of worth and self-esteem.[5]

g. Peer pressure

Social circles matter most after a child's home environment. If parents are too controlling the child might move towards the wrong company to feel better by breaking the rules. In wanting to be part of the group they choose, the child might have to adopt the activities of that group. It may be for drugs or crime.

h. A movie with a wrongful message

In this modern society, children are very much attached to movies, and web series on online platforms, where movies showcase wrong information where a character of a movie commits an offense the movie has not been shown as a Hero rather than an offender. It is the reason for children engage in criminal activities.

In the same way, various other factors influence the child from committing heinous crimes. However, as far as India is concerned it is the poverty and the negative effect of media, especially social media that makes children commit criminal acts.

**Conclusion**

The involvement of youth in crime in India stems from complex socio-economic, cultural, and systemic factors. While legislation like the Juvenile Justice Act focuses on rehabilitation, challenges persist due to poverty, limited education, family dysfunction, and inadequate mental health support. Addressing these issues demands a multi-pronged approach. Early intervention programs, enhanced access to education and employment opportunities, and community-based

[5] Ibid

support systems are crucial. Additionally, improving the quality and accessibility of the juvenile justice system is essential. By prioritizing holistic interventions that address root causes and provide support mechanisms, India can effectively reduce youth involvement in crime, fostering a safer and more promising future for its young population.

# COMPARITIVE STUDY ON INDIAN LAWS FOR ANIMAL PROTECTION WITH GLOBAL STANDARDS

**Piyush V. Amin***

## Abstract

*This is an attempt to understand various animal protection laws in India when compared to global standards concerning the prevention of cruelty to animals, animal protection laws, transportation of animals, life stock vs. pets, endangered species, human methods of slotter-ring, and many more aspects such as diseases that are infectious and contagious.*

*An individual's as well as society's attitude towards animals is an important aspect to understanding the approach of people towards animals, their feelings towards animals are being studied, as animals cannot represent themselves in the human courts of law; it makes more us to prepare our laws to be more stringent and to be brought in line with the global standards*

*Animals need to be protected and taken care of as they are part of the ecology and the environment. Animals feed us and they allow the cycle of plant growth and reproduction. Animals do contribute to humans in many ways be it for agriculture, milk production, or animal-driven carts. Europe and the US, have current and updated laws with strict implementation of the same, hence India too can adopt and adapt certain methods of implementation of these laws.*

**Keywords: AI used for tracking animals, radio collars, cruelty, diseases, animal transportation, implementation of laws, regulations, and modification of laws.**

## Introduction

International standards when compared to India have more regulations towards the protection of animal's laws it will mean that the regulations towards the animal protection itself. Technologies like radio collars and artificial intelligence to track animal moments should be made available by the current regulators animals need to be taken care of and protected from poachers and people who are harmful to animal. Animal cruelty refers to the intentional harm, abuse, or neglect inflicted upon animals by humans.

* 1st Year B.A. LL.B., Shri Dharmasthala Manjunatheshwara Law College, Mangalore, Karnataka

This mistreatment can occur in various forms, ranging from physical violence and deprivation of basic needs to psychological abuse and exploitation. Animals subjected to cruelty often endure significant suffering, leading to injury, illness, and in severe cases, death.

The issue of animal cruelty is pervasive, affecting domestic pets, farm animals, wildlife, and animals used in entertainment and research. Addressing this problem involves raising awareness, strengthening laws and regulations, and promoting compassion and humane treatment towards all living beings. Animal cruelty refers to any act of violence or neglect perpetrated against animals. It encompasses a wide range of behaviour's that harm animals, whether intentionally or due to negligence. Animal cruelty is a serious issue that requires a multi-faceted approach involving education, legal action, and community support to effectively combat and prevent. We always should advance and develop animal care measures like water during summer as well as medication and treatment in case of an injury. When we study countries and their citizen's attitudes towards animals we understand that they follow rules due to fear of the stringent laws or due to their awareness.

Animals, in general, do not have a voice; hence we need to be their voice. The laws that are framed to protect them from poachers and predators need to be comprehensive and elaborate with details and reasons for the formation of the law when reasons are known implementation of the law should be done by every common citizen of our nation.

This involves deliberately inflicting harm or suffering on animals.

Examples include beating, torturing, or killing animals. Such acts are often associated with underlying psychological issues and can be indicators of violent behaviour toward humans.

The ecology sustains when plants and animals live depending on each other. Animals walk long distances and their excreta are dropped in various places it contains undigested seeds which germinate in the rainy season these seeds grow into plants and trees. Addressing animal cruelty requires a multifaceted approach involving legal action, education, and community involvement. By recognizing and preventing cruelty, society can protect animals from suffering and promote a more human world.

This ensures the spreading of a variety of flora and fauna. Animals need water and hence poachers track them and trap them with various painful and harmful trapping instruments there should social awareness among young people to identify detect and remove all such trapping mechanisms.

The laws of the land should include differentiation between pets and life-stock. Hence we need to study various animal laws of other nations by comparison we understand the shortfalls in our current law. The following is the table which analyses the same.

When we study countries and their citizen's attitudes towards animals, we understand that they follow rules due to fear of the stringent laws or due to their awareness.

**Table no.1: Comparative study of laws of various nations.**

| | Country | Main animal laws and punishments | Significance and learning |
|---|---|---|---|
| 1. | United states of America | The animal welfare act (AWA)August 24,1966 | Modernized upgraded. |
| 2 | Australian | The animal welfare act 1955(SA) prohibits cruelty to all animals [s13] | Covers all unique animals like Kangaroo and other Australian species. |
| 3 | New Zealand | The animal welfare act 1999 ( section 9) | Covers marine life and aquatic life. |
| 4 | European union | The European convention for protection of pet animals govern the treatment of companion animals | Breeding of animals and captive animal laws are unique. |
| 5 | United kingdom | The animal welfare act 2006 is the principal law relating to animal welfare. | Have a very elaborate laws which govern the Sky, Earth and water |
| 6 | African continent | Animal protection act 1962 section 2 , The Tanzania animal welfare legislation animal welfare act in Africa | Multiple elephant growth and decrease in lions growth effects the balance |

**Source: Author's own analysis**

**Indian animal's acts are listed as follows:**

i. **The Prevention of Cruelty to Animals Act, 1960**: A central act that aims to prevent the infliction of unnecessary pain or suffering on animals. It led to the formation of the Animal Welfare Board of India (AWBI). This act is useful and helpful in prevention of abuse. So, we understand in depth.

ii. **The Wildlife (Protection) Act, 1972** Provides comprehensive protection to wild animals, birds, and plants. It establishes schedules of protected species and sets the framework for wildlife conservation and protection**.**

iii. **The Indian Penal Code, 1860**: Contains provisions that criminalize acts of cruelty to animals under Sections 428 and 429.

iv. **The Indian Veterinary Council Act, 1984**: Regulates veterinary practices and the profession of veterinary medicine in India.

v. **The Performing Animals (Registration) Rules, 2001**: Requires registration of performing animals to ensure they are not subjected to cruelty and are well-treated.

vi. **The Transport of Animals Rules, 1978**: Sets guidelines for the humane transportation of animals by various means (road, rail, air, and sea)

vii. **The Slaughterhouse Rules, 2001**: Regulates the conditions under which animals are slaughtered to ensure humane treatment and sanitary conditions. ACT NUMBER IN CITATION

viii. **The Animal Birth Control (Dogs) Rules, 2001**: Focuses on the humane management of stray dog populations through sterilization and vaccination.

ix. **The Prevention of Cruelty to Animals (Pet Shop) Rules, 2018**: Regulates pet shops to ensure that animals are kept in humane conditions.[1]

x. **The Prevention of Cruelty to Animals (Dog Breeding and Marketing) Rules, 2017**: Regulates dog breeding and marketing to prevent cruelty and ensure the welfare of breeding dogs and their puppies.[2]

xi. **The Prevention of Cruelty to Animals (Regulation of [3]Livestock Markets) Rules, 2017**: Regulates the sale of livestock to prevent cruelty during trading and transportation.

xii. **The Prevention of Cruelty to Animals (Aquarium and Fish) Tank Animals Shop) Rules, 2017**:[4] Regulates the sale and maintenance of aquarium and fish tank animals to ensure their welfare.

xiii. **The Prevention of Cruelty to Animals (Care and Maintenance of Case Property Animals) Rules, 2017**: Provides for the care and maintenance of animals that are seized or are involved in legal cases.

xiv. **The Performing Animals (Registration) Rules, 1973**:A precursor to the 2001 rules, this also dealt with the registration of performing animals. This act implicates and protects animals from harmful instruments as well as the entertainments which cause animals more abuse.

xv. **The Prevention and Control of Infectious and Contagious Diseases in Animals Act, 2009**: Aims to control and prevent the spread of infectious and contagious diseases among animals.

xvi. **The Drugs and Cosmetics Act, 1940**: Contains provisions related to the use of animals in the testing of drugs and cosmetics, along with rules that mandate ethical treatment during such tests.

3. Sharma .B., Sharma. P.,2017 .,
Right of animals at practice in India. *Journal on contemporary issues of law , P3(7) p 3*

xvii. **The Prevention of Cruelty to Animals (Laboratory Animals) Rules, 1998**: Regulates the use of animals in scientific experiments to ensure ethical treatment and minimize suffering. These acts collectively aim to ensure the welfare of animals, prevent cruelty, and promote ethical treatment across various contexts, including domestic, agricultural, scientific, and entertainment settings.

## Observations and analysis for model development

The laws in India are elaborate and clear. We lack in understanding and educating the general public. Awareness of laws will prevent misdeeds in large numbers. The following model is of my thinking that the laws need to be implemented by citizens across the world. There are many animals classified as marine, wildlife, pets, livestock, birds, etc. All countries with various laws should enforce the protection of animals as well as preserve and save certain endangered species to sustain them for future generations. It is the duty of the people and every individual like me as well as governments across the world.

