



ALLIANCE  
UNIVERSITY

*Private University established in Karnataka State by Act No.34 of year 2010  
Recognized by the University Grants Commission (UGC), New Delhi*

Alliance School of Law

# LEX ET MUTATIO

LAW AND SOCIAL TRANSFORMATION



Volume IV





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# **LEX ET MUTATIO**

## **LAW AND SOCIAL TRANSFORMATION**



**Volume IV**

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**LEX ET MUTATIO**  
**LAW AND SOCIAL TRANSFORMATION**  
**VOLUME IV**

Editors:

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## MESSAGE FROM PRO- CHANCELLOR

*“Education is the most powerful weapon which you can use to change the world.”*

- Nelson Mandela.

In a world characterized by rapid globalization and complex legal challenges, **LEX-ET-MUTATIO: LAW AND SOCIAL-TRANSFORMATION**’s role in disseminating complex research and understanding interdisciplinary collaboration is more important than ever. We believe that this book serves as a medium for scholarly discourse, intellectual exchange, and advancing the growth of legal knowledge and research. Through our rigorous peer review process, we ensure that only the highest quality research is published offering readers a comprehensive understanding of the latest developments and emerging trends in this field. The thought-provoking research acts as a new chapter for societal evolution.

Given the intricate relationship between law and society, legal education plays a pivotal role in identifying and articulating the critical factors that catalyse necessary societal changes. The book brings together the insights of a distinguished ensemble of legal professionals, including academicians, industry experts, students, and practitioners from various disciplines. Through their contributions, they provide a comprehensive exploration and understanding of the intricate issues that shape and sometimes distort the legal and social fabric.

This volume, a compilation of research papers presented at the International Conference on Law and Social Transformation (ICLS-2024), organized by Alliance School of Law, Alliance University, Bengaluru, presents various viewpoints on today’s pressing legal and social issues. I commend the editors for their diligent efforts in curating this invaluable collection. Lex-et-Mutatio is poised to make a substantial contribution to the broader research landscape and to inspire those who are dedicated to the pursuit of social justice and progress.

**Mr. Abhay G. Chebbi**  
Pro- Chancellor  
Alliance University, Bengaluru



## MESSAGE FORM VICE-CHANCELLOR

*“Development consists of the removal of various types of unfreedoms that leave people with little choice and little opportunity of exercising their reasoned agency. The removal of substantial unfreedoms, it is argued here, is constitutive of development.”*

- Amartya Sen

Law, as a dynamic force within the society, acts for the purpose of transformative change in a just manner. It interacts with communities and their individual members, shaping their collective experiences and aspirations. Moreover, law plays a crucial role in integrating nature into the society, a function that has become increasingly important in the context of evolving economics, science, and technology.

While contemporary educational frameworks often compartmentalize law, politics, and society into distinct academic disciplines, researchers working in these interdisciplinary fields frequently portray their insights. This interdependence reflects the reality of a modern society where these domains are so deeply intertwined that it is inconceivable to imagine one without the other. Legal and societal inquiries can contribute to a more rigorous examination of existing laws and provide a platform for innovative policy formulation that drives tangible social changes.

By employing law as a tool for social change, we cultivate a deeper understanding of social transformation and strengthen the legal boundaries. The complex interplay of social structures and economic relationships in fact influences the various legislative reforms by aligning with the broader contours of human activities to enhance the well-being of the society. **Lex-et-Mutatio: Law and Social Transformation** presents a comprehensive exploration of the complex issues at the intersection of law and social change. We are confident that the efforts of Alliance School of Law in convening experts from diverse fields will undoubtedly provide a substantial impetus to the field of socio-legal research.

**Dr. Priestly Shan B**  
Vice-Chancellor  
Alliance University, Bengaluru



## MESSAGE FROM THE DEAN

*“Fight for the things that you care about but do it in a way that will lead others to join you”*

- Ruth Bader Ginsburg

Social transformation, which is a collective aspiration for progress, is a positive change that is closely linked with various other changes. Law as an integral part of our society plays an important role in driving this transformation. A strong law is necessary for peace and harmony in society. Laws act like dynamic forces that help us on how to purposefully and meaningfully change things today whilst preserving them for tomorrow.

All these years law has been a great defender of social transformation, but still we need to note that some unresolved issues become more and more serious over time. Then, the implementation of the available laws is required for any real transformation of society. **Lex-et-Mutatio** provides insights into how different aspects of law have influenced changes within the social sphere as well as how these changes were received by the formal judicial system. The book contains wide-ranging research papers covering fields including Artificial Intelligence, Ethics, Social Transformation, Arbitration and Conflict Resolution, Banking Laws, and various other challenges in legal education.

This publication has established a platform for excellence in legal research, developed by the School of Law. Much credit goes to the dedicated committees who successfully established Lex-et-Mutatio through their unwavering commitment.

**Dr. V Shyam Kishore**  
Professor & Associate Dean  
Alliance School of Law,  
Alliance University, Bengaluru

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The Editors of **Lex-et-Mutatio: Law and Social Transformation, Volume IV**, extend their sincere gratitude to the management of Alliance University, Bengaluru, for their unwavering support and encouragement in facilitating the International Conference on Law and Social Transformation (ICLS)-2024. We are particularly indebted to the Hon'ble Pro-Chancellor, Mr. Abhay G. Chebbi, and his office for their invaluable guidance, enthusiastic involvement, and words of encouragement.

We would also like to express our appreciation to Dr. Priestly Shan Boaz, Vice-Chancellor, Alliance University, for his constant support and motivation, which have been instrumental in the successful publication of this edition. Additionally, we are grateful to Dr. Prakash I N and his dedicated library staff for their invaluable coordination and efforts in facilitating research.

We extend our heartfelt thanks to our Dean, Prof. (Dr.) V. Shyam Kishore, for his unwavering support and guidance in making the publication of the conference book a reality.

This academic endeavour would not have been possible without the significant contributions of the authors and co-authors featured in this edition. Their perseverance, dedication, and hard work are deeply appreciated. We are proud to present this volume as a tangible step towards achieving quality research output.

We express our profound gratitude to the esteemed Faculty Members and Administrative Staff of Alliance School of Law for their steady support and dedication. We would like to acknowledge the exceptional contributions of our Student Editors, whose tireless efforts have been instrumental in ensuring the high quality of this publication. We extend our sincere thanks to all those who have contributed to this academic endeavour. Finally, we express our gratitude to the Divine for blessing us with the courage and determination to contribute to the holistic advancement of the legal fraternity through academic research and excellence.

Editorial Committee,  
LEX ET MUTATIO: LAW AND SOCIAL TRANSFORMATION

## PREFACE

**Lex-et-Mutatio: Law and Social Transformation, Volume IV** presents a compendium of scholarly articles exploring the nexus between law and society. This volume offers a nuanced analysis of contemporary societal dynamics, examining a plethora of topics including transformative constitutionalism, technology and social media activism, humanitarian crises and vulnerable populations, entrepreneurship, taxation, emerging paradigms of intellectual property rights, climate change, and global sustainability.

Through a rigorous examination of these issues, the volume highlights the pivotal role of law in catalysing social transformation. It explores the intricate interplay between legal frameworks and societal dynamics, identifying areas where existing laws may be inadequate or obsolete. By presenting a panoply of perspectives and offering innovative solutions, the volume contributes to a more nuanced understanding of the challenges and opportunities faced in the contemporary times.

This publication serves as a valuable resource for legal scholars, policymakers, and anyone interested in the intersection of law and society. It encourages critical thinking, stimulates academic discourse, and provides insights into the evolving legal landscape.

Sincerely,  
Editorial Committee,  
LEX ET MUTATIO: LAW AND SOCIAL TRANSFORMATION





## INTRODUCTION

**“LEX-ET-MUTATIO: LAW AND SOCIAL TRANSFORMATION”** serves as a preeminent platform for legal scholarship and discourse. Within these pages, we embark on an intellectual journey through the intricate landscape of law, where insightful analyses, pioneering research, and thoughtful commentary come together to shape and enrich the legal landscape. In an epoch defined by dynamic legal challenges and evolving jurisprudence, our publication stands as a beacon of erudition, fostering an environment where legal minds from diverse backgrounds convene to engage in meaningful dialogues.

With an unwavering dedication to intellectual rigor and integrity, we strive to offer a forum for scholars, practitioners, and students to contribute to the ongoing discourse on legal theory and practice. Each edition of Lex-et-Mutatio encapsulates a mosaic of thought-stirring research papers that delve into an array of legal disciplines. From Constitutional Law to International Agreements, from cutting-edge technological advancements to timeless ethical predicaments, we traverse the expansive realm of legal contemplation, providing a comprehensive exploration of issues that mould societies and individuals together. Our editorial board comprises esteemed legal authorities and academicians who diligently goes through each submission, ensuring the utmost standards of quality and precision.

As a promoter of legal knowledge and innovation, we extend our invitation to authors worldwide to share their insights, fostering a global network of legal scholarship transcending boundaries and ideologies. Lex-et-Mutatio extends an open invitation to emerging practitioners, legal scholars, professionals, academicians, or enthusiasts with an abiding curiosity in the legal profession. As we embark on this journey collectively, our aim is to illuminate the intricacies of legal theory, question prevailing norms, and stimulate discussions that pave the way for a more equitable and just future. This volume holds a distinctive place as it sheds light on contemporary concerns across the spectrum of its study areas. We hold firm confidence that this book will continue to inspire readers to engage in socio-legal research, which will ultimately foster in enhancing the society at large.

Editorial Committee,  
LEX ET MUTATIO: LAW AND SOCIAL TRANSFORMATION



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**CHAPTER - 1**  
**ENTREPRENEURSHIP, TAXATION AND**  
**EMERGING PARADIGMS OF IPR**



# AN ANALYTICAL STUDY OF THE RIGHT OF PERSONALITY IN THE AGE OF AI

Dr. Avishek Chakraborty<sup>1</sup>

Dr. Shampa Dev<sup>2</sup>

## INTRODUCTION

Generative AI technologies has brought sea changes in respect of content creation and resulted in introducing new challenges in the realm of protection of personality rights. When the landscape of artificial intelligence is evolving fast, the scope and extent of protection of personality rights is extensively tested. An ongoing case that highlights the friction between technological innovation and protection of personality rights is pertaining to the acclaimed Indian singer, Arijit Singh. A lawsuit has been filed by Mr Singh challenging the illicit use of his voice and likeness through use of generative AI technologies.<sup>3</sup> This ongoing litigation indicates the need for outlining a legal framework that caters to the issues raised by such use of generative AI technologies, that imitate personal attributes of individuals with remarkable precision.

The expression, ‘personality rights’ refer to the protection, that are provided to protect the name, image, voice and likeness of a particular individual, against unconsented use of such personal attributes. It is contended that personality rights emanate from rights to privacy and property. The purpose of protection of these rights is to guarantee that individuals, including celebrities can control the commercialisation and proper attribution of their personal attributes. With the objectives of increasing sales, the name, photograph or voice of a celebrities are used without proper license and this, in turn, has the capability to harm the reputation or brand value of such celebrities.<sup>4</sup>

Generative AI technologies, such as deepfakes and voice synthesis have advanced rapidly. This enabled the creation of highly realistic imitations of individuals. These technologies raise

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1. Assistant Professor, School of Law, CHRIST (Deemed to be University), Bengaluru.
  2. Professor, School of Law, CHRIST (Deemed to be University), Bengaluru.
  3. Shashwat Singh, *Bombay High Court grants interim relief to Arijit Singh in suit to protect his personality rights*, BAR & BENCH (Aug. 11, 2024, 10:30 AM), <https://www.barandbench.com/news/bombay-high-court-interim-relief-arjit-singh-personality-rights>.
  4. Sri Sudharsan S, AI and Personality Rights: Legal Implications, 6 INT’L J. LAW MGMT. & HUMAN. 2278 (2023).

significant legal and ethical concerns, particularly regarding the unauthorised use of individual's likeness. Given the profound transformations driven by generative AI, this paper examines the origins and development of personality rights, particularly the right of publicity. Following this, the discussion shifts to how certain legal challenges from the pre-internet age have resurfaced in recent years, albeit in modified forms, due to advances in technology, such as AI-generated deepfakes, style transfers, and web scraping have reshaped the landscape of personality rights. This article contends that while personality rights remain a crucial mechanism for safeguarding individual identities, they must adapt to the new challenges posed by artificial intelligence. As AI technologies increasingly blur the lines between authentic and synthetic representations, there is a necessity for legal reforms that account for both the economic value of personal identity in respect of AI-generated imitation. These reforms should aim to strike a balance between protecting individual rights and fostering innovation in the creative industries.

## **LEGAL FRAMEWORK PERTAINING TO PROTECTION OF PERSONALITY RIGHTS**

The protection of personality rights is a developing field of law, especially when we bring the context of usage of emerging technologies, like generative AI. Different jurisdictions have tried to address the challenges created by use of generative artificial intelligence regarding protection of personality rights. The rights connected with an individual's distinctive or unique identity, which includes his or her name, mannerism, persona and likeness.<sup>5</sup> These unique attributes are often considered as a form of property that is enforced by the individual or celebrity exclusively. This unique identity, in the form of property rights, are enforced for commercial purposes. In this connection, Lockean labour theory of property is applied to justify protection of personality rights. This theory asserts the fruits of one's labour, skill and effort belong to that individual, since the individual invest substantial dignitary, emotional and moral value in developing their identity and personality. In turn, this public image set certain expectations for themselves in society. Subsequently, this developed personality and identity get attached to celebrity's public image. Celebrities, such as athletes, or actors have specific images that they cultivate, which can be violated when the media associates with them products or activities that contradict their public persona. This not only tarnishes their reputation but also infringes on their moral and personality rights.<sup>6</sup>

As discussed before, personality rights are considered as an individual or celebrity's intellectual property as these rights are linked to an individual's image, name or likeness. In

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5. Agnes Augustian, Protection of Personality Rights in India: Issues and Challenges, 1 IPR J. MAHARASHTRA NAT'L L. UNIV. NAGPUR 44 (June 2023).