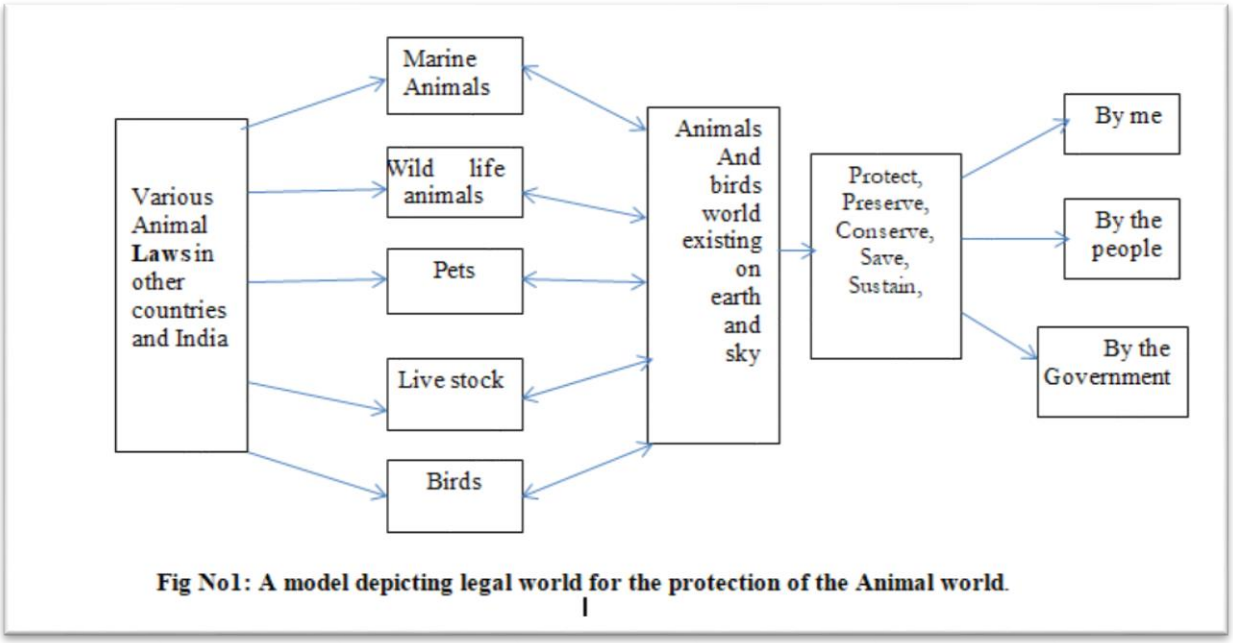



**Fig No1: A model depicting legal world for the protection of the Animal world.**

**Solution**

There are few solutions towards animal cruelty. The following solutions are:

I. **Legislative solutions**:
   a. **Stronger Laws and Penalties**: Implement and enforce stricter laws and harsher penalties for animal cruelty offenses. This includes both domestic and wild animals.
   b. **Regulation of Animal Industries**: Tighten regulations on industries that involve animals, such as farming, entertainment, and research, to ensure humane treatment.
   c. **Animal Welfare Agencies**: Establish and fund agencies dedicated to enforcing animal protection laws and investigating reports of cruelty.

II. **Educational solutions**:
   a. **Awareness Campaigns**: Launch public awareness campaigns to educate people about the signs of animal cruelty, its consequences, and how to report it.
   b. **Humane Education**: Integrate humane education into school curriculums to teach children about empathy, respect for animals, and responsible pet ownership.
   c. **Professional Training**: Provide training for law enforcement, veterinarians, and animal care workers on how to identify and handle cases of animal abuse.

**III. Individual actions:**
   a. **Adoption and Responsible Ownership**: Adopt pets from shelters rather than buying from breeders or pet stores, and practice responsible pet ownership.
   b. **Reporting Abuse**: Report suspected cases of animal abuse or neglect to local authorities or animal welfare organizations.
   c. **Advocacy**: Advocate for stronger animal protection laws and support organizations working to end animal cruelty.

**IV. Technological and Innovative solution:**
   a. **Surveillance and Monitoring**: Use technology such as surveillance cameras in high-risk areas to monitor and prevent animal abuse.
   b. **Data and Analytics**: Utilize data analytics to track and predict patterns of animal cruelty, aiding in prevention and intervention efforts.
   c. **Innovative Alternatives**: Promote and develop alternatives to animal use in research, testing, and entertainment, such as in vitro testing and virtual reality experiences.

**V. Collaboration and global efforts:**
   a. **International Cooperation**: Collaborate with international organizations to tackle cross-border issues related to animal trafficking and wildlife abuse.
   b. **Corporate Responsibility**: Encourage businesses to adopt and enforce animal welfare policies in their supply chains.
   c. **Global Standards**: Work towards establishing global animal welfare standards and encouraging countries to adopt them.

**Conclusion**

While doing research animals should not be hurt. Animal protection and conservation is a must. Dogs to be protected and taken care of. Animals should be treated equally, respected, and with humanity. In this scenario we can see that there will be abuse or injustice happening for the animals in the society, we as citizens should make sure that each animal should be treated well-mannered with respect and love. Hence law should be enforced by the authorities for the greater good of our future generation.

# HOW THE BOUNDLESS FRONTIER OF FREEDOM: EXPLORING THE DYNAMICS OF FREE SPEECH

**Amisha Runa Serrao***

***Abstract***

*This article delves into the intricate dynamics of freedom of speech, a fundamental human right essential for democratic governance and individual autonomy. Through an analysis of Article 29(1) and Article 19 of the Indian Constitution, the article elucidates the protection afforded to minority communities, emphasizing the right to conserve distinct languages, scripts, and cultures. The discourse further explores the perspectives of eminent personalities such as Dr. B.R. Ambedkar, Jawaharlal Nehru, and Sardar Vallabhbhai Patel on the significance of free speech, underscoring its role in fostering democratic participation, ensuring government accountability, and promoting societal progress. Key judicial interpretations, including the landmark cases of Mahesh Bhatt v. Union of India and Bennett Coleman & Co v. Union of India, reinforce the essentiality of this right within the constitutional framework.*

*Furthermore, the article scrutinizes the implications of Article 19(2) in the context of emergencies, particularly the suspension of fundamental rights under Articles 358 and 359 during a National Emergency. It examines the constitutional grounds for imposing restrictions on freedom of speech to safeguard public order, national security, and other vital interests. The analysis includes the impact of emergency provisions on the enforcement of fundamental rights, highlighting the legal mechanisms that balance individual liberties with the exigencies of national crises. This comprehensive exploration underscores the enduring importance of freedom of speech as a cornerstone of democratic integrity and human rights protection in India.*

## Introduction:

*"When you have something to say, there is always someone somewhere with a very good reason to stop you from saying it." — Laurent "Riss"*

The aforementioned statement indicates that every individual harbors a spectrum of viewpoints that propel them towards either progression or inertia, ultimately leading to either garnering support or encountering suppression.

Speech is a vocalized form of human communication. It involves the articulation of sounds to convey information, thoughts, and emotions using a structured language. Speech enables an individual to map their thoughts, and ideas through different phases of their communication.

* 1st Year BBA LL.B (Hons), Shri Dharmasthala Manjunatheshwara Law College, Mangalore, Karnataka

In the realm of legal communication, it is imperative for an individual to maintain a straightforward and unambiguous motive. This precludes any manipulation or distortion of the original intent behind one's words. Utilizing clear and concise language, in conjunction with appropriate body language, affords the listener the ability to grasp the unequivocal viewpoint one endeavors to express

Speeches are timeless, a good speech worth remembering can make its way down the line in centuries. Nehru's reverence for freedom and the aspiration of humanity flows constantly through his speech 'Tryst with Destiny.' He boldly stated, "At the stroke of the midnight hour, when the world sleeps, India will awake to life and freedom."[1] The primary consideration in this matter is, that Nehru painted a lively picture of the historical richness of India and expressed the hope for a greater future in India, with the remembrance of the sacrifices of our freedom fighters, and the work of the new citizens of independent India.

## Balancing Liberties: Understanding the Prerequisites of Article 29(1) in India

### Article 29(1)

In resolving the issues caused by the dominant groups against the minority communities in the country, Article 29 was introduced to protect these communities. Article 29(1) of the Constitution provides that, "any section of the citizens, residing in the territory of India or any part thereof, having a distinct language, script, or culture of its own shall have the right to conserve the same."[2]

### Analysis

Article 29(1) aims to safeguard the interests of minority communities in India. It is acknowledged that certain individuals may possess distinct qualities such as language, writing systems, or cultural backgrounds that are essential to them. This axiom applies to all citizens living in India, highlighting how important it is to protect rights across the entire country.

The Article specifically mentions three key factors for protection: language, script, and culture. This includes linguistic minorities, religious groups, ethnic communities, and others with distinct cultural identities. Minority communities are granted the right to preserve their unique characteristics. This means they have the freedom to uphold, maintain, and pass on their language, script, or culture to future generations without any interference. Implicitly,

[1] Long years ago, we made a tryst with destiny and now the, IdleHearts, https://www.idlehearts.com/1373058/long-years-ago-we-made-a-tryst-with-destiny-and-now-the#google_vignette (last visited Jun 2, 2024).
[2] Gargi, "separate domain" of minority rights under Article 29 & 30 ..., https://ujala.uk.gov.in/files/gargi.pdf (last visited Jun 1, 2024).

Article 29(1) defends minority groups from being assimilated into the dominant culture or language. It values diversity and pluralism in Indian society and works towards safeguarding minority identities from being marginalized.

### Perspectives from the Architects of India's Constitution on Freedom of Speech

a) Dr. B.R. Ambedkar: Serving as the chair of the Drafting Committee and a key figure in shaping the Indian Constitution, Dr. Ambedkar emphasized the importance of freedom of expression as a fundamental essential for the functioning of democracy. He deemed freedom a facet of personal freedom and a defense against oppression. Ambedkar held the belief that an enlightened citizenry, enabled by free speech, was essential for the proper functioning of a democratic society.[3]

b) Jawaharlal Nehru: Nehru, the initial Prime Minister of sovereign India and a notable leader of the Indian National Congress, strongly supported the importance of freedom of speech and freedom of the press. He saw these freedoms as vital for nurturing democratic governance, advancing societal progress, and safeguarding human rights. Nehru emphasized that an open and dynamic public dialogue was necessary for the growth of a diverse society and the protection of minority rights.[4]

c) Sardar Vallabhbhai Patel: Patel, another prominent figure in the Indian National Congress and the inaugural Deputy Prime Minister of India, advocated for freedom of speech while ensuring the preservation of public order and national unity. He acknowledged the need to balance individual freedoms with the broader interests of society, especially in the context of communal harmony and national security.[5]

## The Enduring Importance of Freedom of Speech in Modern Society

### Crucial Significance of Freedom of Expression: An Inherent Human Right

Freedom of speech represents a fundamental human entitlement, crucial for individual self-governance and democratic systems. Acknowledged in Article 19[6] of the Universal Declaration of Human and Article 19(1)(a) of the Indian, this right empowers citizens to voice opinions, challenge injustices, and engage in public matters. It safeguards the

[3] Dr B.R. Ambedkar's ideas on democracy - pallavi ghosh, Doing Sociology (2021), https://doingsociology.org/2021/01/25/dr-b-r-ambedkars-ideas-on-democracy-pallavi-ghosh/ (last visited Jun 8, 2024).
[4] Supra Note 1
[5] Daniel Argov, Vallabhbhai Patel Encyclopædia Britannica (2024), https://www.britannica.com/biography/Vallabhbhai-Patel (last visited Jun 8, 2024).
[6] Article 19 in Constitution of India, https://indiankanoon.org/doc/1218090/ (last visited Jun 8, 2024).

unrestricted exchange of information and ideas, critical for societal advancement and defense against governmental overstep, thus upholding a democracy's power equilibrium.

In *Mahesh Bhatt v. Union of India & Anr,* the Supreme Court affirmed that free speech is the foundation of the Indian Constitution, and that upholds it. The right to express oneself freely is a crucial component of a democratic framework.[7]

In *Bennett Coleman & Co v. Union of India (1972),* the Hon'ble Supreme Court ruled that the freedom of the press was the people's right to free speech and expression. The Court emphasized that the "Freedom of the press entails both qualitative and quantitative aspects. Freedom is present in both the distribution and the substance of information."[8]

## The Vital Importance of Freedom of Speech in Legal Settings

### Democratic Citizen Engagement

Democratic participation entails the active engagement of individuals in the political and decision-making mechanisms of a democratic system. This encompasses participation in electoral processes, involvement in public deliberations, and engagement in communal endeavors such as attending town hall assemblies or affiliating with political organizations. It guarantees that governmental actions mirror the desires of the populace and that citizens possess a role in determining policies that impact their livelihoods. Robust democratic participation fosters answerability, openness, and receptiveness in governing.

In the case of *Himmat Lal v. Police Commissioner, Bombay (1972)*[9], the Supreme Court invalidated a regulation granting the police commissioner the authority to enforce a complete prohibition on all public gatherings and processions. The court determined that the state was only justified in enacting regulations to support the citizens' right to assemble and could enforce reasonable restrictions in the interest of maintaining public order. However, it was deemed impermissible to enact a rule that outright banned all meetings or processions.

### Freedom of Media

The concept of Freedom of Media emphasizes the idea that communication and expression through different forms of media, including print, electronic, and published materials, should be unrestricted. While freedom of the press is not explicitly mentioned in any legal framework, it is implicitly safeguarded under Article 19(1)(a)[10] of the Indian Constitution of 1950.

---

[7] Mahesh Bhatt vs Union of India & ANR. on 23 January, 2009, https://indiankanoon.org/doc/38142746 (last visited Jun 8, 2024).
[8] Bennett Coleman & Co. & ors vs Union of India & Ors on 30 October, 1972, https://indiankanoon.org/doc/125596/ (last visited Jun 8, 2024).
[9] Himat Lal K. Shah vs commissioner of police, ... on 15 September, 1972, https://indiankanoon.org/doc/296985/ (last visited Jun 8, 2024).
[10] Supra Note 6

In *Romesh Thappar v. State of Madras (1950)*[11], the Supreme Court (SC) stated that freedom of the press is fundamental to all democratic organizations.

**Peaceful Conflict Resolution**

This approach offers a method for resolving conflicts in a nonviolent manner by engaging in dialogue and discussions rather than resorting to physical aggression.

In the *Ramlila Maidan Incident of 2012*[12], the Supreme Court highlighted the significance of the right to peaceful assembly. During this event, individuals gathered peacefully to protest but were forcefully removed by the police, resulting in the deaths of several people. The court determined that this use of force was unjust and infringed upon the fundamental rights, including the right to peaceful assembly, of the individuals involved in the protest.

## Guarding the Right to Expression: Ensuring Freedom Safeguards

### Article 19: Universal Declaration of Human Rights

"Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."[13]

**Analysis**

Article 19 of the Universal Declaration of Human Rights acknowledges the basic right to free opinion and expression. It guarantees individuals the freedom to voice their own opinions without interference, as well as the freedom to seek, receive, and share information and ideas by any form of communication. This provision highlights the importance of unrestricted access to information and the ability to exchange ideas across borders, which is essential for democratic governance and the protection of individual liberties across the world.

[11]Romesh Thappar vs the State of Madras on 26 May, 1950, https://indiankanoon.org/doc/456839/ (last visited Jun 8, 2024).

[12] Re-ramlila maidan incident dt ... vs home secretary and ORS on 23 February, 2012, https://indiankanoon.org/doc/17021567/ (last visited Jun 8, 2024).

[13] Universal declaration of human rights, United Nations, https://www.un.org/en/about-us/universal-declaration-of-human-rights#:~:text=Article%2019,media%20and%20regardless%20of%20frontiers. (last visited Aug 16, 2024).

**European Act**

Article 19 of the European Act supports," independent media, civil society, and activists across the region to exercise and defend the right to freedom of expression and access to information."[14]

## Freedom of Speech in India: Current Status and Challenges

**Preamble of the Constitution**

The right of citizens to freely express their ideas, opinions, and thoughts is guaranteed by Article 19(1)(a).[15] This involves having the freedom to express oneself verbally, in writing, in print, visually, or in any other way. For the sake of India's sovereignty and integrity, the security of the State, goodwill with other countries, public order, decency or morality, contempt of court, defamation, incitement to commit an offense, or the sovereignty and integrity of Parliament, reasonable limitations may be placed on this right.

In the case of the *State of Uttar Pradesh v. Raj Narain (1975)*[16], the Supreme Court stated that the right to know originates from the principle of free expression. The Court also ruled that the people of this country are entitled to be informed about any public act or action done in public by their public officials.

Article 19(1)(b)[17] protects the right to peacefully congregate and hold public meetings or processions without arms. This freedom empowers residents to assemble for an array of purposes, including protests, rallies, and conversations. However, reasonable constraints on this freedom may be placed in the interests of public order, sovereignty, and India's integrity

In the case *Re-Ramlila Maidan Incident Dt vs Home Secretary And Ors on 23 February 2012*[18] the Supreme Court stated that "The right to peacefully and lawfully assemble and to freely express oneself coupled with the right to know about such expression is guaranteed under Article 19 of the Constitution of India."

**Constitutional Grounds for Restrictions under Article 19(2) in Emergencies**

In India, a state of emergency is declared by the President during times of crisis. The President can overrule many provisions of the Constitution, which guarantees fundamental rights to Indian citizens, upon the advice of the cabinet of ministers.

---

[14] Europe and Central Asia, ARTICLE 19 (2024), https://www.article19.org/regional-office/europe-and-central-asia/#:~:text=ARTICLE%2019%20supports%20independent%20media,expression%20and%20access%20to%20information. (last visited Jun 8, 2024).

[15] Article 19 in Constitution of India, https://indiankanoon.org/doc/1218090/ (last visited Jun 8, 2024).

[16] State of U.P vs Raj Narain & Ors on 24 January, 1975, https://indiankanoon.org/doc/438670/ (last visited Jun 8, 2024).

[17] Supra Note 12

[18] State of U.P vs Raj Narain & Ors on 24 January, 1975, https://indiankanoon.org/doc/438670/ (last visited Jun 8, 2024).

The emergency provisions are found in Part XVIII of the Indian Constitution, particularly Articles 352 to 360[19]. These regulations enable the central government to swiftly react to any exceptional circumstance. The incorporation strives towards safeguarding the country's sovereignty, unity, integrity, and security, and to uphold the democratic political system and constitution.

**National Emergency**

A national emergency can be declared based on war, external aggression, or violent insurrection. The phrase 'proclamation of emergency' in the Constitution refers to this type of emergency.

**Grounds for declaration**:

1. Article 352 permits the president to proclaim a national emergency if war, external aggression, or armed rebellion poses a threat to India's security.

2. The President can proclaim a national emergency in advance of the occurrence of war, armed rebellion, or external aggression.

3. The expression 'External Emergency' implies to a national emergency declared due to 'war' or 'external attack'. When declared by an ‘armed revolt’, it is referred to as an 'Internal Emergency'.
4. The term 'armed rebellion' is inserted from the 44th Amendment

**The effect on fundamental Rights**

The effect on fundamental rights is addressed in Articles 358 and 359. Articles 358 and 359 states the effect of a National Emergency on Fundamental Rights. These two provisions are explained below:

- Suspension of Fundamental Rights under Article 19: According to Article 358, when a proclamation of National Emergency is made, the six fundamental rights under Article 19 are automatically suspended. Article 19 is automatically revived after the expiry of the emergency.

[19] Subodh Asthana, Emergency in India: Explanation of Article 352 - 360 under the Constitution iPleaders (2022), https://blog.ipleaders.in/emergency-india/ (last visited Jun 7, 2024).

- The 44th Amendment Act laid out that Article 19 can only be suspended when the National Emergency is laid on the grounds of war or external aggression and not in the case of armed rebellion.
- Suspension of other Fundamental Rights: Under Article 359, the President is authorized to suspend, by order, the right to move any court for the enforcement of Fundamental Rights during a National Emergency. Thus, remedial measures are suspended and not Fundamental Rights.
- The suspension of enforcement relates to only those Fundamental Rights that are specified in the Presidential Order. The suspension could be for the period during the operation of an emergency or a shorter period. The Order should be laid before each House of Parliament for approval[20]

**Conclusion**

The right to freedom of speech and expression, as encapsulated in Article 19(1)(a) of the Indian Constitution, serves as a foundational pillar of democratic governance. This right is not absolute and is subject to reasonable restrictions under Article 19(2) to ensure public order, decency, morality, and national security, among other factors. The jurisprudence of the Supreme Court of India has played a crucial role in delineating the contours of this right, balancing individual liberties with societal interests. Landmark cases such as Bennett Coleman & Co. v. Union of India and Himmat Lal v. Police Commissioner, Bombay, underscore the Court's commitment to safeguarding freedom of expression while recognizing the necessity of lawful restrictions.