6. Anrag Pareek & Arka Majumdar, Protection of Celebrity Rights – The Problems and the Solutions, 11 J. INTELL. PROP. RTS. 415 (November 2006).

many jurisdictions, including India, the right to privacy is regarded as a fundamental right under the Constitution. This right provides a foundation for personality rights, since it protects individuals from unauthorised use of their personal attributes. In certain cases, trademark laws can intersect with personality rights, especially when a person's name or likeness is used as a brand identifier. While not specifically designed for personality rights, these laws can offer some level of protection. With the rise of digital technology, data protection laws are increasingly relevant. These laws govern the use of personal data, which can include aspect of an individual's personality and offer protection against misuse. Judiciary has played a substantial role in determining the nature and scope of personality rights in India and in other jurisdictions as well

### **SCOPE AND EXTENT OF PROTECTION OF PERSONALITY RIGHTS**

For the purpose of proving infringement of personality rights, including the publicity right, it is necessary to establish that the identity of the plaintiff has been unauthorisedly used by the defendant. It would be necessary to establish that the defendant has used the name, likeness, voice, photograph, signature or any distinctive identity of the plaintiff.<sup>7</sup> It will be also necessary to establish that the identity of the plaintiff has been commercially appropriated by the defendant for their own benefit. In certain jurisdictions, not only commercial, but also non-commercial uses are also included in this regard. In addition to that, it will be essential to prove that the consent for the use of the unique identity of the plaintiff has not been obtained and because of such unauthorised commercial exploitation injury has been caused to the plaintiff.<sup>8</sup>

In addition to the usage of an individual's mannerism, likeness or name, the personality right incorporates the wider concept of 'persona.' This refers to a broad range of characteristics that are distinctively related to an individual, including the unique voice, mannerisms and other similar attributes that general public would regard as belonging to that individual or celebrity. The concept of persona is inherently broad and flexible, as it must account for the myriad ways in which an individual's identity can be represented and exploited. Courts often look to whether a 'relevant segment to the public' can connect the commercial work to the plaintiff, which means that the association does not have to be universally recognised, but it must be recognisable to a significant portion of the audience that the work is intended to reach.<sup>9</sup> The right of personality is distinct from copyright law, which protects original works of authorship fixed in a tangible medium of expression. Copyright law is concerned with the unauthorized reproduction, distribution, public display, performance, and creation of derivative works based

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7. Quinn Emanuel Trial Lawyers, The Right of Publicity in the AI Age. <https://www.quinnemanuel.com/the-firm/publications/the-right-of-publicity-in-the-ai-age/> (last visited August 11, 2024).

8. *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001);

9. *An Abridged History of the Right of Publicity*, <https://rightofpublicity.com/brief-history-of-rop> (last visited August 11, 2024).

on the copyrighted material. In contrast, the right of publicity is about the unauthorized use of an individual's identity for commercial purposes.<sup>10</sup>

### **PROTECTION OF PERSONALITY RIGHTS UNDER THE COPYRIGHT ACT, 1957**

The Copyright Act, 1957 primarily protects the rights of creators over their original works, such as literary, artistic, musical, and cinematographic works. While the Act is not explicitly designed to protect personality rights, certain provisions within the Act can be invoked to safeguard aspects of an individual's personality, particularly when these aspects are expressed or embodied in a protected work. If an individual's likeness, image, or any other aspect of their personality is captured in an artistic work, such as a photograph, painting, or sculpture, that work is protected under the Copyright Act.<sup>11</sup> Unauthorised reproduction, distribution, or commercial exploitation of such works would lead to copyright infringement.<sup>12</sup> For example, a celebrity's image used without permission in a photograph could give rise to cause of action if that image is reproduced without consent. Biographies, films, and other works that depict a person's life story or character could also involve personality rights. If a film or book uses a person's likeness or identity in a manner that misrepresents them or harms their reputation, the person may seek protection under the Copyright Act, 1957 by claiming infringement if the depiction violates the copyright of a work they have created or authorised.

At this juncture it is relevant to note that copyright protection does not extend to facts, compilation of facts, themes, storylines, concepts, or historical events.<sup>13</sup> These elements are considered part of the public domain and are not eligible for copyright protection. As a result, the protection of personality rights in the context of films or other works based on real-life stories or themes is inherently limited. When a film is produced based on a real-life story or theme, the creators are free to use information and historical events without infringing copyright. However, this also means that the individuals portrayed in such works have limited recourse to protect their personality rights through copyright law. Although the objective behind protection of the rights of personality is protection against unauthorised commercial use of an individual's name, mannerism or identity, such protection cannot be extended to the representation of factual events, related to such individual or personality. Copyright law protects original work of authorship. Such protection does not expressly cover general aspects of the right of personality, which includes commercial use of an individual's identity, name, voice or mannerism. Therefore, copyright protection is restricted or limited to the unlicensed

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10. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992).

11. Copyright Act, 1957, § 2(c), No. 14, Acts of Parliament, 1957 (India).

12. Copyright Act, 1957, § 51, No. 14, Acts of Parliament, 1957 (India).

13. *R G Anand v Deluxe Films* 1978 4 SCC 118.



commercial exploitation of the personal attributes of an individual. This proposition extends to those circumstances which does not contain any copyright protected work.

## **PROTECTION OF PERSONALITY RIGHTS BY WAY OF PERFORMER'S RIGHTS PROTECTION**

Performer's rights, also known as allied or neighbouring rights, guarantee protection to performers over their performances under the Copyright Act, 1957. Section 38 of the Copyright Act, 1957 grants performers rights over their performances in various forms of creative works, including literary works, films, and music.<sup>14</sup> These rights are conferred to protect performers by giving economic and moral rights over the use of their performances. Performers are entitled to the rights for a duration of 50 years, starting from the calendar year in which the performance took place.<sup>15</sup> Section 38A of the Act provided performers with the crucial right to prohibit any unauthorised actions related to their performances. Specifically, it allows performers to prohibit others from making audio or video recordings of their performances, as well as from broadcasting or communicating these performances to the public without their explicit consent.<sup>16</sup>

There is an intersection between performer's rights and personality rights, particularly when a performer's identity, for instance, their image or voice, is central to the performance. For instance, a famous actor's performance might simultaneously invoke performer's rights, protecting the performance, and personality rights, protecting the actor's likeness. Performer's rights alone do not fully protect personality rights. They primarily address the use of the performance itself, while personality rights extend beyond the performance to cover broader aspect of a person's identity. If a recording of a live concert by a famous singer is made without consent, performer's rights could be invoked to prevent the distribution of that recording. However, if someone uses the singer's image to sell merchandise without permission, personality rights would come into play to prevent unauthorised commercial exploitation of the singer's likeness. While performer's rights can indirectly support personality rights by protecting the use of the performances, they do not replace or fully encompass personality rights.

## **PROTECTION OF PERSONALITY RIGHTS THROUGH JUDICIAL PRECEDENTS IN INDIA**

In India, judicial precedents have played a crucial role in recognising and protecting personality rights, although these rights are not explicitly codified in Indian law. The courts have drawn from various legal principles, including the right to privacy, the right to publicity and

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14. Copyright Act, 1957, § 38, No. 14, Acts of Parliament, 1957 (India).

15. Copyright Act, 1957, § 38, No. 14, Acts of Parliament, 1957 (India).

16. Copyright Act, 1957, § 38A, No. 14, Acts of Parliament, 1957 (India).

the principles of tort law, to provide protection to individuals against unauthorised commercial use of their persona. Courts in India have recognised the right to publicity as a component of personality rights, especially for celebrities. In **ICC Development (International) Ltd. v Avree Enterprises**,<sup>17</sup> the Delhi High Court acknowledged the right of an individual to commercially exploit the distinctive identity or the personality as well as to prohibit the unauthorised commercial exploitation of such personality. In **DM Entertainment Pvt. Ltd. v. Baby Gift House and others**<sup>18</sup> the famous singer Daler Mehndi alleged unauthorised commercial usage of his image in production of toys and other merchandise. The court recognised Daler Mehndi's right to restrain the commercial use of his image. This precedent highlight significance of the protection of the rights of personality.

In **Shivaji Rao Gaikwad v. Varsha Productions**,<sup>19</sup> the famous actor Rajinikanth alleged unlicensed use of his name and image in a film, "Main Hoon Rajanikanth." The personality of Mr Shivaji was acknowledged by the Madras High Court and issued an injunction order restraining the defendants from using Rajinikanth's name and image without proper consent or license. Through this precedent, the court highlighted that without obtaining proper consent the name and image of a celebrity should not be commercially exploited. The Madras High Court laid down two criteria for protection of personality rights, (a) identifiability and (b) validity. The Court observed that, an individual can claim infringement of personality rights if general members of the public can identify the name, character or image of such individual in a work. Finally, the Court upheld Rajinikanth's argument by acknowledging the substantial commercial value of his persona, because of his celebrity status and established the requirement of validity.

The decision of the Delhi High Court in **Titan Industries Ltd. v. M/S Ramkumar Jewellers**<sup>20</sup> emphasises the general principle that unlicensed use of well-established persona or identity of an individual is likely to bring about legal consequences. In **Rajat Sharma and another v. Ashok Venkatramani and another**,<sup>21</sup> the Delhi High Court addressed the issue of using the persona of a public figure without obtaining necessary permission. This precedent extended the scope of personality rights beyond the scope of common law protection in the form of defamation. In this manner, the decision ensured proper control of an individual's likeness and reputation against unauthorised commercial exploitation. In **Jaikishan Kakubhai**

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17. ICC Development (International) Ltd. v Avree Enterprises 2003 (26) PTC 245 (Del).

18. DM Entertainment Pvt. Ltd. v. Baby Gift House and others MANU/DE/2043/2010; CS(OS) 893/2002.

19. Shivaji Rao Gaikwad v. Varsha Productions 2015 SCC Online Mad 158.

20. Titan Industries Ltd. v. M/S Ramkumar Jewellers 2012 (50) PTC 486 (Del).

21. Rajat Sharma and another v. Ashok Venkatramani and another IA No.382/2019 & 383/2019.

**Saraf alias Jackie Shroff v. The Peppy Store and others**,<sup>22</sup> the Delhi High Court approached the concern of unauthorised appropriation of the likeness of a public figure. This case involved the use of the name and image of popular actor, Jackie Shroff and emphasises on enforcement of personality rights in India. There was an allegation of unauthorised commercial appropriation of the persona of Mr Shroff without consent by the Peppy Store in endorsement and promotion of their products. The Court observed that this type of unlicensed commercial use has the potential of misleading consumers in believing that Peppy Store's product has been endorsed by Mr Shroff. Consequently, this leads to violation of the right of Mr Shroff to control the use of his commercial identity. This case reinforces the principle that celebrities have the exclusive right to their name, image, and persona, protecting them from unauthorised commercial use that could exploit their reputation and mislead the public.

## RIGHT OF PERSONALITY IN THE DIGITAL ERA

In the pre-digital era, right of personality claims were primarily brought by public figures or celebrities.<sup>23</sup> This was logical given that such individuals had developed a property interest with financial value, and their identities carried substantial commercial worth due to their public prominence. The requirement for proving damages typically hinged on having established such value.<sup>24</sup> However, the digital era has significantly transformed the landscape of right of publicity litigation, extending beyond merely replicating past precedents. Different factors contributed to this evolution.

Firstly, the traditional distinctions between public and private figures have become less relevant as private individuals increasingly lead public or quasi-public lives through platforms like Instagram, Twitter, Facebook, Pinterest, and Periscope.<sup>25</sup> These online spaces are rapidly evolving, with users forming emotional, reputational, and sometimes economic connections to their digital profiles. Many have achieved a level of fame, often referred to as "going viral," that was once reserved for traditional celebrities. Consequently, the economic value of these digital profiles, regardless of their reach, has become significant. Additionally, the users of digital technologies and new media leave an inadvertent digital footprint with nearly every online interaction. Advances in technology have broadened the ways in which an individual's persona can be captured and utilised. For instance, Generative AI – machine learning systems that analyse publicly available data to create derivative works – can use individuals' likenesses

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22. Jaikishan Kakubhai Saraf alias Jackie Shroff v. The Peppy Store and others CS(COMM) 389/2024.

23. Lerman v. Flynt Distributing. Co., 745 F.2d 123 (2d Cir. 1984).

24. Jim Henson Productions. v. John T. Brade & Assocs., Inc., 867 F. Supp. 175 (S.D.N.Y. 1994).

25. Jennifer Rothman, The Right of Publicity: Privacy Reimagined for a Public World 181 (2018).

for various application. Popular technologies such as deepfakes, which swap faces in videos and conversational AI models like ChatGPT, which generate responses based on user interactions, often utilise aspects of a person's identity, such as facial images or voice recordings.<sup>26</sup> These developments underscore the need for robust protection of personality rights in the digital age.

The Writers Guild of America (WGA) recently garnered global attention for their protests against unfair treatment of their members. As a labour union representing writers in film, television, radio and other media, the WGA raised concerns about the regulation of AI-generated content.<sup>27</sup> The writers argue that AI's involvement in television productions undermines their creative contributions and risks allowing production companies to use AI to modify scripts without proper acknowledgement of the original writers. Similarly, the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA) has also been advocating for protections against the misuse of AI in the entertainment industry. SAG-AFTRA has called for safeguards from the Alliance of Motion Pictures and Television Producers, emphasising the need to protect human-created work and secure consent before any alterations are made to an actor's voice, performance, or likeness.<sup>28</sup> Notably, the voices of several prominent actors, including Samuel L. Jackson and Mark Hamill, have been used by producers for AI-generated voiceovers in television shows, raising further concerns about the ethical use of their digital likeness.<sup>29</sup> When combined with the two foundational principles established by right of publicity litigation in the pre-digital era, namely, the protection of an individual's identity or persona and the evolving methods of wrongful appropriation, these elements have led to new litigation and legislative developments that push the boundaries of the right of personality. Recent advancements in four key areas warrant scrutiny: (1) deepfake technologies; (2) style transfers; and (3) web scrapping.

## DEEPPFAKE TECHNOLOGIES

Deepfakes, a combination of 'deep learning' and 'fakes,' refer to highly realistic and often hard-to-detect digital alterations of audio or video content.<sup>30</sup> The rapid advancement in

26. Quinn Emanuel Trial Lawyers, *The Right of Publicity in the AI Age*, <https://www.quinnemanuel.com/the-firm/publications/the-right-of-publicity-in-the-ai-age/> (last visited on August 11, 2024).

27. Molly Kinder, *Hollywood writers went on strike to protect their livelihoods from generative AI. Their remarkable victory matters for all workers*, BROOKINGS (Aug. 11, 2024, 11:00 AM), <https://www.brookings.edu/articles/hollywood-writers-went-on-strike-to-protect-their-livelihoods-from-generative-ai-their-remarkable-victory-matters-for-all-workers/>.

28. Andrew Dalton, *AI is the wild card in Hollywood's strikes: Here's an explanation of its unsettling role*, AP NEWS, (Aug 11, 2024, 11:30 AM). <https://apnews.com/article/artificial-intelligence-hollywood-strikes-explained-writers-actors-e872bd63ab52c3ea9f7d6e825240a202>.