The provisions for emergency under Articles 352 to 360 highlight the extraordinary measures that can be invoked to preserve the sovereignty and integrity of the nation. During a national emergency, the President is empowered to suspend the enforcement of certain fundamental rights, including those guaranteed under Article 19. The 44th Amendment to the Constitution, however, ensures that the suspension of Article 19 is limited to emergencies declared on grounds of war or external aggression, thereby preventing potential misuse during internal disturbances. These constitutional mechanisms aim to strike a balance between individual freedoms and the imperatives of national security, ensuring that the democratic fabric of the nation is both resilient and adaptable in times of crisis. The preservation of these rights, within the framework of lawful restrictions, is essential for the continued evolution and strengthening of India's democratic ethos.

[20] Emergency Provisions, Drishti IAS coaching in Delhi, Best UPSC Website for IAS Test Series & Study material, https://www.drishtiias.com/to-the-points/Paper2/emergency-provisions/print_manually#:~:text=The%2044th%20Amendment%20Act%20laid%20out%20that%20Article%2019,the%20case%20of%20armed%20rebellion. (last visited May 16, 2024).

# DELAYS CAUSED BY ADJOURNMENTS

**Hansa Vani Verkila Nath***

***Abstract***

*A significant number of cases—over 4.7 crore—are outstanding in courts across various tiers, according to the NJDJ National Judicial Data Grid. Of those, 87.4% are pending in subordinate courts. In India, about 70,000 cases are waiting at the Supreme Court and 12.4% in High courts. Judicial delays are a major setback in the judiciary and are caused by various factors, some of the factors being low ratio of judges, overcrowded courts, legal complexity of the cases, inadequate judicial resources, procedural hurdles, delays caused by parties or lawyers, and lack of accountability.*

*As we know justice delayed is justice denied, here in this research work we will learn about what are adjournments, how they cause delays in judicial procedure, what measures can be taken to tackle this issue, and discuss any case laws related to it. This essay aims to emphasize the adjournment statute and how it has evolved into a major factor contributing to the injustice that results from interminable delays in reaching a decision.*

*In addition to the advocates, The "Code of Civil Procedure Code, 1908" regulation, which states unequivocally that an adjournment request may only be granted in an emergency outside of the parties' control, has been made fun of by court authorities. But this provision is disregarded, placing innocent people at the whim of an ineffective legal system. Therefore, in addition to highlighting the problem, this paper will offer a few recommendations that could be put into practice to address the unfortunate situation.*

## Introduction

Adjournment is the postponement of court proceedings, where the present procedure is shifted to a later date due to some reason which is a sufficient cause for adjournment. Only the judge has adjourning power. It is given under ORDER XVII of CPC which contains provision for adjournment of suits. It mentions

* 2nd Year, LL.B., National Law University, Odisha

- **Rule 1[1]: "Court may grant time and adjourn hearing"—** 1[(1) The Court may, if sufficient cause is shown, at any stage of the suit grant time to the parties or any of them, and may from time to time adjourn the hearing of the suit for reasons to be recorded in writing:

  Provided that no such adjournment shall be granted more than three times to a party during the hearing of the suit.
- **Costs of adjournment[2]**: Costs of adjournment-In every such case the Court shall fix a day for the further hearing of the suit and 2[shall make such Orders as to costs occasioned by the adjournment or such higher costs as the court deems fit]

The legal adage, "Justice postponed is justice denied," could not be more appropriate when considering the problem of widespread delays in the administration of justice within the nation's current legal system. A common topic of discussion in judicial reforms is the pervasive delay in court procedures, which hinders the court from fulfilling its national-building mission. Prior to discussing improvements, the causes and inefficiencies of the system's pervasive delays must be investigated. The people's right to a free and prompt trial, guaranteed by "Article 21 of the Constitution", is directly threatened by a number of inefficiencies in the way the courts operate, particularly in subordinate courts.

But this research will look at one important aspect—the rules of adjournments—and how litigants utilize it as a weapon to drag out the legal process. Deferring a court session to a later date upon request is known as an adjournment. In the Delhi High Court, research on the inefficiencies causing the delay revealed that "adjournments, in particular, occur in heightening proportions in delayed cases. in which "Ninety-one percent of cases that were postponed involved at least one adjournment, and seventy percent of cases involved three or more adjournments. Nonetheless, the Civil Procedure Code of 1908 establishes the guidelines for adjournments and specifies the conditions under which a judge may grant a request for one.

However, the courts and litigants disregard these guidelines, which leads to the egregious abuse of clause. Consequently, in order to comprehend adjournment legislation and how it affects the legal system.

[1] Government of India (no date a) *National Judicial Data Grid , Welcome to NJDG - National Judicial Data Grid*. Available at: https://njdg.ecourts.gov.in/njdgnew/index.php (Accessed: 11 June 2024).

[2] Order 17 CPC

**Factors of judicial delay**

Judicial delay can be caused by various factors varying from issues in the system to faults in the legal system, some of them are as follows;

I. **Complex legal procedures:** The steps involved in the legal process are complicated and lengthy which takes time for the court and leads to delay.
II. **Overburdened courts:** Courts are overburdened with cases, thus making it difficult for the courts to give judgments sooner.
III. **Lack of infrastructure and resources:** Less a number of courtrooms and low facilities infrastructure.
IV. **Case backlogs:** Stacking up cases one after the other, beyond the judicial limits also leads to judicial delay.
V. **Mismanagement of cases:** Not checking upon the development of the cases, no proper allocation of dates and hearings.
VI. **Complexity of cases:** When there are bundles of evidence, and many parties are involved.
VII. **No legal representation:** Some parties don't have a legal representative and face difficulty in the legal process causing delays.
VIII. **Delaying tactics and abuse of process**: Some engage in frivolous filing of suits, and knowingly delay the process for their own benefit.
IX. **Corruption:** When a judge is bribed to prolong the cases.

In this research work, I asked for reasons for judicial delay and their views on it, to few of my mates working in the Tis Hazari district court in Delhi,

X. ***Deepika Pal***: who is an intern in Tis Hazari court stated that delays are caused as the clients themselves are not aware of the procedures, like making files, etc.
XI. ***Teheran Qureshi***: a legal associate stated that due to high corruption and politics in the system, delays are caused as some are fraudulent cases, and even the thinking of lawyers that the longer the case runs more fees they can suck out from the clients.
XII. ***Advocate Buvneshwari Priya Sharma:*** states that as the number of judges is less as compared to the population, delays are prone to happen, procedural laws are lengthy and they are made lengthy by the professionals deliberately, basically lack of ethics and corruption on the part of public servants. Moreover, every pity issue is brought to the court, majorly people fight for ego, not for remedy.

XIII. ***Advocate Neeru Tanwar***: stated that one case has many parts to it and it's not crisp and short, divorce cases go very long with cooling periods even when the relation between husband and wife is irretrievable, and people have this mindset of " I will see you in court" rather than trying to solve it at root level itself.

**How adjournment causes judicial delay**

I. **Time consumption:** The legal process is dragged out with each adjournment since it necessitates rescheduling hearings, informing all parties, and possibly changing the testimony of witnesses or the presenting of evidence. This takes up important court time that could be spent on other matters.

II. **Burden increase:** Cases that are adjourned stay outstanding on court dockets, which increases the burden for judges, court employees, and advocates. This may result in a backlog of cases and more hold-ups in getting new hearings scheduled.

III. **Momentum disruption:** Parties may lose steam in their preparation or presentation of their case as a result of adjournments, which impede the smooth operation of the courtroom. This could make it more difficult to get back on track, which would delay the case's outcome even more.

IV. **Cost implications:** All parties may incur higher costs as a result of adjournments, including legal fees, court costs, and other related charges. This financial strain could deter parties from effectively settling their differences and lengthen the legal process.

V. **Inefficiency and annoyance:** Prosecution parties, witnesses, and other interested parties may become frustrated with many adjournments, which can result in inefficiencies within the legal system. In addition to causing delays, this can erode trust in the legal system by making parties less cooperative or inclined to move things forward quickly.

VI. **Effect on access to justice:** Adjournments can produce delays that can seriously affect someone's ability to access justice, especially if they are a vulnerable person or have little money. Extended legal proceedings may intensify monetary pressure, psychological distress, and additional challenges encountered by those embroiled in legal conflicts.

**2017 Panel for Judicial Reforms**[3]

A government commission found that more than half of the cases being handled by courts do not follow the stated established protocol that allows for a maximum of three adjournments per case. This results in an increase in the number of cases that are pending. The panel emphasized the need to strictly adhere to the law of three adjournments in order to reduce the pendency rate, which stands at an astounding three crore cases throughout Indian courts.

***Event by Delhi High Court Women Lawyers Forum: 'Role of bar in Reducing Arrears: Judicial Perspective'***

Justice Jasmeet Singh of the Delhi High Court said that courts need to draw a line when it comes to granting adjournments and called for a three-adjournment rule to be followed. He said that even as a judge cannot say that an adjournment cannot be granted, a balance needs to be struck so that matters do not go on for years.

***Yashpal Jain V. Sushila Devi***[4]

In the case of Yashpal Jain vs. Sushila Devi, the Court acknowledged substantial delays in the legal system and stressed the significance of taking preventative action. They emphasized the need to plan to satisfy the expectations of the public litigant as well as to decrease the significant backlog of cases at all levels. Consequently, the Honourable Court sent twelve directives to every High Court in the need to unravel the maze of postponement and uncertainty and guarantee the prompt administration of justice.

**Facts of the case**

In the current case, a 1982 lawsuit seeking a 41-year statute of limitations and an order for ownership of the properties was filed and never resolved. The Supreme Court noted that the suit's 41-year adjudication delay demonstrates how some civil courts operate and how different parties are, either directly or indirectly, contributing to these delays.

[3] Sarda, K. (2024a) *Judicial reforms: House panel calls for asset disclosure, diversity, staggered vacations , India Today*. Available at: https://www.indiatoday.in/law/story/judicial-reforms-house-panel-calls-for-diversity-asset-disclosure-by-judges-staggered-vacations-2499455-2024-02-08 (Accessed: 10 May 2024).

[4] Yashpal Jain V. Sushila Devi 2023/INSC/948

**Judgment**

In order to guarantee that "speedy justice" is delivered, the Court gave the following requests to Honourable Chief Justices of the High Court and directed the trial courts to adopt these guidelines.