29. Ibid.

30. Robert Chesney & Danielle Citron, *Deepfakes and the New Disinformation War: The Coming Age of Post-Truth Geopolitics*, FOREIGN AFFS., Jan./Feb. 2019, at 147-48.

deepfake technology has significantly increased its speed, believability and scalability, making detection and prevention extremely challenging. Regulating deepfakes has been problematic. In the USA, states like Hawai, Texas, Virginia, and Wyoming have criminalised non-consensual pornographic deepfakes, while New York and California offer a private right of action for victims to pursue civil lawsuits.<sup>31</sup> In April 2023, Kyland Young, a reality TV cast member known for CBS's Big Brother, filed a class action lawsuit against NeoCortex Inc., the developer of the 'Reface' app.<sup>32</sup> The app allows users to swap their faces with those of celebrities and other public figures by using a searchable catalogue of images and videos compiled from various websites. Young claimed that Reface used his images and videos without his consent or compensation, particularly in watermarked previews for the subscription version, 'Reface PRO.' His lawsuit, filed under California Civil Code section 3344,<sup>33</sup> alleges a violation of his right of personality. This case highlights the legal challenges related to deepfake technology and unauthorised use of personal images.

## STYLE TRANSFERS

In addition to targeting deepfake technologies, plaintiffs are increasingly asserting right of personality claims against generative AI, even when the technology does not use their actual likeness or voice. Some generative AI programs enable 'style transfers', where the AI is instructed to 'draw [X] in the style of [Y]' or 'sing [X] in the style of [Y].'<sup>34</sup> Since these algorithms are often trained on the original works of specific artists, plaintiffs typically pursue claims of direct and vicarious copyright infringement. They may also bring related causes of action, including violations of the Digital Millenium Copyright Act, unjust enrichment, conversion, and unfair competition.<sup>35</sup> Since these generative AI programs can create 'clones' that closely resemble an artist's work, some plaintiffs are incorporating common law and statutory right of publicity claims in their lawsuits. This was the case in **Andersen v. Stability AI Ltd.**, a putative class action against the creators and distributors of AI image-generation programs like

31. Isaiah Poritz, *States Are Rushing to Regulate Deepfakes as AI Goes Mainstream*, BLOOMBERG LAW (Aug. 11, 2024, 11:15 AM), <https://www.bloomberg.com/news/articles/2023-06-20/deep-fake-porn-political-ads-push-states-to-curb-rampant-ai-use>.

32. *Young v. NeoCortex, Inc.*, Civ. A. No. 2:23-cv-02496-WLH(PVCx), compl. (N.D. Cal. Apr. 3, 2023).

33. Cal. Civ. Code § 334.

34. *Generative AI Models Explained*, AltexSoft (October 13, 2022) <https://www.altexsoft.com/blog/generative-ai/> (last visited August 11, 2024).

35. See generally *Chabon v. OpenAI*, Civ. A. No. 3:23-cv-04625, compl. (Sept. 8, 2023); *Silverman v. OpenAI*, Civ. A. No. 3:23-cv-03416, compl. (N.D. Cal. July 7, 2023); *Kadrey v. Meta Platforms, Inc.*, Civ. A. No. 3:23-cv-03417, compl. (N.D. Cal. July 7, 2023).

Stable Diffusion, Midjourney, DreamStudio and DeamUp.<sup>36</sup> Here, the plaintiffs argued that their ‘names and artistic identities’ are not only confined to specific copyright protected works but also encompass their entire body of work, allowing the public to recognise art created ‘in the style’ associated with them. Plaintiffs claim that the ‘knock-off’ images produced by these style-transfer programs dilute the market, mislead consumers, deprive artists of commissions and fail to be considered as ‘transformative’ since they simply exploit the stolen artistic work and the inherent value of the name and identities of the plaintiffs. Considering the significant role that ‘style transfers’ play in many generative AI programs, the decision of the court in this case is highly anticipated. It is expected to set a critical precedent for visual artists, musicians and authors, potentially shaping the future of how their work is protected in the context of AI-generated content.

## WEB SCRAPING

‘Web scrapping,’ the automated process of using bots to extract content, data and HTML code from websites, marks another significant intersection between emerging digital technologies and the expanding right of personality. Early cases involving the right of publicity and scraping technologies emerged from practices by social networking sites, which often aggregated users’ personally identifiable information to create targeted advertisements or endorsements, showcasing that a ‘friend’ within one’s network had liked or purchased a product<sup>37</sup>. While right of personality claims historically involved celebrities, models, entertainers or professionals who had cultivated commercially exploitable value through their efforts, courts analysing social media PII cases have generally determined that a plaintiff does not need to have developed such value through personal talent or effort to seek damages. In essence, the right of personality applied to all individuals, regardless of fame or skill.<sup>38</sup>

Over time, right of personality cases, such as **Fraley v. Facebook**,<sup>39</sup> a class action that survived a motion to dismiss and ultimately settled, proved costly or threatening to social networking sites. To avoid such claims, these platforms turned to consent as a complete defense. By adding or modifying terms in their service agreements, they secured a license to scrape and use users’ PII in exchange for access to their platforms, effectively pre-empting right of personality lawsuits. However, obtaining such consent is not a viable option many generative AI

36. Andersen v. Stability AI Ltd., Civ. A. No. 3:23-cv-00201, compl. ¶¶ 201-222 (N.D. Cal. Jan. 13, 2023) (asserting both statutory and common-law right of publicity claims under California law).

37. Parker v. Hey, Inc., 2017 Cal. Super. LEXIS 609 (Cal. Sup. Ct., S.F. Cnty., Apr. 14, 2017); Fraley v. Facebook, Inc., 830 F. Supp. 2d 785 (N.D. Cal. 2011); Cohen v. Facebook, Inc., 2011 WL 5117164 (N.D. Cal. Oct. 27, 2011); Cohen v. Facebook, Inc., 798 F. Supp. 2d 1090 (N.D. Cal. 2011).

38. Fraley v. Facebook, Inc., 830 F. Supp. 2d 785 (N.D. Cal. 2011).

39. 830 F. Supp. 2d 785 (N.D. Cal. 2011)



programs. As a result, plaintiffs are now asserting that the mere act of scraping data containing aspects of an individual's identity constitutes actionable misappropriation under the right of personality. The case **in re Clearview AI Inc., Consumer Privacy Litigation**<sup>40</sup> offers a glimpse into the future of such claims. Here, Clearview AI, a facial recognition software was sued for misappropriating three billion images without obtaining consent. This led to the allegation of violation of the right of personality.

### **THE CURIOUS CASES OF ARIJIT SINGH AND ANIL KAPOOR – INTERSECTION OF RIGHT OF PERSONALITY AND GENERATIVE AI IN INDIA**

Generative Artificial Intelligence can mimic the likeness or voice of an individual with higher accuracy through deep learning and can create realistic audio, images and video. This advent of the use of generative AI has raised significant concerns regarding the protection of the rights of personality in India. Unauthorised use of personal attributes of Arijit Singh, a well-known playback singer and Anil Kapoor, an acclaimed Bollywood actor by using generative AI has brought into forefront the challenges posed by such technologies in protection of personality rights in India. These cases of unauthorised commercial use of personal attributes of celebrities by generative AI need to be explored to analyse the broader implications of such technologies on protection of personality rights, including celebrity rights.

#### **THE CASE OF ARIJIT SINGH**

In **Arijit Singh v. Codible Ventures LLP and others**,<sup>41</sup> singer Arijit Singh has been successful in obtaining an interim relief from the Bombay High Court in a lawsuit involving infringement of his personality rights. The plaintiff contended that multiple AI platforms have generated audio and visual content that has mimicked plaintiff's name, voice, image, caricature, likeness and other personal attributes. By using advanced algorithms these AI platforms used text-to-speech software that helped users to convert written text into voice of Arijit Singh. The unauthorised exploitation of Singh's persona extended beyond AI platforms. For instance, a pub in Bangalore used Singh's name and image to promote an event without his consent. Additionally, another defendant was selling merchandise featuring Singh's photograph on e-commerce websites, while yet another had registered domain names incorporating Singh's name (e.g., arijitsingh.com) without authorisation.<sup>42</sup>

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40. Re Clearview AI Inc., Consumer Privacy Litigation 585 F. Supp. 3d 1111 (N.D. Ill. 2022).

41. Arijit Singh v. Codible Ventures LLP and others, Interim Application (L) No.23560 Of 2024 in COM IPR Suit (L) No.23443 Of 2024.

42. Vidya, *High Court bars illegal exploitation of singer Arijit Singh's personality rights*, INDIA TODAY (Aug. 11, 2024, 10:45 AM), <https://www.indiatoday.in/law/story/high-court-bars-illegal-exploitation-of-singer-arjit-singhs-personality-rights-2574748-2024-08-0>.

Counsel for Arijit Singh argued that the singer holds exclusive rights to control and commercialise his personality traits. The defendants should be restrained to prevent any potential harm to his reputation. Furthermore, they contended that any unauthorised alteration or distribution of Singh's performance, which could damage his reputation, would constitute a violation of his moral rights under Section 38B of the Copyright Act, 1957.<sup>43</sup> The defence argued that the use of AI-generated content fell under the domain of creative expression and should be protected under the free speech rights. The Court held that the plaintiff had a strong case against the unauthorised commercial misappropriation of the personality trait of Arijit Singh. The Court observed that a celebrity's persona cannot be commercially misappropriated without obtaining consent in the guise of freedom of speech and expression as well as for the purpose of writing critique and commentary. The defendants were prohibited from using the plaintiff's name, voice, mannerisms, photographs and other personal attributes without his consent. It also ordered the suspension of URLs bearing Singh's name.

### THE CASE OF ANIL KAPOOR

In **Anil Kapoor v. Simply Life India and others**,<sup>44</sup> Anil Kapoor, a prominent actor, filed a lawsuit to protect his personality rights, including his name, image, likeness, persona and voice from unauthorised use of the internet. He also claimed right to publicity, copyright in his dialogues and images and protection under common law against passing off, dilution and unfair competition. Anil Kapoor, who has appeared in over 100 films and numerous advertisements, sought to prevent the misuse of his well-known persona. The plaintiff contended that the defendants used his name, image and likeness without his permission for commercial purposes, which constituted a violation of his personality rights. The issue of deepfakes was brought into the suit as a significant aspect of the violation of his personality rights. It was argued that the unauthorised use of his likeness extended to the creation of his deepfake videos and images. These deepfakes manipulated Mr Kapoor's face, voice and other attributes to create content that appeared to be authentic but was entirely fabricated.<sup>45</sup> The Court upheld Anil Kapoor's personality rights and granted a permanent injunction against the defendants, restraining them from using his name, image, likeness, voice or any other attributes of his personality for any commercial purposes without his prior consent. The Court took into consideration the potential harm that has been caused to the plaintiff through the unauthorised use of deepfakes. By way

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43. Copyright Act, 1957, § 38B, No. 14, Acts of Parliament, 1957 (India).

44. *Anil Kapoor v. Simply Life India and others* CS(COMM) 652/2023 and I.A. 18237/2023-18243/2023

45. Jason Nelson, '*Not Only Me*': Actor Anil Kapoor Wins AI Deepfake Court Case, DECRYPT (Aug. 11, 2024, 9:30 AM), <https://decrypt.co/198256/not-only-me-actor-anil-kapoor-wins-ai-deepfake-court-case>.



of using deepfakes, a person's likeness can be digitally altered to create deceptive content.<sup>46</sup> In this way, this precedent acknowledged the role of deepfakes in infringing personality rights of an individual.

## CONCLUSION AND SUGGESTIONS

The accelerated growth of use of AI technologies, especially the application of deepfakes and generative content, has posed substantial questions in respect of protection of personality rights. This paper has attempted to understand the balance required to be maintained between the use of such emerging technologies and the regulatory frameworks intended to protect individual's distinctive and unique identity and personality. The analysis suggests an increasing friction between the future innovative role of AI and the requirement of protecting individual's dignity and autonomy. The ability of generative AI to mimic and replicate human likeness without obtaining license indicate significant risks in respect of protection of personality rights. This requires a re-evaluation of the prevailing standard of legal protection in this regard.

The interim order of the Delhi High Court on the exploitation of singer Arijit Singh's personality rights reinforces the protection of personality rights in India, a concept gaining legal recognition despite the absence of specific statutory recognition. The interim order serves as a warning to businesses and individuals against exploiting a person's identity without explicit consent. The decision can encourage other celebrities to assert their personality rights more aggressively, potentially leading to a more regulated use of personal identities in commercial endeavours. Despite the decision of the court, enforcing personality rights can be challenging. The digital age, characterised by rapid content dissemination and the difficulty of tracking unauthorised use, complicates the enforcement of such rights.

The inclusion of deepfakes in the lawsuit involving Anil Kapoor highlighted the need for expanded protection of personality rights in the digital age. It was argued in the suit that traditional personality rights must evolve to cover the advanced technological manipulation of a person's image and voice, such as through deepfakes, which can have serious reputational and commercial consequences. This suit will pave the way in respect of the manner in which judiciary will deal with the issue of digital manipulations and the protection of personality right.

While legal clarifications and pertinent amendments are waited for, concerned artists might reflect on implementing a collaborative approach with AI developers. Such framework may include acknowledgement of the contribution of original singer while using AI-generated voice in creation of musical works as well as other promotional materials. There is a requirement of

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46. Sunanda Bharti, *Image Rights Alright—But Can They Trump Established Rights and Doctrines? Should They?*, SPICYIP (Aug. 11, 2024, 10:15 AM), <https://spicyip.com/2023/10/image-rights-alright-but-can-they-trump-established-rights-and-doctrines-should-they.html>.

setting explicit licensing standards that indicate the terms of use, including any limitations, the duration of the license and any other relevant conditions. In addition to that, acquiring clear and unambiguous consent from the concerned singer is a key requirement. Implementation of a definite royalty payment system becomes crucial in ensuring the commercial success and use of the AI-generated content. Finally, transparency should be ensured by providing explicit disclaimers whenever AI-generated voices are used. Based on sound ethical principles, this approach can strive to maintain an equilibrium between technological advancement and safeguarding of the rights of artists and celebrities.

## **CROSS -BORDER INSOLVENCY AND JUDICIAL COOPERATION: NAVIGATING LEGAL CHALLENGES AND HARMONISING PRACTICES**

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Dr. Rashmi K S<sup>2</sup>

### **INTRODUCTION**

The potential for enterprises to collapse is one of the economic realities. This failing has the potential to have cascading effects on the economy and adversely impacts the interests of stakeholders, including creditors. Nevertheless, a strong insolvency law framework can mitigate the effect. Businesses that operate within a secure regulatory environment will encounter the least amount of difficulty in resolving insolvency. Consequently, it is unsurprising that the World Bank examines regulations for insolvency resolution as one of the ten areas for comparing and evaluating the convenience of doing business across economies.<sup>3</sup> As economies worldwide become increasingly interconnected and interdependent, they must devise strategies to confront the obstacles posed by cross-border regulations. Businesses now frequently conduct operations across multiple jurisdictions. In such instances, the resolution of insolvency becomes more intricate. Since the mid-20th century, laws concerning cross-border insolvency have become increasingly significant and prominent. The situation in which an insolvent debtor trades, or has assets or creditors, in more than one jurisdiction is addressed by such laws. On the one hand, sovereign national laws enable countries to enforce their national regulations and exercise jurisdiction over businesses that operate within their respective territories.<sup>4</sup> This territorialism provides jurisdictional creditors with a reasonable degree of certainty; however, it has the potential to be unjust to a number of parties in any other international proceeding. However, in order to maintain their appeal to foreign investment and to ensure that their national businesses receive reciprocal courtesy, countries have reluctantly conceded some ground in order to facilitate a seamless resolution of insolvencies that are dispersed across multiple countries. This universalism enables creditors to concentrate on

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1. Ph.D. Scholar, Alliance School of Law, Alliance University, Bengaluru.
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  3. Misra, Priya, and Adam Feibelman, *The Institutional Challenges of a Cross-Border Insolvency Regime*, 2 CORP. AND BUS. LJ, 329 (2021).
  4. Das, Ishita. "The Need for Implementing a Cross-Border Insolvency Regime within the Insolvency and Bankruptcy Code, 2016." *Vikalpa* 45.2 (2020): 104-114.

economic principles during the decision-making process for reorganisation and liquidation, rather than on the “arbitrage inherent in a world of multiple legal systems” with varying degrees of maturity and certainty.<sup>5</sup>

The principles of cross-border insolvency that have been implemented by numerous countries worldwide have facilitated this. The United Nations Commission on International Trade Law (UNCITRAL) has been a leader in the global standardisation of the regulatory framework for cross-border insolvency. It has developed a model law for the same, which has been embraced by numerous countries. An insolvency regime that is both effective and efficient should strive to accomplish specific key objectives, including the following: the maximisation of asset value, the establishment of clear rules for the ranking of priority claims, the recognition of existing creditor rights, the establishment of a framework for cross-border insolvency, the provision for timely, efficient, and impartial resolution of insolvency, and the equitable treatment of similarly situated creditors. A transparent and predictable insolvency law should also be in place, with incentives for the gathering and dispensing of information. A critical objective of any effective insolvency regime is the establishment of a framework for cross-border insolvency. In order to facilitate the provision of assistance in the administration of insolvency proceedings that originate in a foreign country and promote coordination between jurisdictions, insolvency laws should establish regulations on cross-border insolvency, which includes the recognition of foreign proceedings.<sup>6</sup>

In recent times, India has been making progress in the implementation of insolvency resolution regulations. Indeed, the Insolvency and Bankruptcy Code, 2016 (IBC) has been a substantial stride towards the modernisation of insolvency law in India. Nevertheless, the Code does not provide a comprehensive framework for cross-border insolvency. Certainly, two sections offer guidance; however, their scope and application are grossly inadequate. A current endeavour is ongoing to implement modifications to the Code in order to establish a comprehensive regulatory framework for cross-border insolvency.<sup>7</sup>

## THE UNCITRAL MODEL LAW ON CROSS BORDER INSOLVENCY

The UNCITRAL Model Law on Cross Border Insolvency, 1997 was developed by the United Nations Commission on International Trade Law in 1997 with the intention of developing an efficient way for dealing with instances that include insolvency that occurs across international

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5. Shukla, Sudhaker, and Kokila Jayaram. “Cross border insolvency.” (2021).

6. Sikri, A. K., *Cross border insolvency: Court-to-court cooperation*, 51 JOURNAL OF THE INDIAN LAW INSTITUTE, 467-493 (2009).

7. Feibelman, Adam, and Priya Misra., *The Institutional Challenges of a Cross-Border Insolvency Regime*, ARIZONA ST. UNIV. COMMERCIAL AND BUSINESS LAW JOURNAL (2021).

borders. At its thirteenth session, which took place in Vienna on May 30, 1997, the United Nations Commission on International Trade Law (UNCITRAL) approved the Model Law. “In order to facilitate the coordination and settlement of complex insolvency situations that occur across international borders, states have the ability to incorporate the Model Law into their own domestic legal systems. In contrast to a convention established by the United Nations, the Model Law does not mandate that a state must inform the United Nations or any other states of its intention to put it into effect upon its implementation. As of this moment, forty-four states have incorporated the Model Law into their own domestic legal systems, albeit to various degrees. It is interesting to note that the Model Law does not mandate the required unification of the substantive domestic legislation of the many states that are adopting it.”<sup>8</sup>

Access, recognition, relief (help), and collaboration are the four components that are proposed as a means of facilitating the process of cross-border bankruptcy resolution. There are five chapters that make up the Model Law. These subheadings cover general provisions, the access of foreign representatives and creditors to courts in a state, the recognition of foreign proceedings and relief, cooperation with foreign courts and foreign representatives, and the procedure to deal with concurrent proceedings.<sup>9</sup>

An international main proceeding and an international non-main proceeding are both recognised by the Model Law as distinct types of processes. In this study, these ideas are discussed in greater depth than they were previously. In a nutshell, A foreign main proceeding is one that occurs in the country where the main business or assets in which the debtor has the “centre of its main interests.” In the event that the debtor has a “establishment,” a foreign non-main procedure is a foreign process that is distinct from the foreign main proceeding taken in another country. It is possible to determine the “centre of main interests” with the help of the Model Law, which offers direction in this regard. “In addition, the Model Law defines “establishment” as a place of operations where the debtor engages in a non-transitory economic activity using human means and commodities or services. This definition is included for the purpose of recognising a foreign non-main proceeding with the intention of recognising it. In addition, the Model Law has a public policy exemption, which states that courts in a state have the authority to refuse to take an action that is authorised by the Model Law if taking such an action would be “manifestly contrary to the public policy” of that state. Following the incorporation of the Model Law into their own domestic legal systems, states have made modifications that they see as being appropriate for their respective jurisdictions. By way of

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8. Rout, Ipsita. *Universalism v. Territorialism: A plethora of issues in cross border insolvency across jurisdictions and local laws*, 2 INDIAN JL & LEGAL RSCH, 1 (2021)

9. Sharma, Sadhak, *Cross Border Insolvency Mechanism in India: The Need to Adopt UNCITRAL Model Law*, 1 INT’L JL MGMT. & HUMAN, 376 (2021).

illustration, the phrase “manifestly” in the public policy exemption that was addressed before is not included in the domestic legislation of nations like Singapore, but countries like the United States of America and the United Kingdom have made the decision to include it.”<sup>10</sup>

## STATUS OF CROSS BORDER INSOLVENCY IN INDIA

India’s insolvency system underwent a total makeover not so long ago. Approved on December 15, 2016, the Insolvency and Bankruptcy Code, 2016 (“Code”) combined many laws pertaining to insolvency resolution of businesses, partnerships, and individuals. The Code now covers corporate entities only; the clauses pertaining to partnerships and individuals are not yet published. Though the Code is new, changes, rules, and court interpretation have been greatly helping it to evolve. The Code now has two sections helping with cross-border bankruptcy conflicts:

**Agreements with other nations:** Under Section 234 of the Code, the Central Government could sign an agreement with the Government of another nation for Code implementation. Furthermore, the Central Government may instruct the execution of the Code’s provisions in respect to assets or property of a corporate debtor or an individual, including a personal guarantor of a corporate debtor, located outside India under a reciprocal arrangement.<sup>11</sup>

**Letter of request:** Section 235 of the Code allows the resolution professional, liquidator, or bankruptcy trustee to apply to the NCLT when evidence or action pertaining to assets of a corporate debtor located outside India is needed in relation to an insolvency resolving process. Should the NCLT decide it appropriate, it might send a letter of request to a court or another authority of a nation to whom a reciprocal arrangement has been agreed upon based on Section 234 of the Code.<sup>12</sup> “While the addition of Sections 234 and 235 in the Code was meant to help to resolve cross-border insolvencies, it was noted that no actions had been done to properly apply the inter-government accords. An order of the NCLT in a cross-border bankruptcy case as of today would not be directly accepted or followed in any other nation. Moreover, even in circumstances of notification, these clauses fall short in sufficiently addressing the complex problems resulting from cross-border bankruptcy events. Given this, on October 16, 2018 the Insolvency Law Committee (also known as Committee) sent in a Report recommending the

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10. Godwin, Andrew, Risham Garg, and Debaranjan Goswami, *Cross-border insolvency law in India: Are the principles of comity of courts and inherent common law jurisdiction relevant?* 32 INTERNATIONAL INSOLVENCY REVIEW, 228-252 (2023)

11. S., Gayathri; N., Aieshwaryaa. “Analysing the Contours of Cross-Border Insolvency within the Indian Legal Framework.” 2 INDIAN JL & LEGAL RSCH. 5 (2023): 1.

12. Ramesh, K. A. N. N. A. N., *Cross-Border Insolvencies: A New Paradigm*, 6 INTERNATIONAL ASSOCIATION OF INSOLVENCY REGULATORS’ ANNUAL CONFERENCE AND GENERAL MEETING, SINGAPORE, (2016)

Model Law (also known as Draft Provisions) be included into the Code. The Draft Provisions include several changes and variants of the Model Law as judged required by the Committee in the Indian setting.”<sup>13</sup>

## LEGAL FRAMEWORK IN USA

There are crucial requirements that apply to situations of insolvency that include many countries that are included in Chapter 15 of the United States Bankruptcy Code. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 Established Chapter 15, which effectively replaced Section 304 of the Bankruptcy Code. This was accomplished through the implementation of Chapter 15. This modification was made in order to bring the legal framework of the United States of America into conformity with the UNCITRAL Model Law. When this measure is implemented, it is necessary to have a synchronised interpretation with other jurisdictions that have also accepted the Model Law. This will help to promote a unified legal framework for situations involving insolvency that occur across international borders.<sup>14</sup> An all-encompassing strategy is clearly demonstrated by the legislative objectives that are defined in Chapter 15. “The major purpose is to encourage collaboration between local courts in the United States, relevant stakeholders, and international courts and competent authorities that are involved in bankruptcy cases that include several countries. In addition, it seeks to build a framework of legal clarity, encourage principles of justice and efficiency, protect the interests of all relevant parties, maximise the value of the debtor’s assets, and make it easier for financially troubled businesses to successfully recover from their financial predicaments. The approval of the UNCITRAL Model Law by the United States of America in October of 2005 is an accomplishment that deserves recognition. It is essential to realise that the United States of America considers key court hearings to be ancillary, underlining the role that they play in providing assistance during the principal procedure. As a legislative structure that encourages collaboration between US and foreign courts and their respective officials, Chapter 15 of the United States Bankruptcy Code serves as a framework for the administration of bankruptcy proceedings. In order to help debtors in maximising the value of their assets, its major purpose is to provide assistance.”<sup>15</sup>

The failure of Lehman Brothers in 2008 was a key event that provided the impetus for a financial crisis that affected the whole world. This dilemma was finally resolved by the United

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13. Arora, Dakshita, *Cross Border Insolvency in India and the Adoption of UNCITRAL Model Law: A Comprehensive Analysis*, 2 INDIAN JL & LEGAL RSCH. (2021)

14. Spigelman, James, *Cross-Border Insolvency: Cooperation or Conflict?* 83 AUSTRALIAN LAW JOURNAL 44-55 (2009)

15. Mason, Rosalind. “*Cross-border insolvency and legal transnationalisation.*” INTERNATIONAL INSOLVENCY REVIEW 21.2 (2012): 105-126.



States Bankruptcy Court's decision to recognise Chapter 15 as a valid source of bankruptcy protection. As a consequence of the execution of this legal manoeuvre, the process of coordinating the assets of Lehman Brothers on a worldwide scale became more simplified, which finally led to a resolution that was more effective. In the *Indian Journal of Law and Legal Research*, the decision was analysed, and it was found to have important ramifications for the administration of the insolvency of the financial behemoth on a worldwide scale. Not only did it make it possible to handle the problem in a more expedient manner, but it also made certain that assets were distributed to creditors all over the world in a more equal manner. In the aftermath of the fall of Lehman Brothers, Chapter 15 of the financial crisis played a significant part in the inefficient management of the aftermath. It has brought to light the significance of adopting a coordinated and equitable strategy in order to address the multiple problems that have arisen as a result of this unprecedented financial crisis.<sup>16</sup>

However, it is essential to take into consideration that Chapter 15 has a subtle exception that is described in detail. Interim and non-judicial processes that have been allowed by a court are now included in the expansion of the scope of foreign cases that are eligible for recognition by the United States of America. The availability of inclusiveness makes it possible for administrators from other nations, who are otherwise working without cross-border systems, to pursue recognition in the United States.”<sup>17</sup> The United States of America maintains a posture that rejects any type of discriminatory treatment towards its debtors in the absence of reciprocal recognition, despite the fact that it is committed to openness.

## LEGAL FRAMEWORK OF SINGAPORE

In the field of cross-border bankruptcy, Singapore has changed significantly from a territorial approach to the acceptance of some universalism aspects. Under some conditions, a foreign unregistered corporation might be “wounded up” in Singapore in line with the present legal system. Included are the following: incapacity to meet the outstanding debt, stop of commercial activity, lack of a physical Singaporean establishment, or dissolution. This clause still applies in case the firm dissolves in its place of incorporation, therefore facilitating concurrent procedures. Engaging the courts in Singapore is crucial to name a liquidator who will act as the representation in Singapore when a company incorporated in another country starts winding-up procedures in their home country. The appointed liquidator is obliged to use newspaper ads to notify creditors

16. McCormack, Gerard, and Wan Wai Yee. “*The UNCITRAL model law on cross-border insolvency comes of age: new times or new paradigms.*” *TEX. INT’L LJ* 54 (2018): 273.