"Order V Rule 2 of the CPC" mandates that all district and taluka courts make sure that summonses are correctly issued and served in a timely manner. This process will be supervised by Principal District Judges, who will transmit the figures to the committee the High Court created for evaluation and oversight after they have been compiled.

Written statements must and should be filed in accordance with the "Order VIII Rule 1" and submitted to all district and taluka courts within the appropriate time frame, which is usually within 30 days. In accordance with the caveat to “Rule (1) Order VIII of the CPC,” they must additionally submit written explanations for any deadline extensions longer than thirty days.

All District and Taluka courts should ensure that the parties are called upon to appear on the day specified by Order X and that the admissions and non-admissions are recorded once the pleadings are concluded. Subsection (1) of Section 89 stipulates that the parties to a lawsuit must select one of the out-of-court settlement options, and the court will then order the parties to establish a date for their appearance before the relevant authority or forum at their discretion. The court will give instructions that should show up at the specified time, place, and date if the parties choose to pursue any of the settlement choices. The parties will comply without additional notification and present at the designated time and location. The reference order should also make it clear that the trial is scheduled for longer than two months, and that if alternative dispute resolution (ADR) proves unsuccessful, the trial will resume on the following day and continue day by day.

The court must establish the issues for decision-making in public, ideally within a week, if the party does not select alternative dispute resolution, as required by “Section 89(1) of the CPC”.

When the trial date is decided, the parties' experienced advocates will be consulted, giving them the opportunity to adjust their schedules. The trial should, if possible, begin on the designated day and proceed day by day.

The District and Taluka Courts' expert trial judges will make an effort to maintain a notebook in which they list all of the cases that can be tried on a particular day. In order to avoid cases becoming overly busy and requiring adjournments, which might otherwise cause trouble to the parties concerned, they will also make an effort to complete recording all of the evidence.

To try to focus the dispute, the counsel for the parties may be informed of the requirements of Orders XI and XII. The Bar Councils and Associations would also have the onerous task of planning regular refresher courses, preferably online.

Following the trial, "Order XX of the CPC" mandates that the oral arguments be heard continuously and promptly followed by a judgment.

Each presiding officer is required to report statistics about cases that have been pending for longer than five years to the District Judge once a month. The District Judge will assemble the facts and transmit them to the review committee that the relevant High Courts established so that it might take further action.

At least once every two months, the Honourable Chief Justice of each State's Committee will meet to supervise the relevant court's implementation of any required remedial actions. Additionally, the Committee will be keeping a close eye on previous cases—ideally, ones that have been ongoing for longer than five years.

On the other hand, the proviso to Order XVII rule 1(1) prohibits the court from giving a party more than three adjournments over the course of a lawsuit. The said rule's constitutionality was contested before the Indian Supreme Court which the court dismissed.

***Ishwarlal Mali Rathod v. Gopal & ORS. (2021) 12 SCC 612***[5]

In the ruling known as *"Ishwarlal Mali Rathod v. Gopal"*, the Supreme Court expressed its strong disapproval of the habit of many adjournments that is common in our

[5] Ishwarlal Mali Rathod v. Gopal & ORS. (2021) 12 SCC 612

nation, particularly among the lower courts. The Court further advised the courts not to routinely grant repeated adjournments.[6]

The Supreme Court Bench, which is made up of Justices MR Shah and AS Bopanna, noted that plaintiffs become discouraged and eventually lose faith in the legal system as a result of many postponements. Additionally, it was made clear that a judge must remember his obligations to the parties involved and need not be concerned about the "displeasure of the bar" for refusing to grant needless adjournments. The Bench further clarified that "It is now necessary to alter the work environment and break free from the culture of adjournment in order to preserve the Rule of Law and the confidence that litigants have placed in the legal system."

**Factual Background**

As previously noted, this instance is a prime illustration of the improper use of an adjournment granted by the court. It should be mentioned that the initial plaintiffs, who are the respondents in this case, filed a lawsuit for eviction, unpaid rent, and mesne profit back in 2013. Subsequently, in spite of the court's repeated requests for and approval of adjournments—two of which were granted as a final resort—and the imposition of expenses, the defendant did not try to cross-examine the plaintiff's witness.

Sadly, the Trial Court and the High Court continued to grant adjournments, which contributed to the delay in the resolution of the suit, which was for eviction. Despite the defendant having ample opportunity to cross-examine the plaintiff's witness, they never took advantage of this opportunity and instead continued to delay the proceedings by pleading for more time. The High Court's decision to keep granting adjournments after adjournments caused a delay in the suit's resolution, which was eviction-related. Such a strategy is just unacceptable. Professional ethics and the law forbid such behavior.

[6] Advocate Sanjeev Sirohi (no date a) *It breaks the back of Litigants & Kills Justice: Sc urges courts to get out of 'adjournment culture' [read order]*, *latestlaws.com*. Available at: https://www.latestlaws.com/case-analysis/it-breaks-the-back-of-litigants-kills-justice-sc-urges-courts-to-get-out-of-adjournment-culture-read-order-177434 (Accessed: 01 June 2024).

**Reasoning**

Adjournments are frequently used as a means of destroying justice. The litigants lose patience when there are frequent postponements. The courts are required to carry out their responsibilities with the goal of enhancing the general public's trust in the organization tasked with enforcing the law. Discouragement must be extended to any endeavour that threatens the integrity of the justice system and erodes public confidence in it.

As a result, the courts are forbidden from granting adjournments automatically or on a regular basis and from contributing to delays in the administration of justice. To establish an effective judicial system and uphold the rule of law, the courts must be diligent and act promptly. We also know that trial courts frequently suffer criticism from the Bar and are labelled as being tough when they refuse to grant needless adjournments. But if a judge has a clear conscience, he need only consider his obligations to the litigants in front of the courts, who have come seeking justice and for whom the courts are intended. The courts will do everything within their power to ensure that the litigants receive justice in a timely manner.

Take the current situation as an example. It was an eviction lawsuit. Eviction lawsuits are frequently launched on the grounds that the landlord has legitimate needs. The basis for obtaining an eviction decree based on the personal bonafide criterion may occasionally be negated if the plaintiff who filed the claim is not receiving timely justice and receives the decree after ten to fifteen years. This would have the unintended consequence of making the plaintiff lose faith in the legal system. Rather than pursuing a civil suit and abiding by the law, he might choose to use an alternative course of action that is not supported by the law, which would ultimately undermine the rule of law.

As a result, the court will grant adjournments very slowly and, as previously noted, will not routinely grant multiple adjournments. In order to preserve the Rule of Law and the confidence that litigants have placed in the justice delivery system, it is now necessary to alter the work culture and break free from the adjournment culture."

**Held**

"In light of aforementioned, for the reasons outlined above, and taking into account the fact that this case had total of ten adjournments from 2015 to 2019 and that two times orders were passed allowing time for cross-examination as a final opportunity—at one point

even a cost was implicated—as well as the fact that even after the High Court's final order extending of the time, it was expressly stated that no further time shall be given and/or extended—the petitioner-defendant never took advantage of the liberty and the grace that was shown.

Indeed, it could be argued that the defendant and petitioner abused the court's grace and liberty. According to reports, even the primary lawsuit has been resolved as a result. The current Special Leave Petitions have been dismissed because they are entitled to be dismissed under the conditions.

**How to address and deal with delays caused by adjournments**

The right to a timely trial is guaranteed by "Article 21 of the Indian Constitution", which was noted by the Supreme Court of India in the 1979 case of Hussainara As a result, the court will grant adjournments very slowly and, as previously noted, will not routinely grant multiple adjournments. In order to safeguard the Rule of Law and the confidence that litigants have placed in the justice delivery system, it is now necessary to alter the work culture and break free from the adjournment culture."

As a result, the court will grant adjournments very slowly and, as previously noted, will not routinely grant multiple adjournments. In order to safeguard the Rule of Law and the confidence that litigants have placed in the justice delivery system, it is now necessary to alter the work culture and break free from the adjournment culture."

The Delhi High Court established a pilot project called "Zero Pendency Courts" in 2017 with the goal of maximizing quick trials and eradicating case delays. This initiative would examine how Delhi's trial courts operate and gather information about the different factors that contribute to this matter. Adjournment is one of these factors that the study evaluates.

Using a court log program created by DAKSH[7], a number of reasons were noted for the adjournment, including the lack of witnesses, the delay in serving the summons, the parties' or counsel's request for an extension, the parties' absence from the court, and the

[7] final report on the pilot project by high court of Delhi, zero pendency courts project, https://dakshindia.org/wp-content/uploads/2019/05/PublicNotice_3MRRIN3QTHN.pdf.

attorneys' acceptance of additional cases. The study successfully provided a list of strategies that can be used to resolve the adjournment problem.

A few of these include issuing summonses via a variety of electronic applications, efficiently listing the cases to prevent them from being postponed due to time constraints, discouraging adjournments and charging fees for pointless and intrusive applications, and providing each party with a bulk date in order to efficiently manage the case and guarantee fewer adjournments.

**Adjournment record:** It is mandatory for courts to maintain a record of every advocate's adjournment petition, including the frequency of granted requests and the proportion of denied requests. This would facilitate parties' adjournments and ease the workload of judges.

**Strict clause in the Advocates Act, 1961:** Lawmakers might expect to implement a clause outlining the consequences for wilful misuse of adjournment. The advocates wouldn't be able to request needless adjournments from that court.

**Appropriate Training for Law Students:** This change, which places a strong emphasis on educating students about the proper use of adjournments and how to avoid using them in court, will hopefully help to reduce the "adjournment culture" in the future.

**Strict restrictions issued by the Supreme Court:** When granting a partial adjournment, the highest court will establish the rules that justices must abide by.

**Full-hour CCTV surveillance of court room:** CCTV cameras must be put in courtrooms of all courts, particularly subordinate courts, in order to monitor the working hours of all judges. Judges frequently take a break from their jobs by going to their rooms. Consequently, a number of the cases on the list are still pending. The usual expression in the court complex is "Judge Sahb is not sitting," according to an advocate of the Rohtak District Courts. To address the issue, this will also be fixed.

**Hiring Judicial Officer:** One of the main causes of the excessive number of unresolved cases in our nation is the dearth of judges. Lower courts will continue to hire an increasing number of judges.

**Imposing Heavy Cost:** Advocate Amarjeet Singh Sahni having 25 years of experience suggests that the court should impose heavy costs on adjournments as defined in 35A of CPC.