17. Boshkoff, Douglass G. “*United States Judicial Assistance in Cross-Border Insolvencies.*” *INTERNATIONAL & COMPARATIVE LAW QUARTERLY* 36.4 (1987): 729-750; Shah, Bhavi, and Shaivi Awasthy. “Inefficacy of Cross Border Insolvency Framework in India.” *Indian JL & Legal Rsch.* 2 (2021): 1.



in nations where the business functioned before the dissolution processes. This notice helps creditors to submit their claims within the specified period before asset liquidation.<sup>18</sup>

Notwithstanding the geographical basis of bankruptcy rules, the courts in Singapore are ready to let international liquidators within the legal system. “Notwithstanding certain restrictions deriving from the lack of local bankruptcy procedures, the courts have acknowledged the jurisdiction of foreign liquidators in instances such **China Union Lines Ltd. v. American Marine Underwriters Inc.** and **Tohru Motobayashi v. Official Receiver**. Recent court decisions, such as **Beluga Chartering and RBG Resources Plc. v. Credit Lyonnais**, highlight the cooperative approach the Singaporean courts have embraced. The way Section 377(3)(c) was construed in the *Beluga Chartering*—as an obligatory rather than a discretionary clause—showcased the courts’ dedication to fostering collaboration. Furthermore, the case of **RBG Resources Plc. v. Banque Cantonale Vaudoise** made clear that, independent of the nationality of the creditors, the phrase “local creditors” as defined in Section 340 covers debts acquired in Singapore. This decision virtually removes any discriminatory treatment directed between local and international creditors.<sup>19</sup>

To protect the rights of financial creditors in cross-border circumstances, Singapore has constantly followed the territoriality theory. But the city-state’s transformation into a major worldwide financial market needed a pragmatic shift to a modified universalist model. Adopting the UNCITRAL Model Law on Cross-Border Insolvency in 2017 marks a major turning point for Singapore; the Act was approved in 2018. This choice clearly signalled the change.”<sup>20</sup> The ruling shows Singapore’s ability to adapt and react to the shifting dynamics of international bankruptcy considering several elements. Ultimately, since Singapore has moved from territoriality to universalism, the author’s choice to look at the cross-border bankruptcy legal system reflects the nation’s will to effectively resolve cross-border insolvencies. The change clearly shows Singapore’s proactive commitment to match its legal framework with global norms, therefore addressing the issues of local and international creditors.

## LEGAL FRAMEWORK IN AUSTRALIA

Australia revised its insolvency laws significantly in 2008 using a modified form of the UNCITRAL Model Law. The above-described legal framework is made of important elements

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18. Chan, Sek Keong. “Cross-Border Insolvency Issues Affecting Singapore.” *Singapore Academy of Law Journal* 23.2 (2011): 413-433.
  19. Hathorn, Phoebe. “Cross-Border Insolvency in the Maritime Context: The United States’ Universalism vs. Singapore’s Territorialism.” *Tul. Mar. LJ* 38 (2013): 239.
  20. Kim, Minjee. “Cross-border insolvency and debt restructuring law reform in Singapore: Reflections on the Hanjin shipping case.” *Australian Journal of Asian Law* 19.2 (2019): 233-245.

that support the national approach to cross-border insolvency processes. One interesting aspect is the inclusion of clauses allowing the recognition of international insolvency processes. This is a necessary step towards encouraging worldwide cooperation and standardizing the handling of disputes involving companies across several countries.<sup>21</sup>

Foreign delegates seeking recognition are subject to strict eligibility standards developed under this legislative framework. This ensures that clear instructions control the recognition process, therefore encouraging equity and openness. Particularly focused on guaranteeing fair treatment for local and foreign creditors, the Act gives creditors' rights great priority. The shown commitment to equality is in line with world standards and helps to resolve cross-border bankruptcy issues in more uniform and fair manner. A key component of Australia's cross-border bankruptcy rules is their encouragement of collaboration and coordination between Australian courts and officials and those abroad. The cooperation effort aims to eliminate duplications, improve communication across borders, and streamline procedures. Australia wants to build a legal system that supports an internationalised approach to bankruptcy and efficiently resolves the complexity of contemporary company structures.<sup>22</sup>

Significant financial losses followed the collapse of well-known Australian insurer HIH Insurance in 2001. The Australian Court took a major ruling acknowledging international insolvency procedures and pushing cooperation with foreign officials. It helped global asset aggregation to be established, therefore enhancing creditor recovery worldwide. Furthermore, the decision set a standard for the encouragement of better cooperation among Australian and foreign courts in the efficient handling of cross-border bankruptcy proceedings. Apart from addressing the issues arising from the fall-through of HIH Insurance, the previous innovative choice laid the groundwork for international cooperation in such financial crises. Finally, the author chose Australia's law on cross-border insolvency because Australia's choice to adopt the modified UNCITRAL Model Law shows a proactive attitude to improving its legal framework for managing cross-border insolvency cases, which is a fundamental component of the Indian legal system. These important elements highlight Australia's involvement in the global bankruptcy scene by proving a dedication to equality, cooperation, and effective problem-solving.<sup>23</sup>

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21. Mason, Rosalind. "Cross-border insolvency and legal transnationalisation." *International Insolvency Review* 21.2 (2012): 105-126.

22. Spigelman, James. "Cross-Border Insolvency: Cooperation or Conflict?." *Australian Law Journal* 83.1 (2009): 44-55.

23. McCormack, Gerard, and Wan Wai Yee. "The UNCITRAL model law on cross-border insolvency comes of age: new times or new paradigms." *Tex. Int'l LJ* 54 (2018): 273.

## RECOMMENDATIONS OF THE INSOLVENCY LAW COMMITTEE REPORT

### Recognition of Foreign Proceedings

Any judicial or administrative procedure that takes place in a foreign nation in accordance with a law that pertains to insolvency is referred to as a foreign proceeding. The assets and affairs of the corporate debtor are placed under the control or supervision of a foreign court for the purpose of reorganisation or liquidation while the procedure is being conducted in a foreign jurisdiction. There are two categories of foreign proceedings that are highlighted in the Draft Provisions: foreign main proceedings and foreign non-main procedures. The amount of control that a jurisdiction has over the process of insolvency resolution, as well as the type and scope of relief that the National Company Law Tribunal (NCLT) can give in connection to the proceedings that are taking place in another country, are both determined by this distinction. In addition, as will be elaborated upon in the following discourse, the National Company Law Tribunal (NCLT) has the authority to provide required relief in the event of a foreign main process and non-mandatory relief in the event of a foreign non-main proceeding.<sup>24</sup>

Proceedings that are considered to be foreign main proceedings are those that are initiated in the jurisdiction in which the corporate debtor has its centre of major interests (also known as “COMI”). The COMI is one of the topics that has been the subject of the most intense controversy since the Model Law was enacted. The Draft Provisions offer direction for the determination of the COMI, which includes the following: the assumption is that the jurisdiction in which the corporate debtor’s registered office is located is the jurisdiction in which the corporate debtor’s COMI is located, unless there is evidence to the contrary.

### Mandatory and Non-Mandatory Relief

When a moratorium is in place, it guarantees that the assets of the corporate debtor will be safeguarded for the duration of the bankruptcy procedures. Because the assets of the corporate debtor may be located in more than one legal jurisdiction, the establishment of a moratorium is of utmost significance in proceedings pertaining to bankruptcy that takes place across international borders. In accordance with the characteristics of the international process, the Draft Provisions include both obligatory and non-mandatory reliefs at their disposal.<sup>25</sup>

In the event that the National Company Law Tribunal (NCLT) concludes that the foreign procedure is a foreign main proceeding, it is required to provide obligatory relief by announcing a moratorium on the following: The filing of lawsuits or the continuing of lawsuits or actions

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24. Jilani, Wajahat Monaf. “The Insolvency and Bankruptcy Code: Challenges and reforms.” *RG-NUL Fin. & Mercantile L. Rev.* 5 (2018): 345.

25. Singh, Vijay Kumar. “Modern Corporate Insolvency Regime in India: A Review.” *NLS Bus. L. Rev.* (2021): 22.

that are already in progress against the corporate debtor, including the enforcement of any judgement, decision, or order in any court of law, tribunal, arbitration panel, or other authority; in the event that the corporate debtor transfers, encumbers, alienates, or otherwise disposes of any of its assets or any legal right or beneficial interest therein; Any action taken by the corporate debtor to foreclose, recover, or enforce any security interest created by the corporate debtor in relation to its property, including any action taken in accordance with the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002; The recovery of any property by an owner or lessor in situations where the property in question is occupied by or in possession of the corporate debtor.

Through the implementation of a moratorium, the corporate debtor is prevented from engaging in the actions that have been specified above. A moratorium of this kind is automatically imposed in the event that a foreign main proceeding is taken into consideration. It is made clear in the Draft Provisions that the moratorium that will be imposed will be comparable to the moratorium.<sup>26</sup>

In the event that the National Company Law Tribunal (NCLT) concludes that there is a foreign non-main process, it has the authority to impose a moratorium on the features that are emphasised in paragraphs above, as it sees proper. Additionally, the National Company Law Tribunal (NCLT) can authorize the distribution of a corporate debtor's assets located in India to the foreign representative, or another person appointed by the NCLT, if a foreign process, whether main or non-main, is recognized. On the other hand, in order for the National Company Law Tribunal to issue such an order, it must be fulfilled that the interests of creditors in India are appropriately protected.<sup>27</sup>

### **Concurrent Acts and Procedures**

In the Draft Provisions, there are three scenarios that are envisioned for concurrent bankruptcy procedures across international borders: recognition of the major proceeding from a foreign country. In the event that a case is recognised as a foreign primary proceeding, any procedure may be initiated in accordance with the Code if the corporate debtor possesses assets in India. i. The assets of the corporate debtor that are located in India will be the only ones that are subject to this procedure. A process of this nature would be subject to the framework for cooperation and coordination of proceedings when it is applicable. ii. Conducting activities simultaneously – In the event that an application for recognition of a foreign proceeding is received after a procedure has already begun under the Code, any nonmandatory relief that

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26. Thomas, Susan, ed. *Insolvency and bankruptcy reforms in India*. Springer, 2022.

27. Das, Abhiman, et al. "Insolvency and bankruptcy reforms: the way forward." *Vikalpa* 45.2 (2022): 115-131.

is provided by the NCLT with regard to the foreign proceeding must be consistent with the proceedings that are being conducted under the Code.<sup>28</sup>

### **Public Policy**

The Draft Provisions include a broad public policy exemption right from the beginning of the legislative process. Because of this exemption, the National Company Law Tribunal has the authority to decline to take an action that would otherwise be authorised under the Draft Provisions if the conduct in question is obviously in conflict with the national policy of India. In addition, the Central Government has been granted the authority to submit a petition to the National Company Law Tribunal in the event that a conduct that is authorised by the Draft Provisions is deemed to be plainly adverse to the national policy of India. As was mentioned before, the Model Law includes a provision that stipulates this public policy exemption, which has been embraced by countries to varied degrees. By way of illustration, the phrase “manifestly” in the public policy exemption that was addressed before is not included in the domestic law of countries like Singapore, but nations like the United States of America and the United Kingdom have made the decision to include it.

The courts in the United States have acknowledged that the public policy exception should be utilised in a limited capacity and should only be invoked in the most exceptional of situations. The High Court of Singapore has made the decision that because the word “manifestly” was not included in the Model Law when it was being adopted, Singapore is subject to a lower bar of judgement when it comes to determining whether or not an activity is against the public policy of the country. A definition of what comprises public policy has not been tried to be included in the Draft Provisions draft. Given the history of jurisprudence of ‘public policy’ in the context of arbitration law, it is not yet clear how the public policy exception will be read by courts in the Indian context. Given this, it is reasonable to anticipate that the exception will be subject to a variety of interpretations from the courts.

### **CONCLUSION**

The implementation of the Model Law in the Indian context is not devoid of its own set of hurdles and difficulties. To begin, the provisions that are now being draughted include a public policy exemption that is in accordance with the Model Law. In accordance with this exception, the Authority has the authority to decline to take an action that would otherwise be authorised by the proposed provisions if the action in question is obviously in conflict with the public policy of India. The ILC, on the other hand, has not made any attempt to define what exactly constituted public policy. The way in which Indian courts would arrive at their interpretation of

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28. Manhas, Anupam. “Corporate Insolvency Laws: A Critical Analysis.” *Issue 4 Int’l JL Mgmt. & Human.* 5 (2022): 1378.

the public policy exception is not predictable. The ILC has the ability to provide a more precise definition of the public policy exception, highlighting the limited scope of the exemption through the statute itself.

It's worth noting that the government hasn't demonstrated any urgency or inclination to implement the proposed section on cross-border insolvency. This could be an acknowledgment that, without detailed subordinate legislation outlining the procedural specifics, adding the new section to the Code would be incomplete and lead to more confusion than benefits. Furthermore, during the process of draughting the rules and regulations, it is possible that the necessity for small adjustments to be made in the proposed section of the Code will be recognised. These adjustments can be made in advance. The Model Law should serve as a guide for the subordinate laws, and it should be consistent with that objective. As far as possible, it is recommended that departures from the standard text be kept to a minimum. This will help to ensure that the national legislation is as open and accessible to consumers from other countries as is humanly practicable.

On the basis of its adaptability, the Model Law is being supported by a significant number of people. In spite of this, the most significant problem is that it is more of a procedural law than a substantive one, which allows for customising possibilities. Such a degree of adaptability appears to be detrimental to the goal of achieving harmonisation across different jurisdictions. There is a possibility that India may continue to have difficulties in engaging in cooperative endeavours with nations that have not yet implemented the Model Law, even after it has been adopted. "If in a corporate insolvency resolution process or liquidation process, the assets and properties of the CD (corporate debtor) are situated in multiple jurisdictions or in particular in both the countries (countries who have adopted the Model Law and the countries who have not adopted) then it would be very difficult to proceed for the insolvency resolution process under the proposed draft legislation."

In addition, the absence of a unified international contract law for international contracts in India presents a problem for the resolution of disputes pertaining to international contracts. Included in this category are contracts for foreign sales, contracts using Incoterms defined by the foreign Chamber of Commerce (ICC), contracts for insurance, and contracts that contain arbitration clauses. Furthermore, India has not ratified the United Nations Convention on Contracts for the International Sale of Goods (CISG), which is a piece of international law. If there is a breach of contract with the Indian CD, and the other party is a party to the CISG, and the jurisdiction is with the nation that is a member of the CISG, then the resolution of those issues may take a significant amount of time.



In light of the fact that India is on the verge of implementing a fundamental shift in the manner in which it will manage cross-border insolvency, it is high time that the country started putting more of an emphasis on capacity development for advocates, insolvency professionals, and other individuals who are involved in an insolvency process. “The NCLT members should be given exposure to the interpretation of Model Law on cross border insolvency.”