## Conclusion

The Act's adjournment provision was created with the goal of enabling plaintiffs to request a postponement of the court hearing in an unusual circumstance. However, lawyers have repeatedly abused this provision by requesting needless adjournments. This needless postponement has grown to be a significant contributing element to the rise in open cases in Indian courts, hindering the ability of the courts to carry out their role in fostering national development. Not only have advocates failed to recognize this issue, but judicial officers have also been complicit in granting the requests made by advocates.

People's right to a speedy and free trial must be taken into consideration when handling this case. For the same reason that people are losing faith in it, the judiciary has become less credible. The goal of this article is to offer reforms that could be used to address the issue of needless adjournments.

Will end it as we started this **"JUSTICE DELAYED IS JUSTICE DENIED"**

# TRADITIONAL KNOWLEDGE FOR SUSTAINABLE PRACTICES: INDIGENOUS TRIBAL PEOPLE COGNIZANCE ON CLIMATE CHANGE

**Shreya Bisht***

***Abstract***

*Traditional knowledge is a vital component of sustainable practices, and indigenous tribal people have been at the forefront of developing environmentally conscious practices for centuries. Their knowledge is often rooted in spiritual and cultural practices, passed down through generations, and is closely tied to their relationship with the land and natural environment. This essay explores the traditional knowledge of indigenous tribal people on climate change, highlighting their unique perspectives and approaches to mitigating its impacts.*

*Indigenous tribal peoples possess a profound understanding of their natural environments, developed over millennia through direct interaction and intergenerational transmission of knowledge. This traditional knowledge offers valuable insights into sustainable practices and climate resilience. This essay explores the role of indigenous knowledge in addressing climate change, highlighting the sustainable practices of various indigenous communities and their potential contributions to global climate strategies. Through case studies and an examination of traditional ecological knowledge (TEK), this essay underscores the importance of integrating indigenous wisdom with modern science to foster sustainable development and climate resilience.*

**Keywords: Traditional Knowledge, Indigenous Peoples, Sustainable Practices, Climate Change, Traditional Ecological Knowledge.**

## Introduction

Climate change poses a significant threat to ecosystems and human societies worldwide. While modern technological solutions are critical in combating climate change, the traditional knowledge of indigenous tribal peoples offers invaluable lessons in sustainability and resilience. This essay delves into the rich repository of traditional ecological knowledge (TEK) possessed by indigenous communities, exploring how their sustainable practices and

* 3rd year B.A. LL.B, Lloyd Law College, Greater Noida, Uttar Pradesh

deep understanding of natural systems can contribute to global climate change mitigation and adaptation efforts.

Indigenous tribal communities have cultivated intricate relationships with their environments over millennia, developing rich repositories of traditional knowledge that offer insights into sustainable practices and adaptation strategies. As custodians of diverse ecosystems, indigenous peoples possess a deep understanding of the intricate interplay between human societies and the natural world. This introduction provides an overview of the significance of traditional knowledge in indigenous cultures, particularly in the context of climate change, and sets the stage for a deeper exploration of its implications for sustainable practices and resilience.

## Significance of Traditional Knowledge

Traditional knowledge holds profound significance within indigenous tribal communities, particularly in the context of addressing climate change and fostering sustainable practices. It encompasses a wide array of insights, practices, and beliefs passed down through generations within indigenous communities. It reflects an intimate understanding of local ecosystems, weather patterns, and natural resources, rooted in centuries of observation, experimentation, and cultural transmission. Traditional knowledge is not static but dynamic, evolving in response to changing environmental conditions and societal needs while retaining its core principles and values. This section delves deeper into the importance of traditional knowledge and its relevance to indigenous tribal people's cognizance of climate change, highlighting its unique contributions to environmental conservation, resilience-building, and cultural preservation.

### A. Cultural Heritage and Identity

Traditional knowledge is deeply intertwined with the cultural heritage and identity of indigenous tribal peoples. Passed down orally from generation to generation, it embodies centuries of collective wisdom, spiritual beliefs, and cultural practices rooted in intimate connections with the land, water, and sky. Traditional knowledge reflects indigenous worldviews that emphasize reciprocity, respect for nature, and harmonious coexistence with the Earth, reinforcing cultural continuity and resilience amidst changing environmental and social contexts.

### B. Ecological Understanding and Local Expertise

Indigenous tribal peoples possess intricate knowledge of their local ecosystems, including the behaviour of plants, animals, and weather patterns, derived from direct observations and interactions with the natural world. This ecological understanding enables indigenous communities to adapt to dynamic environmental conditions, anticipate changes in weather and ecological processes, and develop sustainable land management practices tailored to their specific landscapes and resource needs. Traditional knowledge thus serves as a valuable source of local expertise and innovation in environmental conservation and climate change adaptation.

### C. Adaptive Strategies and Resilience-building

Traditional knowledge offers indigenous tribal peoples a toolkit of adaptive strategies and resilience-building practices honed over centuries of adaptation to environmental variability and adversity. Drawing upon traditional practices such as agroforestry, water harvesting, and crop diversification, indigenous communities can mitigate climate risks, enhance food security, and maintain ecosystem health while preserving cultural traditions and livelihoods. Moreover, traditional knowledge systems often incorporate social institutions, customary laws, and community-based governance structures that promote collective action, solidarity, and equitable resource distribution, fostering resilience at both individual and community levels.

### D. Intergenerational Knowledge Transmission

Central to the significance of traditional knowledge is its transmission from elders to younger generations within indigenous tribal communities. Through oral traditions, storytelling, and experiential learning, indigenous elders impart valuable ecological knowledge, cultural values, and survival skills to future generations, ensuring the continuity and vitality of traditional knowledge systems in the face of social change and environmental disruption. It fosters a sense of belonging, pride, and responsibility among indigenous youth, empowering them to actively engage in environmental stewardship and cultural revitalization efforts.

## Traditional Knowledge on Climate Change

Indigenous tribal people have long recognized the importance of climate change and its impacts on their communities and the environment. In many cases, their traditional knowledge

has been shaped by their experiences with climate-related disasters, such as droughts, floods, and wildfires. For example, the indigenous peoples of Australia have developed a deep understanding of climate change through their observations of changes in weather patterns, sea levels, and animal migrations[1]. Similarly, the indigenous peoples of Africa have developed a nuanced understanding of climate change through their observations of changes in rainfall patterns, soil moisture, and plant growth[2].

One of the key ways in which indigenous tribal people have developed traditional knowledge on climate change is through their spiritual practices. Many indigenous cultures believe that all living beings are connected and that the natural world is imbued with spiritual energy[3]. This understanding has led to the development of spiritual practices that are designed to maintain balance and harmony in the natural world. For example, many indigenous cultures practice rituals to ensure the health and fertility of the land, which includes activities such as ceremonial hunting, planting ceremonies, and ritual cleansing[4].

Another way in which indigenous tribal people have developed traditional knowledge on climate change is through their observations of changes in the natural world. Many indigenous cultures have developed sophisticated systems for tracking changes in weather patterns, animal migrations, and plant growth[5]. For example, some indigenous cultures use observations of animal behaviour to predict changes in weather patterns or droughts[6]. Similarly, others use observations of changes in plant growth to predict changes in soil moisture or temperature[7].

**Traditional Knowledge on Climate Change Mitigation**

Indigenous tribal people have developed a range of traditional practices for mitigating the impacts of climate change. These practices are often designed to maintain balance and harmony in the natural world and are based on a deep understanding of the interconnectedness of all living beings. For example, some indigenous cultures practice sustainable agriculture

[1] Berkes et al. (2000). The importance of local knowledge for wildlife conservation: A case study from Australia.
[2] Nadasdy (2003). Indigenous knowledge and science: A case study from sub-Saharan Africa.

[3] Kirsch (2013). The transformative power of technology: Indigenous perspectives on sustainability.
[4] Brightman (2012). Indigenous perspectives on sustainability: A case study from Canada.

[5] Turner (2013). The importance of local knowledge for environmental management: A case study from Canada.
[6] Berkes et al. (2000). The importance of local knowledge for wildlife conservation: A case study from Australia.
[7] Nadasdy (2003). Indigenous knowledge and science: A case study from sub-Saharan Africa.

practices that prioritize soil health and biodiversity[8]. Others use traditional hunting practices that prioritize sustainable use of natural resources[9].

One of the key ways in which indigenous tribal people have developed traditional practices for mitigating the impacts of climate change is through their use of traditional medicines. Many indigenous cultures have developed sophisticated systems for identifying and using medicinal plants that are adapted to changing environmental conditions[10]. For example, some indigenous cultures use traditional medicines to treat diseases that are caused by climate-related disasters, such as droughts or floods[11].

Another way in which indigenous tribal people have developed traditional practices for mitigating the impacts of climate change is through their use of traditional technologies. Many indigenous cultures have developed innovative technologies that are designed to reduce greenhouse gas emissions or adapt to changing environmental conditions[12]. For example, some indigenous cultures use traditional windmills or solar panels to generate electricity[13]. Others use traditional irrigation systems to conserve water[14].

**Indigenous Perspectives on Climate Change**

Indigenous peoples are among the most vulnerable to the impacts of climate change, given their close dependence on natural resources for sustenance and cultural practices. Yet, they also possess unique insights and adaptive strategies derived from centuries of lived experience in diverse environments. Indigenous perspectives on climate change emphasize interconnectedness, reciprocity, and respect for the Earth, highlighting the need for holistic approaches to environmental stewardship and resilience-building.

**1. Observations of Environmental Changes**

Indigenous peoples have been observing and documenting environmental changes for generations, providing valuable insights into climate change impacts.

[8] Turner (2013). The importance of local knowledge for environmental management: A case study from Canada.
[9] Brightman (2012). Indigenous perspectives on sustainability: A case study from Canada.
[10] Kirsch (2013). The transformative power of technology: Indigenous perspectives on sustainability.
[11] Berkes et al. (2000). The importance of local knowledge for wildlife conservation: A case study from Australia.
[12] Nadasdy (2003). Indigenous knowledge and science: A case study from sub-Saharan Africa.
[13] Turner (2013). The importance of local knowledge for environmental management: A case study from Canada.
[14] Brightman (2012). Indigenous perspectives on sustainability: A case study from Canada.

Example: The Inuit people of the Arctic have noticed significant changes in sea ice patterns, wildlife behavior, and weather conditions. Their detailed observations have contributed to scientific understanding of Arctic climate change. Inuit knowledge of ice conditions, animal migrations, and seasonal changes is crucial for developing adaptive strategies in the face of rapidly changing Arctic environments.