The MCA formed the Cross Border Insolvency Rules and Regulations Committee (CBIRC) in January 2020. Dr. K. P. Krishnan was appointed as the committee’s chairman. The committee’s mission was to examine the report of the Insolvency and Liquidation Committee (ILC) and to provide recommendations about the rules and regulations that would ensure the smooth operation of the planned cross-border insolvency. In June of 2020, the committee presented its report to the MCA, in which it included suggestions on draft rules, regulations, and notifications for matters pertaining to insolvency that occurred across international borders. In addition to this, it has proposed a few modifications to the suggestions that were made by the ILC in relation to the Draft Part Z. Through a notification dated November 24, 2021, the Ministry of Civil Affairs (MCA) had also requested public feedback on Draft Part Z, in addition to other suggested revisions that were mentioned in the notice. One may say that the revision of the Indian Business Code (IBC) to include a complete framework and the implementation of additional laws and regulations for cross-border bankruptcy will signal a significant transformation in Indian insolvency law, bringing it on line with mature regimes throughout the world.

## **BUSINESS RESPONSIBILITY SUSTAINABILITY REPORTING: THE REALITY IN INDIA**

Pranav Agrawal<sup>1</sup>

### **INTRODUCTION**

Businesses were traditionally made to be a wealth making organization as told by the famous economist Milton Friedman that the social responsibility of a business is making wealth for the owners of such business. But there has been a paradigm which came into observation just when the humankind was hit by the biggest travesty it had yet faced, the Covid-19 pandemic when the world came to a stop from all the commercial races we were having and gave all of us some time to think what the main objective is a big corporation like Apple Inc. or Walmart. Is it just making profits for the shareholders? Is it just giving products to the end consumer? The companies world-wide were in this dilemma that whether does the companies who have somewhat big impact on the environment and are one of the reasons for the climate change, should they also be looking and sustainability and giving back to the society from which they had taken so much. There had been discussion on these topics since the early 2000s but there was never an official statement given by a group of organization about it and there was no effort in changing what was so called primary goal of the company which was to provide profits to the shareholders. This pandemic fast tracked the process of reaching to the new and more correct to the modern definition of what should be the goal of a corporation in the modern world.

The Business Roundtable which is an organisation of many CEOs of the top multinationals with 181 signatories and they in 2019 changed the purpose of a corporation and tilted it to a more stakeholder satisfaction route. They think that Businesses are important to the economy as they create jobs, produce goods and services, and support economic growth. The companies should commit more to delivering value to their customers, investing in their employees, treating suppliers fairly and ethically, supporting their communities, and generating long-term value for their shareholders. All stakeholders are essential, and companies are committed to delivering value to all of them for the future success of their businesses, communities, and country.<sup>2</sup> Not only BRT but also the world economic forum<sup>3</sup> and many other global forums are agreeing to

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1. 5<sup>th</sup> Year BALLB Student, Alliance School of Law, Alliance University, Bengaluru
  2. BUSINESS ROUND TABLE, <https://opportunity.businessroundtable.org/ourcommitment/>, (last visited 20 July 2024)
  3. MINISTRY OF CORPORATE AFFAIRS, [https://www.mca.gov.in/Ministry/pdf/BRR\\_11082020.pdf](https://www.mca.gov.in/Ministry/pdf/BRR_11082020.pdf), (last visited 20 July 2024)



the stakeholder capitalisation policy where the stakeholders of the companies should be given a priority over the profits. Thus, to see that the companies are on the right track of achieving sustainability we needed a way in which we can calculate the impact of the companies on the environment as to how much they are impacting the environment and are they taking any steps to see that they reinvest some of the profit back to the environment so that they can maintain the environment in such a way that it is sustainable thus to keep a check on this the governments of various countries introduced integrated reporting systems in which the companies had to mention the sustainability principles which were followed by their company, like how are they trying to decrease their carbon footprint, how are they contributing to their community, how are they planning to reach higher level of sustainability in future.

India being one of the pioneers of the concept of Corporate Social Responsibility, which find a mention in the old scriptures like the concept of *vasudhaiva kutumbakam*, did not show any lax in coming up with a new way of reporting the sustainability reporting, on 10 May 2021 the Security Exchange Board of India (SEBI) came up with the notification making it mandatory for the Top 1000 companies (as per market capitalization) need to follow the process of Business Responsibility and Sustainability Reporting for the purpose of reporting. This was not a sudden change which the companies did not see coming, India had started this concept of integrated and sustainability reporting back in 2009 by the way of Economic and Social Governance, it was not a rabbit's leap rather the current BRSR is a result of the small tortoise steps taken by the Ministry of Corporate Affairs form more than a decade, thus it was not a shock to the Indian top 1000 companies.

## MEANING AND NEED OF SUSTAINABILITY REPORTING

### Sustainability Reporting

Sustainability is a term which has been in vogue since the last half century, though the term sustainability was coined in the year 1713 when it was used in the German forestry circles, the credit for coining this term goes to a German accountant (which is quite relevant when we talk about sustainability reporting) Hans Carl von Carlowitz<sup>4</sup>. But the term got its share of recognition only after the 1972 United Nation Human Environment conference in Stockholm, Sweden<sup>5</sup> when all the nations for the first time took a stance of recognizing that the climate change and ozone layer depletion is real, and they need to take some steps so that the earth is given to the future generation in an equal if not better condition. Thus, the nations consented

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4. Jacobus A. Du Pisani Sustainable development – historical roots of the concept, 3 TAYLOR AND FRANCIS ENVIRONMENTAL SCIENCES, 83-96, (2006)

5. UNITED NATIONS, <https://www.un.org/en/conferences/environment#:~:text=The%20history%20of%20sustainable%20development,the%20issue%20of%20the%20environment.> (last visited 21 July 2024)

to the concept of sustainable development which means to develop in such a fashion that there is no, or negligible loss caused to nature and even if done then it should be compensated to the environment in some other way to maintain the balance between development and the environment. Thus, sustainability became one of the main goals of the nation's when they talk about environmental issues furthering this in 2015 the countries in the United Nation general meeting on 25 September adopted sustainable development goals these goals are set to be achieved by 2030 and the 193 member countries of the United Nations have been since working to further these goals. The corporates being one of the big members of the society also had to adopt sustainability measures to give back to the society what they have taken from it thus the concept of corporate sustainability came up which is defined as the commitment of the companies to improve the quality of life among the employees and the members of society and making economic development in a sustainable development, by World Business Council for Sustainable Development<sup>6</sup>.

Sustainable reporting/ integrated reporting is also one of the way in which the companies are helping to further the sustainable goals as sustainable reporting is defined as reporting for the purpose of being accountable to the stakeholders regarding the sustainable goals by the Global reporting initiative<sup>7</sup> it is also defined as the disclosure and communication of the economic, social and environmental goals and how the company is working to achieve these set of goals<sup>8</sup> it enables companies to be more transparent towards their stakeholders and it helps the society and the government to observe whether the company is working for a sustainable future. It like the normal reporting puts a sense of accountability on the companies and that they have to achieve some set of goals both economic and environment.

The main factors that push the company for using sustainability reporting (other than India, since it is mandatory in India):

- Good Reputation among the stakeholders: Goodwill and *word of mouth* are very important for a steady growth of a company and increased transparency in reporting system are great for a better reputation as proved in many studies <sup>9</sup>.

6. Priyanka Aggarwal, *Sustainability Reporting and its Impact on Corporate Financial Performance: A Literature Review*. 4 INDIAN JOURNAL OF COMMERCE AND MANAGEMENT STUDIES, 51–59 (2022).

7. *Id.*

8. BOSTON COLLEGE CENTER OF CORPORATE CITIZENSHIP, <https://ccc.bc.edu/content/ccc/research/corporate-citizenship-news-and-topics/sustainability-reporting.html#:~:text=Sustainability%20reporting%20is%20the%20disclosure,a%20company's%20progress%20towards%20them>. (last visited 21 July 2024)

9. ERNST & YOUNG, <https://www.eticanews.it/wp-content/uploads/2013/05/report-value-of-sustainability.pdf>, (last visited 20 July 2024)

- Meeting the expectation: It helps in increment of employee loyalty and retention rates and positively impacts the whole firm.
- Improved capital access: As increased transparency and working for the society pleases the investors thus getting money out of their pockets is easier.
- Increased efficiency and waste reduction: the companies when start work to achieve sustainability they reduce the amount of waste they are producing and become more efficient to maintain the sustainability.
- Emphasizes the link between the financial and non-financial performance aspect of the companies.
- Increases the scope of reporting as it gives a clearer view of how the company should function in the future, it gives a greater viewing angle to the decision makers of the company.

If we take the real-life example, we can see the reports of companies like apple where they have reported the plan on how they are going to decrease their carbon footprint by using greener material and using a better and more energy efficient way of transportation of their good across the globe and how are they going to make their plants 100% energy efficient in the future.<sup>10</sup>

The theoretical background of sustainability reporting and corporate sustainability

The concept of sustainability reporting is a relatively novice concept, but it finds its roots in the very basic theories of corporate social responsibility or rather corporate governance, these are:

1. Legitimacy Theory: As the name suggests it makes talks about when the company is considered to be legitimate to the society, as per this theory the corporation is a part of the society in which it is established and thus should pay attention to the norms which are laid down by the society. It basically talks about the acceptance of a body corporate into a community and now with multinationals it has become an even bigger challenge as every other community has its own norms which need to be followed in that area to gain legitimacy. Thus, it says that the value system of that country should be in harmony with the value system of the body corporate which can be easily achieved with the instruments of sustainability reporting<sup>11</sup>.

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10. APPLE INC. [https://www.apple.com/environment/reports/docs/Apple\\_Environmental\\_Responsibility\\_Report\\_2014.pdf](https://www.apple.com/environment/reports/docs/Apple_Environmental_Responsibility_Report_2014.pdf) (last visited 20 July 2024)

11. Supra note, 6

2. Stakeholder Theory: As the name suggests it is a theory of corporate governance which basically say the governance the stakeholders of the company should be given the preference and the decisions in the company should be taken keeping in view the stakeholders of the company too, this goes hand in hand with sustainability reporting as in sustainability reporting we talk about how the company is going to grow keeping in mid the environment and the community in which it is working and since society is the biggest stakeholder and they are given the necessary the importance when we talk about sustainability reporting. Thus, we can say that they stakeholder theory is one of the basics of the concept of sustainability reporting<sup>12</sup>.
3. Agency Theory: This theory of corporate governance is considered to be one of the oldest theories<sup>13</sup> of corporate governance it basically says that there is a divide among the owners of the company and the management of the company and the managers due to the natural human nature will work for their own profit and thus they will try to create an asymmetry of information but sustainability reporting by increasing the transparency decreases the possibility of the information asymmetry and fixing the agency problem to a great extent<sup>14</sup>.

## THE NEED FOR SUSTAINABILITY REPORTING AT A GLOBAL LEVEL

To follow the ever-increasing legislations: The member nations of the United nations who have ratified the 17 sustainability development goals are very serious about their performance and how they can achieve those goals thus the countries are somewhat extra-stringent on these laws like in Denmark the climate act have set a goal of decreasing the carbonization and emission of greenhouse gases by 70% till the year 2030 and their main focus would be the decrease in emission by the industries and transportation<sup>15</sup> and Austria aims to achieve climate neutrality by 2040 and has outlined a series of measures to achieve this goal. These include implementing an eco-social tax reform, drawing up a mobility-masterplan for 2030, introducing an affordable nationwide annual pass for public transport, phasing-out oil, coal, and fossil natural gas for room heating, and significantly increasing renewable energy. Austria also supports carbon border adjustments and the earliest possible phasing-out of financing

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12. FREEMAN, R. E., HARRISON, J.S., WICKS, A.C., PARMAR, B.L., AND SIMONE DE COLLE, *STAKEHOLDER THEORY*, 1-29 (Cambridge University Press 2010)
  13. Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review*, 14 *THE ACADEMY OF MANAGEMENT REVIEW*, 57-74 (1989)
  14. *Ibid.*
  15. CLIMATE AND CLEAN AIR COALATION, <https://www.ccacoalition.org/en/partners/denmark#:~:text=The%20Climate%20Act%20sets%20a,be%20set%20every%20five%20years>. (last visited 21 July 2024)

and subsidizing fossil infrastructures at the EU-level. Additionally, Austria advocates for decarbonizing energy systems without nuclear power, as they believe it is not a viable option for combating climate change and sustainability reporting being the basics on which the companies are being evaluated whether they are following with the goals makes it very important for the companies to have a robust system so that they have a good report on their sustainability and how they are not affecting the environment of the country in a negative way<sup>16</sup>

To meet-up with the environmental and the social expectations of the investors both current and future<sup>17</sup> Shareholders have different orientations ranging from strictly ethical to strictly financial. Ethical investors focus on the character of behaviour or activities, such as human rights violations, corruption, and environmental degradation, and are divided into two types: principled and consequential investors. Principled investors exclude companies that violate their principles, while consequential investors consider a company's action program to prevent violations before making an investment decision. The action program should include a clear set of business principles, a code of conduct, management systems, employee training programs, monitoring and auditing processes, and accountability<sup>18</sup>.

## **SUSTAINABILITY REPORTING SYSTEM IN INDIA**

### **Evolution of the reporting system**

In 2009, the Ministry of Corporate Affairs (MCA) issued the 'Voluntary Guidelines on Corporate Social Responsibility' to encourage businesses in India to take responsibility for their social, environmental, and economic impacts.

India endorsed the United Nations Guiding Principles on Business and Human Rights (UNGPs) in 2011, which provide a framework for businesses to respect human rights and prevent negative impacts. The MCA also issued the National Voluntary Guidelines on Social, Environmental and Economic Responsibilities of Business, 2011 (NVGs) with a Business Responsibility Reporting framework designed to encourage businesses to report on their social and environmental impacts.

In 2012, the Securities and Exchange Board of India (SEBI) mandated the top 100 listed companies by market capitalisation to file Business Responsibility Reports (SEBI-BRRs/BRR) through the Listing Agreement to promote meaningful engagement with stakeholders. In 2019,

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16. Burhan, Nasser & Rahmanti, Wiwin, *The Impact of Sustainability Reporting on Company Performance*. 15 JOURNAL OF ECONOMICS BUSINESS AND ACCOUNTANCY VENTURA, 257 (2012)

17. *Id.*

18. Harry Hummels and Diederik Timmer *Investors in Need of Social, Ethical, and Environmental Information*, 52 JOURNAL OF BUSINESS ETHICS, pp. 73-84 (2004).

MCA released the updated version of NVGs as National Guidelines for Responsible Business Conduct (NGRBCs) providing guidance on responsible business conduct in areas such as labour rights, consumer protection, and anti-corruption.

SEBI extended the BRR requirement to the top 1000 listed companies by market capitalisation in December 2019, which increases transparency and accountability. These guidelines and requirements promote responsible business conduct, sustainability and ensure that businesses are accountable to their stakeholders in India.