**2. Climate Adaptation Strategies**

Indigenous communities have developed adaptive strategies to cope with environmental changes, ensuring their survival and resilience.

Example: The Maasai people of East Africa have traditionally practiced transhumance, moving their livestock between seasonal grazing areas to cope with variable rainfall and drought conditions. This adaptive strategy allows them to make optimal use of available resources and maintain their livelihoods in the face of climate variability. The Maasai approach to climate adaptation underscores the importance of mobility and flexible resource management in building resilience.

**Challenges and Opportunities**

Despite its importance, traditional knowledge faces numerous challenges, including erosion due to cultural assimilation, inadequate recognition by external actors, and the encroachment of modern development pressures. However, there are also opportunities for revitalization and empowerment, as indigenous peoples assert their rights to self-determination, cultural heritage, and environmental governance. By fostering collaboration, dialogue, and mutual respect between indigenous and non-indigenous stakeholders, we can harness the full potential of traditional knowledge to address the complex challenges of climate change and promote sustainable practices for the benefit of present and future generations.

**1. Threats to Indigenous Knowledge and Practices**

Indigenous knowledge and practices face numerous threats, including land dispossession, cultural assimilation, and environmental degradation.

Example: Many indigenous communities have been displaced from their ancestral lands due to development projects, conservation initiatives, and climate impacts. This displacement disrupts traditional knowledge transmission and undermines sustainable practices. Protecting

indigenous land rights and supporting their self-determination is essential for preserving TEK and promoting climate resilience.

**2. Opportunities for Collaboration**

There are growing opportunities for collaboration between indigenous communities, scientists, and policymakers to integrate TEK into climate action.

Example: A global effort to promote sustainable use of biodiversity in rural landscapes, emphasizes the integration of traditional knowledge with modern conservation practices. Indigenous communities are key partners in this initiative, sharing their knowledge and contributing to sustainable landscape management. The Satoyama Initiative demonstrates the potential for mutually beneficial collaborations that enhance both biodiversity and cultural heritage.

**Policy Implications**

**1. Recognizing Indigenous Land Rights**

Recognizing and protecting indigenous land rights is fundamental for preserving TEK and promoting sustainable practices. Secure land tenure enables indigenous communities to maintain their traditional livelihoods and manage their resources sustainably.

Example: The United Nations Declaration on the Rights of Indigenous Peoples affirms the rights of indigenous peoples to their lands, territories, and resources. Implementing UNDRIP in national policies can support the preservation of TEK and enhance indigenous participation in climate action.

**2. Inclusive Climate Policies**

Climate policies must be inclusive, recognizing the contributions of indigenous peoples and ensuring their meaningful participation in decision-making processes. Inclusive policies can promote equitable climate solutions and enhance the resilience of marginalized communities.

Example: Nationally Determined Contributions

Under the Paris Agreement can include commitments to integrate TEK and support indigenous-led climate initiatives. By incorporating indigenous perspectives and knowledge into NDCs, countries can enhance the effectiveness and equity of their climate actions.

## Integrating TEK with Modern Science

### 1. Benefits of Integration

Integrating TEK with modern science can enhance climate change mitigation and adaptation strategies by combining holistic, long-term perspectives with technological innovations. This integration can lead to more effective and culturally appropriate solutions.

Example: Participatory research involves collaboration between scientists and indigenous communities to co-produce knowledge and develop sustainable solutions. This approach recognizes the value of TEK and ensures that indigenous voices are heard in climate action. Participatory research can lead to the co-creation of adaptive strategies that are grounded in both scientific and traditional knowledge.

### 2. Challenges of Integration

Integrating TEK with modern science presents challenges, including differences in knowledge systems, power imbalances, and the risk of knowledge appropriation. Addressing these challenges requires mutual respect, equitable partnerships, and recognition of indigenous intellectual property rights.

Example: Protecting indigenous intellectual property rights is crucial for ensuring that TEK is not misappropriated or commercialized without the consent of indigenous communities. Legal frameworks and policies that recognize and safeguard these rights are essential for promoting ethical collaborations and preserving integrity of TEK.

## Case Studies

### 1. The Adivasi of India

The Adivasi, or indigenous peoples of India, have a wealth of traditional knowledge related to agriculture, forest management, and water conservation. They practice shifting

cultivation, agroforestry, and community-based water management, which contribute to biodiversity conservation and climate resilience.

**2. Shifting Cultivation and Agroforestry**

Shifting cultivation, also known as jhum, is a traditional agricultural practice in which fields are cleared, cultivated for a few years, and then left fallow to regenerate. This practice maintains soil fertility and biodiversity, providing a sustainable livelihood for Adivasi communities. Agroforestry systems, which integrate trees and crops, enhance ecosystem services and climate resilience.

**3. Community-Based Water Management**

Adivasi communities in India have developed intricate systems of community-based water management, including the construction of small dams, check dams, and ponds to capture and store rainwater. These systems improve water availability, reduce soil erosion, and support sustainable agriculture.

**4. Cultural Burning**

Cultural burning, or controlled burning, is a traditional fire management practice used by Aboriginal communities to reduce fuel loads, promote biodiversity, and prevent large wildfires. This practice enhances ecosystem resilience to climate change and supports the regeneration of native vegetation.

**5. Sustainable Hunting and Gathering**

Aboriginal peoples have developed sustainable hunting and gathering practices that ensure the conservation of wildlife populations and ecosystems. These practices are guided by cultural values and deep ecological knowledge, contributing to the sustainable use of natural resources.

**Judicial cases**

Here are some judicial cases related to traditional knowledge and sustainable practices of indigenous tribal people in the context of climate change:

**1. Narmada Bachao Andolan vs. Union of India (2000)**

This case was filed by the Narmada Bachao Andolan, a movement led by indigenous communities in the Narmada Valley, to challenge the construction of the Sardar Sarovar Dam, which was expected to displace thousands of people. The Supreme Court of India ruled in favor of the dam's construction, but also recognized the rights of indigenous communities to their traditional knowledge and way of life.

**2. Indigenous People's Rights to Traditional Knowledge and Resources (2007)**

The Indian government's National Commission for Scheduled Tribes (NCST) issued a report highlighting the importance of recognizing indigenous peoples' rights to traditional knowledge and resources. The report emphasized the need for consultation and consent with indigenous communities before implementing development projects that may impact their lands and resources.

**3. Maoist Indigenous Peoples vs. Union of India (2011)**

In this case, the Maoist Indigenous Peoples, a group of indigenous communities from the states of Andhra Pradesh and Odisha, challenged the government's plans to establish a national park in their ancestral lands. The court recognized the community's rights to their traditional knowledge and way of life, and ordered the government to conduct a comprehensive study on the impacts of the national park on indigenous communities.

**4. Kalinga Sangha vs. Union of India (2013)**

This case was filed by the Kalinga Sangha, a non-profit organization working with indigenous communities in Odisha, to challenge the government's plans to establish a mining project in an area sacred to indigenous communities. The court recognized the community's rights to their traditional knowledge and cultural heritage, and ordered the government to conduct an environmental impact assessment before granting permission for the project.

**5. National Green Tribunal (NGT) orders on Traditional Knowledge and Climate Change (2019)**

The NGT has issued several orders emphasizing the importance of recognizing traditional knowledge and involving indigenous communities in decision-making processes related to climate change adaptation and mitigation. Example, in a case involving the displacement of indigenous communities due to climate-related flooding, the NGT ordered the government to consult with local communities and involve them in decision-making processes.

**Conclusion**

In conclusion, traditional knowledge is a vital component of sustainable practices, and indigenous tribal people have been at the forefront of developing environmentally conscious practices for centuries. Their knowledge is often rooted in spiritual and cultural practices, passed down through generations, and is closely tied to their relationship with the land and natural environment. By examining the traditional knowledge of indigenous peoples on climate change, this essay has argued that their approaches to climate change mitigation can inform and complement modern scientific efforts to address this global issue.

# DISCOURSE OVER AGE OF CONSENT UNDER THE POCSO ACT

**Parinati Mishra***

***Abstract***

*The Prevention of Children from Sexual Offences Act of 2012 was introduced with a special focus on children and to provide for special courts for expeditious disposal of such matters. The backbone of this law can be traced to our Constitution's Article 15(3) which empowers the state to make special provisions for women and children.*

*In addition to the above, we have also acceded to the Convention on the Rights of the Child in the year 1992 thus promising to act in the best interest of the child. One of the commendable aspects of this legislation is that it ensures the right to privacy and confidentiality for the child. The development and well-being of the child must be multi-dimensional. One provision that is significant with regard to the issue at hand is Section 2(1)(d) of the act which defines "child" as any person below eighteen years of age.[1] With the coming in force of this act, the minimum age for consent was enhanced from 16 to 18 years. The article intends to deal with the issue, the ongoing debate around it, and the way forward.*

## Origin of the Debate

It is not a matter of surprise that courts in India have been flooded with the rampant misuse of the provision of this child-specific legislation. In such cases, consenting teenagers are prosecuted for acts that are illegal because of their age. All sexual acts between minors are criminalized irrespective of the presence of consent as a minor is considered incapable of giving the same.

The judiciary has time and again urged the lawmakers to create a distinction between the "age of consent" and the "legal age for marriage." It has been considered a conservative view about pre-marital sex and judges have laid emphasis on this point that sexual acts are not confined to marriage in today's times. However, the government has been silent on this point.[2]

* IV year of Rajiv Gandhi National University of Law, Patiala, Punjab

[1]The Protection of Children from Sexual Offences Act, 2012, § 2(1), No. 32, Acts of Parliament, 2012 (India).

[2] Bharti Mishra Nath, *Opinion: Age of Consent in India- What is the debate?*, NDTV (June 3, 2024, 10:00 A.M.), https://www.ndtv.com/opinion/age-of-consent-in-india-what-is-the-debate-4231508.

**References made by various high courts**

The Bombay High Court while hearing an appeal by a man who had been sentenced to 10 years of imprisonment in lieu of maintaining a sexual relationship with a minor stated that the age for consent under the POCSO Act should be revisited as many adolescents have been prosecuted for such consensual relationships and it is the need of the hour.

Another reference had been made by the Dharwad Bench of the Karnataka High Court to the Law Commission to consider the age of consent under the act citing the number of rising cases in which minor girls above 16, falling in love, having sexual relationships and eloping with the boy.