### **Effectiveness of the reporting system**

There have been various studies on the effectiveness of sustainable reporting if we see for the top 200 companies in India the article explores the communication of Corporate Social Responsibility (CSR) and sustainability issues on the websites of the top 100 companies in India. The research findings indicate that larger companies tend to communicate more extensively about CSR and sustainability issues on their websites compared to smaller companies, suggesting a positive shift in the CSR and sustainability climate in India. However, the study also identifies areas where there is potential for improvement, such as incorporating interactive features and links to social media to enhance stakeholder engagement. Furthermore, the research reveals that larger companies tend to comply better with Global Reporting Initiative (GRI) reporting standards than smaller companies. State-owned companies perform better than privately-owned companies in disclosing their CSR commitments. The most frequently discussed topic on corporate websites is environmental stewardship, reflecting the growing industrialization and establishment of manufacturing units in India. However, there were no significant differences in CSR and sustainability focus areas among different industries. Economic impacts are the most commonly described indicators on the corporate websites, and most of the information is found in annual reports or sections dedicated to investors. The study suggests that the main objective of this information is to strengthen the company's market position and not to reflect on its economic contributions. In conclusion, the research highlights the positive shift in the CSR and sustainability climate in India, with larger companies becoming more transparent and open about their CSR responsibilities. However, there is still room for improvement in incorporating interactive features and links to social media to enhance stakeholder engagement. Additionally, companies should focus on disclosing their environmental impacts in accordance with GRI reporting standards, rather than just their economic impacts<sup>19</sup>. Another of the Article talks about the banking sector in India which basically says that the sustainability disclosure of Indian organizations varies based on multiple factors, including regional location, socio-economic development, consumer preference, and regulatory environment. A study on the banking

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19. Jain, Rajul; Winner, Lawrence H, *CSR and sustainability reporting practices of top companies in India*, 21 CORPORATE COMMUNICATIONS, 36-55 (2016)



sector in India discovered that social development indicators, like community development programs, financial inclusion, training, education, and healthcare, were commonly disclosed by both public and private sector banks. However, environmental indicators were infrequently disclosed, with most banks only revealing qualitative data on their internal environmental care practices. Banks prioritized sustainability issues linked directly to their business operations, like financial inclusion and energy efficiency. In comparison, private sector banks exhibited lower disclosure of environmental care practices and internal socio-environmental conduct policies than public sector banks. Only a handful of banks in India published standardized sustainability reports, with limited adoption of international sustainability codes like GRI standards, UNEP FI, UNGC principles, and Equator principles. The study recommends that the Indian banking industry should integrate sustainability reporting into their overall business strategy since sustainability reporting is still at an early stage. Both public and private sector banks need to standardize their nonfinancial reporting and progress beyond regulatory compliance towards standardized sustainability reporting<sup>20</sup>.

### **Real Impact of the reporting system on the environment**

We can see the real impact on of the reporting system only by looking in the new pollution reports on Indian pollution According to a study conducted by Dalberg Advisors, the Clean Air Fund, and the Confederation of Indian Industry, air pollution imposes a significant economic burden on Indian businesses. This burden amounts to around \$95 billion annually, which is equivalent to 3% of India's total GDP. This cost represents half of all taxes collected each year, or 150% of India's healthcare budget. In addition to its health impacts, air pollution also results in lost revenue for businesses. For example, workers in India take 1.3 billion days off each year due to the adverse effects of air pollution, leading to \$6 billion in lost revenue. Lower air quality also reduces workers' productivity, which results in a decrease in business revenue of up to \$24 billion. Moreover, consumer-facing businesses lose \$22 billion in revenue due to lower air quality. The IT sector, which accounts for 9% of India's GDP, experiences a loss of \$1.3 billion per year due to productivity loss caused by pollution. The report suggests that Indian businesses should include air emissions in their profit and loss statements and that industry leaders should advocate for cleaner air.<sup>21</sup> Another news article highlights that Indian companies feature prominently in the list of the world's most polluting companies, with Vedanta Limited holding the top spot and other companies like Adani Power, Reliance Power, NTPC, Tata Power, JSW Steel, and Hindalco Industries also ranking among the top 25. These private enterprises

20. Kumar, K., Prakash, A. *Examination of sustainability reporting practices in Indian banking sector*, 4 ASIAN JOURNAL OF SUSTAINABILITY AND SOCIAL RESPONSIBILITY AJSSR 2 (2019).

21. V Rishi Kumar, *Air pollution costs Indian businesses \$95 b every year*, THE HINDU BUSINESS LINE <https://www.thehindubusinessline.com/news/national/air-pollution-costs-indian-businesses-95-b-every-year-report/article34365387.ece> (Last visited July 23, 2024, 10:00 AM).



have been criticized for their impact on local resources and environments, and environmental regulatory mechanisms in India face problems with compliance and implementation due to the dilution of regulations by governments at state and central levels. Local communities suffer from displacement and exposure to high levels of air toxicity, and India's pollution control efforts are inadequate. There was public backlash against the draft EIA notifications, which proposed post facto clearance, and it remains to be seen whether India will take effective steps to rein in polluting industries for the larger public good.

## CONCLUSION

In India, there are several areas where sustainable reporting can be improved to ensure that companies are transparent about their social and environmental impacts. One crucial area for improvement is the need for more comprehensive reporting from smaller companies, especially in terms of CSR and sustainability on their websites. This can enhance stakeholder engagement and transparency. Another essential area for improvement is the need to disclose environmental impacts in line with Global Reporting Initiative (GRI) reporting standards, rather than just economic impacts. This can help stakeholders to better understand the overall sustainability performance of companies and hold them accountable. Furthermore, public and private sector banks in India need to go beyond regulatory compliance and adopt standardized sustainability reporting, including nonfinancial reporting. This can help build trust among stakeholders and promote sustainable practices in the financial sector. Finally, Indian businesses need to include air emissions in their profit and loss statements and advocate for cleaner air. This can promote more accurate measurement of companies' environmental impacts and help drive progress towards a more sustainable future. In conclusion, sustainable reporting in India can be improved by addressing these key areas, which can help companies to become more transparent, accountable, and sustainable.

## **THE CONCEPTUAL ASPECTS OF THE EMERGING PARADIGMS OF IPR WITH SPECIAL REFERENCE OF TRADITIONAL KNOWLEDGE**

Neeti Gupta<sup>1</sup>

Dr. Shiksha Mishra<sup>2</sup>

### **INTRODUCTION**

This century has seen a series of challenges for the intellectual property system globally because advances in science and technology has created a number of unprecedented issues. The commercialization of traditional knowledge has resulted in new legitimate claims as well. Biotechnology (BT) and information and communication technologies (ICTs) have both seen extraordinary advances at staggering rates, presenting new challenges to intellectual property protection systems<sup>3</sup>. Both of these fields have transformed the world by their growing progress. The methods and techniques to conduct business and other activities have changed remarkably with the progress of these two in the last quarter of century. The conduct of research and development which resulted in predatory efforts to commercialize traditional knowledge systems and exploit indigenous cultural heritage without acknowledging or sharing these resources with communities, has raised several ethical and equity issues<sup>4</sup>. Traditional knowledge (TK) is an album term that includes knowledge about various aspects of community culture, such as science and technology, farming, medicine, biodiversity, folk art, crafts, dance, dramas, and music, motives, symbols, and stories. By combining modern science and technology, products developed from traditional knowledge and indigenous resources have generated mega businesses<sup>5</sup>. Many forms of folk art have been transformed into a huge cultural industry. Intellectual property rights issues are brought into play by this transformation of TK into big commerce.

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1. Research Scholar, IFTM University, Moradabad.
  2. Assistant Professor School of Law. IFTM University, Moradabad.
  3. Rapela, M.A., 2019. *Fostering innovation for agriculture 4.0*. Springer International Publishing.
  4. Gupta, A.K., 2004. WIPO-UNEP study on the role of intellectual property rights in the sharing of benefits arising from the use of biological resources and associated traditional knowledge (Vol. 769). WIPO.
  5. Visser, C.J., 2004. Making intellectual property laws work for traditional knowledge. *Poor people's knowledge: Promoting intellectual property in developing countries*, 207, p.213.

The world's intellectual property system has faced several hurdles this century as a result of numerous previously unheard-of problems brought forth by scientific and technological advancements. There have also been new, valid claims as a result of the commercialization of traditional knowledge. Information and communication technologies (ICTs) and biotechnology (BT) have both advanced at startling rates, posing new difficulties for intellectual property protection frameworks. Because of their rapid advancement, both of these areas have changed the globe. With the advancement of these two during the past 25 years, there have been significant changes in the ways that business and other activities are conducted. Research and development activities that lead to predatory attempts to exploit indigenous cultural heritage and sell traditional knowledge systems without acknowledging.

Traditional knowledge is the foundation of cultural heritage. India possesses a wealth of traditional knowledge about the characteristics and applications of different biological resources due to its abundant natural resources and biodiversity. It is important to conserve traditional knowledge in order to maintain customs, civilizations, and knowledge. The continued existence of indigenous communities and traditional people is also dependent on traditional knowledge. The loss of biodiversity is not nearly as severe a concern as the preservation of different cultures and languages worldwide. In the early postcolonial period, cultural intellectual property was used mostly to describe items of spiritual significance and cultural significance those had been misappropriated. As well as intangible aspects, heritage includes tangible components, such as language and folklore<sup>6</sup>. It is becoming increasingly important to protect culture of indigenous people and intellectual property rights related to it. As a result of their knowledge and expertise, indigenous communities make significant contributions to the management of ecosystems, the protection of the environment, the sustainable development and the conservation and sustainable use of biodiversity. Indigenous people and communities serve as custodians of ancient traditions and modern practices, as well as link between ancient and modern practices.

So indigenous people have struggled for control over their own knowledge in the last decade. The movement to own these less tangible areas has been slow. These issues of control and ownership of cultural property rights have become subject to a great deal of controversy<sup>7</sup>. Thus the development of specific law for the protection of cultural intellectual property rights is essential at national and international level.

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6. Ruggles, D.F. and Silverman, H., 2009. From tangible to intangible heritage. *Intangible heritage embodied*, pp.1-14.

7. Silverman, H., 2010. Contested cultural heritage: A selective historiography. In *Contested cultural heritage: Religion, nationalism, erasure, and exclusion in a global world* (pp. 1-49). New York, NY: Springer New York.

## INDIGENOUS HEALTH AND TRADITIONAL KNOWLEDGE

Several Indian medical systems, including Ayurveda and Siddha, are extremely well developed and based on traditional knowledge<sup>8</sup>. Apart from that, folk medicines and psychotherapeutic healing practices are also worth considering. Indigenous communities around the world are largely in agreement with this. Aside from herbs and plants, indigenous communities are also extremely knowledgeable about insects, reptiles, birds, minerals, and water resources. They have developed sustainable living methods that preserve and enhance biodiversity as well as giving back what they have taken from the world in harmony with nature. Traditional knowledge and indigenous resources have been applied to modern science and technology, Mega businesses have been created by using traditional knowledge and resources<sup>9</sup>. Natural resources are owned by the community, rather than by individuals. It is imperative to reconcile the divergent approaches in order to advance both equity and science. It is not necessary for traditional knowledge to be old; in fact, it can even be current.

The Indian subcontinent is abounding with health traditions of many kinds. There is perhaps no health tradition than the Ayurvedic and Siddha systems are adopted by people of this geographical area<sup>10</sup>. Not only do they have a lineage of practitioners but also theoretical and textual support, there has been a noticeable presence of these outside of India as well. In Indian medicine, however, there are two notable modes of expression, namely classical and folk. Ayurveda, Siddha, and Unani make up the coded systems known as classical systems, which are characterized by institutionalized practitioners, texts, and highly developed theories<sup>11</sup>. Traditions have been passed down from generation to generation or from guru to disciple in tens of thousands of villages all over the world. This classical medical system has been used in various stages of medical treatment such as procedures for diagnosing diseases, measures that can be taken to prevent disease Using yoga, meditation, and other forms of physical culture to promote and prevent disease. The setting of bones, treatment of poisons, and Panchakarma (five purification procedures) are the special areas.

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8. Silverman, H., 2010. Contested cultural heritage: A selective historiography. In *Contested cultural heritage: Religion, nationalism, erasure, and exclusion in a global world* (pp. 1-49). New York, NY: Springer New York..
  9. Gupta, A.D., 2012. Way to study indigenous knowledge and indigenous knowledge system. *Research Journal of Recent Sciences*, ISSN, 2277, p.2502..
  10. Chaudhary, A. and Singh, N., 2012. Intellectual property rights and patents in perspective of Ayurveda. *AYU (An International Quarterly Journal of Research in Ayurveda)*, 33(1), pp.20-26.
  11. Wujastyk, D. and Smith, F.M. eds., 2013. *Modern and global Ayurveda: pluralism and paradigms*. State University of New York Press.

## BIOTECHNOLOGY AND TRADITIONAL KNOWLEDGE

Living organisms or parts of them are used in biotechnology, as are proteins and enzymes that occur naturally in living systems, or compounds derived therefrom. Biotechnology offers limitless opportunities for inventions and innovations. In addition, establishing a biotech-based industry requires a lot of venture capital<sup>12</sup>. Considering these characteristics, biotechnology is one of the hottest areas for intellectual property protection. The field, however, carries a number of sensitive, ethical, and moral issues that are the source of heated controversy.

There has never been a tradition of treating living objects as intellectual property, whether they are natural or engineered<sup>13</sup>. Consequently, there is a re-examination of views and issues regarding living systems and technologies derived from them because they represent a goldmine of products and processes that serve science and society as well as meet a wide range of human needs. Before 1980, many industrialized countries patented microorganisms for use in pharmaceutical research. It wasn't long before plants, animals, and even humans, were being cultured for tissues and cells<sup>14</sup>. A number of ethical questions have been raised by this trade, including those of recombinant DNA, cell fusion, and embryo manipulation in biotechnology inventions; the rights of researchers and communities; the privilege of farmers, as well as the distinction between discovery and invention in genetic material sharing<sup>15</sup>.

It follows that a discovery, not an invention, occurs when man observes the properties of an existing substance in nature for the first time. It is not a product of human invention, but rather a product of nature. A patent cannot be granted for any natural biological process of reproduction in animals or plants.