A similar reference had been put forth by the Gwalior Bench of the Madhya Pradesh High Court where the court pointed out the injustice caused due to the present form of the statute in cases of statutory rape where the acts were consensual.[3]

**Issues faced**

One of the most prevalent threats that grasps the minds of adolescents is being reported if they try to approach for help or any sort of intervention. In case it is being reported it may not be correct to compel a person in every case to opt for a legal remedy.

Instead of police carrying out interviews of the adolescents it should be carried out by a social worker or a support person at the first instance. It is important for such persons to interact with the concerned persons and ascertain whether the person wishes to pursue a legal complaint or not. To have a better view of the situation, it must be inquired whether the intimacy was consensual or not and it consensual whether it was exploitative in nature or not. It is a pertinent issue that the mandate to ask questions comes at a stage after the FIR is filed and in various cases, it has been reported that girls either turn hostile in courts or it might end up in acquittal.

The compulsion to pursue legal remedy may lead to an increase in the burden upon the courts. The process itself turns out into a punishment for such young minds and affects their

[3] Abhinay Lakshman, *Should the age of consent be revised in India?*, The Hindu (June 3, 2024, 11:30), https://www.thehindu.com/opinion/op-ed/should-the-age-of-consent-for-sex-be-revised/article67154438.ece.

psychological well-being for a very long time. In such cases, even the remedy granted by the court cannot undo the damage done.

It has been time and again observed that the capacity to give consent can vary in different people and a black-and-white demarcation is not what we need rather it is important to know when the consent would be relevant. Answers regarding the capacity to understand consent would vary in different cases.

**The underlying arguments**

The debate over this issue is quite complicated. Autonomy must be understood in wide terms and not merely from the point of legal age. Importance has to be given to a person's cognitive capacity, level of emotional development, psycho-social maturity, etc. The different facets of this issue must be analysed and investigated well. The evolving capabilities of children need to be considered. There are always two sides to a coin, similarly, there are different strata of the population, one which advocates that the provision needs to be altered and the other observes that it should be retained as it is.

The side favouring the alteration of this provision has held that drawing a line to determine the age of consent would not be able to justly cover the right set of people. Competency to give consent cannot be unfirmly set for people belonging to the same age bracket. A more subjective approach is required to determine the individual's capacity to understand consent or not. Another contention that was raised by this stratum of people was that even if the age for consent was raised to 18 it cannot be said to change the situation on the ground that adolescents under 18 years of age do indulge in sexual acts which are otherwise illegal.

Last, but not the least, a major concern that comes to the front is that the problem of stigmatization and criminalisation pose this generation to a wide variety of sexual challenges,

untimely childbirth, adolescent pregnancy, and even unsafe abortion leading to further health complications in young girls.[4]

**22nd Law Commission**

The law commission took note of the various references that had been made by various High Courts and submitted its **283rd Report**, favouring the current provision of the age of consent being set at 18. It was headed by **Justice (Retd.) Ritu Raj Awasthi** and the report was submitted to the Union Minister for Law & Justice.

The commission noted that the age of consent should not be tinkered with citing the potential dangers of human trafficking, prostitution, child abuse, etc. The report gave the recommendation of introducing the concept of ***"guided judicial discretion"*** in cases that involved the tacit approval of adolescents belonging to the age group of 16-18. They reiterated the point that the law must be implemented in the best interest of the child.

The panel directed towards other amendments that could be introduced in the POCSO Act of 2012 to tackle the cases that involve tacit approval. The law commission insisted that if any reduction is made to the age of consent, it would have a negative bearing on issues of child marriage and trafficking. The commission advised the courts to proceed with caution in cases of *"adolescent love"* that may not have a criminal intention.

It was also pointed out that in case an exception is carved out with regards to sexual relations among children above 16 years of age it might be largely prone to misuse as children can be manipulated to give consent and this would be extremely problematic to deal with. The law is very clear on this point that the consent of child is no consent.

The incidents relating to cyber-crimes and sextortion have been on the rise and are a clear depiction of the fact that how children belonging to such a vulnerable age group can be exploited. It can be misused as a loophole in law by the child abusers to escape from liability. The report further enlisted that such an alteration may led to coercion of minor girls into acts of

[4] Vageshwari Deswal, *Need to revisit the concept of 'age of consent',* THE TIMES OF INDIA (June 4, 2024, 11:30 A.M.), https://timesofindia.indiatimes.com/blogs/legally-speaking/need-to-revisit-the-concept-of-age-of-consent/.

marital rape, different forms of sexual abuse, subjugation among others. It clearly mentioned that the legal age for marriage and consent are not mutually exclusive to each other.[5]

**Other Recommendations of the Report**

The cases involving tacit approval shall not be treated with the same amount of severity as other cases. The commission focussed on introducing the concept of "judicial discretion" while awarding sentencing in such cases.

However, the report mentioned that such discretion could be allowed after certain prerequisites are complied with, such as, the accused should not have had any criminal antecedents, ready to bear good conduct, any element of undue influence, coercion, etc. should be missing and there should be no element indicating towards a possibility of trafficking and the victim was not used for pornography, etc. In addition to the above conditions, it has to be checked that the age difference between the victim and the accused should not be more than three years.

Moreover, the report suggested the registration of E-FIRs shall be started with the offences attracting imprisonment of up to 3 years and later to other offences as well so that delay in registration could be countered and crime can be reported well within time.[6]

**Possible Recourse**

Those who argued in favour of changing the current provisions proposed an idea of "context-sensitive" approach. It was said that different capacities should be demarcated for different activities so that it could be more efficient in identifying consent as more reflective of the evolving capabilities of such adolescents.

---

[5] Sravasti Dasgupta, *As Law Commission Recommends Against Lowering Age of Consent, Questions on Stigma of Criminalisation Remain*, THE WIRE (June 5, 2024, 10:45 A.M.), https://thewire.in/law/expert-view-law-commission-lowering-age-of-consent

[6] Sandeep Phukan, *Law Commission against lowering age of consent under POCSO Act*, The Hindu (June 5, 2024, 12:00 P.M.), https://www.thehindu.com/news/national/law-commission-against-lowering-age-of-consent-under-pocso-act-suggests-guided-judicial-discretion/article67361714.ece.

Margin should be provided to exercise discretion at any or all stages of investigation, thus promoting a fluid understanding of consent. It may not be correct to set a fixed age of consent for all forms of sexual activities.

The first interaction with the child is done by the police and it should be identified at that stage whether the child wants to proceed with complaint or not. Unnecessarily filing an F.I.R in every case might lead to injustice and attach a stigma to the person involved as well as to his family.

In case the police could not figure out the same at this stage the same can be done at the investigative stage if the act was non-consensual and non-exploitative or not. Further, in case the proceedings are commenced with then the courts shall exercise this power of calling the witnesses and verifying the circumstances at hand and close the case, if required.

**Challenges in the Way Ahead**

Apart from the above discussion, there are certain roadblocks in such situations that cannot be disregarded. The courts may lack discretion if towards the end of the trial it is discovered that some other forces or pressures were put upon the child. If a statutory offence has been defined the courts need to abide by the same.

Another issue noted was that under the POCSO Act, the punishment for aggravated penetrative sexual assault i.e. repeated sex, is 20 years which is twice of that given in case of penetrative sexual assault. Instances involving repeated sex can be common in romantic relationships thus leading them to be booked under the harsher provision and the courts are unable to exercise discretion in such cases.

In light of pursuing a legal case, often other rehabilitative services such as counselling, reproductive and sexual health services go unnoticed. In order to prevent the commission of such acts in future it is imperative to provide such aid and assistance. It is important to observe that what kind of sexual practices are the adolescents engaging in and at what age groups to have a better assessment of its impact on them. Certain relationships can be categorised into harmful or non-harmful categories.

Last but not the least, in various instances the parties are asked to marry as a way to remedy the situation. However, in every case it might not be in the best interest of the parties and may had a negative impact on their lives.

**Conclusion**

The debate over the age of consent originated from the linkage between sexual act and marriage. Considering today's times, the society as well as the age for puberty has changed. No more sex and marriage can be considered synonymous to each other. The High Courts are not completely incorrect in asking the legislature to investigate this grey area that has led to numerous frivolous litigations. Other than this, it is high time that emphasis is laid on reforms and access to sexual and reproductive health services is provided in addition to compulsory sex education so that an informed decision can be made.

The research paper shed light upon both sides of the debate, and it would be wisest to strike a balance between the rights of the victim and unnecessary criminalisation of the accused by exercising discretion. At this juncture, the aspect of "guided judicial discretion" comes into picture that was introduced by the Law Commission in its report, in cases involving tacit approval. Different parameters are to be investigated for adopting a context-sensitive approach so that only the real culprits are convicted. It cannot be overlooked that in cases of false conviction it leads to a severe psychological impact even if the person is discharged later.

***STATEMENT OF OWNERSHIP***

**FORM IV RULE 8**

| | | |
|---|---|---|
| 1. | Place of Publication | Mangalore, India |
| 2. | Name, address and Nationality of the Publisher | Dr. Tharanatha<br>Indian<br>Principal & Chairman<br>S.D.M. Law College<br>Centre for P.G. Studies & Research in Law<br>Mangalore - 575 003. |
| 3. | Name, address and Nationality of the Editor | Dr. Tharanatha<br>Indian<br>Principal & Chairman<br>S.D.M. Law College<br>Centre for P.G. Studies & Research in Law<br>Mangalore - 575 003. |
| 4. | Periodicity of Publication | Lex Plus Student Law Review 2024 |
| 5. | Name, address and Nationality of the Printer | Udaya Printery & Publication (P.) Ltd.,<br>Kodialbail, Mangalore - 575 003<br>Indian |

I, Dr. Tharanatha do hereby declare that the above contents are true to the best of my knowledge.

Date: August, 2024

**Dr. Tharanatha**
Editor-in-chief


SDM
LAW
COLLEGE
SDM COLLEGE OF
BUSINESS MANAGEMENT


SHRI DHARMASTHALA MANJUNATHESHWARA LAW COLLEGE
CENTRE FOR POSTGRADUATE STUDIES & RESEARCH IN LAW, MANGALURU-575003
February 16 and 17, 2024


सत्यमेव जयते


LAW COLLEGE
LEX ULTIMA
2024


ಕಾರ್ಯಾಗಾರ - 2024


S.D.M.L.C