## BIODIVERSITY AND TRADITIONAL KNOWLEDGE

Biological diversity refers to the diverse types of life (living organisms) that exist in various ecosystems on land or in water. There is a great deal of biodiversity in developing countries, both in the plant and animal kingdoms. In addition to pharmaceutical and cosmetic products, these varieties are extremely beneficial for the development of scientific research and development. In order to maintain biodiversity and to preserve traditional knowledge, it is highly desirable

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12. Tripathi, M.S., Parnami, N. and Pati, K.S., 2009. Biotechnology and intellectual property rights (IPRs). *Crop Breeding and Biotechnology*, p.227.
  13. Castle, D. ed., 2009. *The role of intellectual property rights in biotechnology innovation*. Edward Elgar Publishing..
  14. Ergin, V.B., 1996. *Biotechnology as an Intellectual Property Right (IPR)* (Master's thesis, Marmara Universitesi (Turkey).
  15. Straus, J., *Intellectual property rights and bioeconomy*, 12 JOURNAL OF INTELLECTUAL PROPERTY LAW AND PRACTICE, pp.576-590 (2017)

to have access to them<sup>16</sup>. Due to a lack of resources, both in terms of knowledge of modern science and technology, and financial resources, the exploitation of biodiversity and traditional knowledge by companies and entrepreneurs of developed countries often does not benefit indigenous communities. Therefore, this is considered unfair and unjustified. Efforts are being made to ensure that genetic material donors and traditional knowledge holders receive adequate recognition.

Traditionally, indigenous plants and herbs are used extensively in traditional systems of medicine, which creates a conflict of interest. The use of plants extends beyond medicines and healthcare products to food and beauty products, which are large industries in their own right. Often, manufacturers and the communities from which the plants and traditional knowledge are sourced are at odds because they do not have to access plant material directly from the communities<sup>17</sup>. Through techniques such as tissue culture, cell culture and transgenic technologies, it has become easy to propagate plants that have been removed, lawfully or otherwise.

Because of the inevitable intrusion of the global IP system, there are two different views about traditional knowledge. First view is that the IP system should be extended to cover TK so that innovation can be boosted and the TK can be brought into the main economy<sup>18</sup>. According to the second contending view, this unauthorized use of TK for commercial gain leads to a few appropriating and exploiting the community's property. Developing countries could reconcile these antagonistic viewpoints by ensuring that traditional communities get an equitable share of the commercial benefits of using their genetic resources and knowledge.

The protection and promotion of TK are important. TK protection involves two things: a) preventing third parties from unauthorized use of TK; b) prohibiting use that is likely to erode it and negatively affect the community's life and livelihood. Multifaceted approaches would be needed to promote TK<sup>19</sup>. As a result, TK innovation would be encouraged, and elements of TK that could be commercialized would be highlighted, ensuring equitable distribution of benefits. Natural resources must be used sustainably by involving indigenous communities. To ensure growth and equity, TK access should be closely monitored for various purposes.

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16. Venkataraman, K. and Latha, S.S., 2008. Intellectual property rights, traditional knowledge and biodiversity of India.
  17. Vogt, D.B., 2001. Protecting Indigenous Knowledge in Latin America: Maintaining Biological Diversity, Creating Relationships, and Returning Benefits to Native Communities for Ethnobotanical Drug Discoveries-Can It Be Done. *Or. Rev. Int'l L.*, 3, p.12.
  18. Oguamanam, C., *Beyond theories: intellectual property dynamics in the global knowledge economy*, 9 WAKE FOREST INTELL. PROP. LJ, p.104 (2008)
  19. Correa, C.M., 2001. Traditional knowledge and intellectual property. *Geneva: The Quaker United Nations Office (QUNO)*, 17.



## AGRICULTURE AND TRADITIONAL KNOWLEDGE

The process of testing and validating traditional knowledge is also found in the field of agriculture. Several sources indicate that there is a tremendous amount of Vrikshayurveda knowledge that survives and even flourishes among folk practitioners<sup>20</sup>. It is the farming community, who undoubtedly possess a large amount of this knowledge, as well as lay people, housewives, etc., who are its practitioners. This knowledge has seen a surge of publications, documentation, and discussion since the late ninteens.

There are still a lot of people in India who make their food choices based on the wisdom of ayurvedic wisdom. A number of dos and don'ts are practiced by local communities, which are often difficult for modern investigators to understand. Perhaps this explains why many traditionally highly valued substances such as rice, do not have a good understanding of their nutritional value. There are entirely different terminologies used by ayurvedic texts to characterize and describe rice than those used in modern medical and nutritional texts<sup>21</sup>. The first, mainly hot foods were offered, while during the second, mainly cold foods were offered. Generally, hot foods produce subjective feelings of burning eyes, burning urination, and a feeling of warmth throughout the body after consumption. For the metabolic study, four normal, healthy adults were selected from the laboratory staff.

## COMMUNITY RIGHTS AND TRADITIONAL KNOWLEDGE

Traditional knowledge developed over generations is de facto the property of indigenous and local communities. Indigenous and local practices, innovations, and knowledge are recognized as essential for conserving and utilizing biodiversity in a sustainable manner in article 8(j) of the Convention on Biodiversity<sup>22</sup>. In addition to “respecting, preserving and maintaining” them, “promoting and involving communities in their wider application” and “encouraging an equitable sharing of benefits from their use,” Parties must “promote and assist in preserving” them. In order for these three clauses to be effectively implemented, communities’ rights over their knowledge must be recognized. CBD article 10 (c), Parties must protect and encourage customary use - this means protecting the rights of communities to continue using TK. To generate incentives for conservation: It is a requirement of the CBD that Parties adopt incentives for conservation of biodiversity. There was a strong emphasis on local benefits and incentives in the 2002 World Summit on Sustainable Development Plan of Implementation. There has

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20. Giri, U. and Hedayetullah, M., 2020. *Text Book of Agricultural Heritage*. Scientific Publishers.

21. Payyappallimana, U. and Venkatasubramanian, P., 2016. Exploring ayurvedic knowledge on food and health for providing innovative solutions to contemporary healthcare. *Frontiers in public health*, 4, p.57..

22. Downes, D.R., *How intellectual property could be a tool to protect traditional knowledge*, 25 COLUM. J. ENVTL. L, p.253 (2000).



been extensive research showing that local benefits and incentives are important in promoting conservation (e.g. Millennium Ecosystem Assessment, 2005). As well as providing an incentive for sustainable management, secure rights over traditional knowledge and related resources enable communities to generate benefits. Traditional knowledge, practices, and resources are continuously adapted to the changing environment through adaptive management systems. Not only TO-holders, but also farmers worldwide, need such adaptive systems to adapt to climate change<sup>23</sup>. In the 21st century, traditional knowledge documentation has not evolved to meet the challenges. Land is being taken over for industrial agriculture, forestry concessions, biofuels, conservation, and the erosion of cultural values and customary laws are destroying traditional knowledge systems<sup>24</sup>. There is a need to protect the community's bio-cultural heritage as a whole, including their traditional knowledge, bio-resources, culture, and land.

TK rights and responsibilities are outlined in customary laws and values of local and indigenous communities<sup>25</sup>. They are intended to ensure that traditional knowledge is preserved for future generations and meets community needs. For indigenous peoples to continue living in a customary manner and using resources according to custom, customary laws are needed. Customary laws and institutions are in a variety of factors, including government authority extensions, natural resource laws, and land alienation. It is therefore urgently necessary to recognize and strengthen the authority and powers of customary law. Policies and laws need to be implemented that will protect community rights over 'bio cultural systems' as a whole, which are essential to the continuation of TK systems.

## CONCLUSION AND SUGGESTIONS

There is a rich cultural heritage among the people of India. There are also forms of traditional knowledge related to agriculture, forest management, conservation, and sustainable use of biological diversity. These fields also include traditional literature, traditional arts and crafts, music, visual arts, ceremonies, traditional beliefs, and traditional architecture related to specific sites. Traditional medicine and traditional medical practices are also included, as well as traditional medicine and traditional medicine practices. Indian culture has been passed down through oral traditions and folklore.

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23. Egyir, I.S., Ofori, K., Antwi, G. and Ntiamoa-Baidu, Y., *Adaptive capacity and coping strategies in the face of climate change: a comparative study of communities around two protected areas in the coastal savanna and transitional zones of Ghana*. 8 JOURNAL OF SUSTAINABLE DEVELOPMENT, p.1-24, (2015)
  24. Parrotta, J.A. and Agnoletti, M., 2012. *Traditional forest-related knowledge and climate change* (pp. 491-533). Springer Netherlands..
  25. Tobin, B., *The role of customary law in access and benefit-sharing and traditional knowledge governance: Perspectives from Andean and Pacific Island countries*, WORLD INTELLECTUAL PROPERTIES ORGANIZATION AND THE UNITED NATIONS UNIVERSITY, (2008).

People now live, work, and conduct business differently than ever before, thanks to advances in ICT. It has become very simple and cheap to reproduce high-fidelity images in large numbers. Transmitting data across national boundaries is possible from anywhere and everywhere. These circumstances make it difficult to enforce intellectual property rights. As a result of their vast economic potential, biotechnological products and processes are hot items of intellectual property. In addition to ethical issues, there are moral debates as well. It raises questions about ownership and benefit sharing when developing biotechnological processes and products based on biodiversity and traditional knowledge of developing nations. It is only recently that IP has been extended to living things. By integrating the various aspects of Indigenous communities' way of life, it is also necessary to ensure that community members have a better understanding of the international and national legal frameworks in which their lives are increasingly governed. In response to opportunities and challenges, the new instrument might serve as a platform for asserting rights under customary, national, and international law. In addition, it could contribute towards strengthening the conservation ethos, worldview, and practices of Indian local communities that are under threat from both external and internal factors.

### **Recognition and Protection of TK**

- **Policies and Legal Frameworks:** Implement comprehensive policies and legal frameworks at national and international levels to formally recognize traditional knowledge (TK) as a form of intellectual property. This involves creating legal mechanisms that acknowledge the cultural and economic value of TK, ensuring that it is treated with the same respect as other forms of intellectual property.
- **Protection from Unauthorized Use:** Establish systems to protect TK from unauthorized exploitation by third parties. This includes setting up legal provisions that prevent the unauthorized commercial use of TK and ensuring that any use of TK is done with the consent of the communities that own it.

### **Benefit Sharing**

- **Equitable Sharing of Benefits:** Assure fair and equitable sharing of benefits from commercialization of TK by developing and enforcing mechanisms. This includes profits from the development and sale of pharmaceuticals, cosmetics, and other products based on TK.
- **Recognition and Compensation:** Ensure that indigenous communities are recognized for their contributions to these products and receive financial compensation. This can be achieved through benefit-sharing agreements and other legal arrangements.

### **Community Participation**

- **Involvement in Decision-Making:** Participate actively in the decision-making processes surrounding the use and protection of tribal knowledge. This ensures that their perspectives and needs are considered and respected.
- **Community-Led Initiatives:** Promote and support community-led initiatives for the documentation, preservation, and sustainable use of TK. This empowers communities to manage and protect their own knowledge.

### **Documentation and Preservation**

- **Respectful Documentation:** Document TK in ways that respect the confidentiality and rights of the knowledge holders. This includes obtaining prior informed consent from communities before documenting their knowledge.
- **Accessible Repositories:** Create and maintain databases and repositories for TK that are accessible to the communities that own this knowledge. This helps preserve TK for future generations and ensures that it is available for sustainable use.

### **Cultural and Biological Diversity Conservation**

- **Conservation Strategies:** Implement strategies that conserve both cultural and biological diversity, recognizing the intrinsic link between the two. This involves protecting traditional practices and the biodiversity they depend on.
- **Sustainable Use of Resources:** Encourage the sustainable use of biological resources while respecting and incorporating traditional knowledge. This ensures that resource use does not harm the environment or the communities that rely on it.

### **Ethical Standards in Biotechnology**

- **Ethical Guidelines:** Establish ethical guidelines for biotechnological research and commercialization involving TK. Indigenous communities' rights and interests should be respected through these guidelines.
- **Preventing Exploitation:** Ensure that biotechnological innovations do not exploit indigenous communities and their knowledge. This includes enforcing laws and regulations that prevent bio piracy and ensure fair compensation.

### **International Collaboration**

- **Cross-Border Issues:** Foster international cooperation to address cross-border issues related to TK and biodiversity. This involves working with other countries to create global agreements that protect TK and ensure fair benefit-sharing.

- **Global Agreements:** Develop and implement international agreements that recognize the rights of indigenous communities over their TK and ensure that benefits from its use are shared fairly.

#### **Support for Indigenous Health Systems**

- **Recognition of Traditional Health Systems:** Recognize and support traditional health systems such as Ayurveda, Siddha, and other indigenous medicine practices. These systems are often well-developed and have valuable knowledge that can contribute to modern healthcare.
- **Integration with Modern Healthcare:** Facilitate the integration of traditional health knowledge with modern healthcare systems to create holistic approaches to health and wellness.

#### **Incentives for Conservation**

- **Conservation Incentives:** Develop incentives for communities to conserve and sustain their TK and biological resources. This can include financial rewards, technical support, and other benefits.
- **Promoting Sustainable Practices:** The use of sustainable resources and conservation of biodiversity should be encouraged. To ensure future generations have access to TK, this helps preserve it.

#### **Monitoring and Enforcement**

- **Monitoring Use of TK:** Establish mechanisms to monitor the use of TK and ensure compliance with regulations that protect it. This includes setting up oversight bodies and tracking systems.
- **Enforcing Protections:** Ensure that violators of TK rights are held accountable through appropriate legal actions. This helps deter unauthorized use and exploitation of TK.

## PHARMA TAXATION POLICY: AN ETHICAL APPROACH

Ansh Kanaujia<sup>1</sup>

Meghana Chowdary Dasari<sup>2</sup>

### INTRODUCTION

The pharmaceutical industry plays a vital role in the economy of every nation around the globe with a profound influence on both public health and economic development. It is undeniable that the pharmaceutical taxation policies are the critical issue as it has many challenges and problems which can affect the economic development and public health of the nations. Pharma taxation policy refers to the systematic way of taxing the pharmaceutical industry by the government. However, the biggest problem is the high cost of pharmaceutical products which became a major concern for the consumers and government. In the recent years, the world had witnessed many debates that how a country should structure or design their pharmaceutical taxation policies for the better implication in their economy which will further foster innovation. This issue is complex and multifaceted as different countries have different approaches to strike the balance between generating revenue and ensuring the access to affordable medicines.

Before understanding the area of pharmaceutical taxation it is important to understand the significance of the pharmaceutical industry. It is an economic powerhouse which has its impact and significance over and across the borders. This industry not only contributes to GDP but also plays a very vital role in enhancing the health of overall populations. The pharmaceutical industry encompasses a vast array of activities from drug research to development to manufacturing and distribution. Pharmaceuticals provide tools to diagnose and an essential component of health care systems. The design of the pharma taxation policy is a complex task where the government must balance the competing interests between raising revenue and making the pharmaceutical products being available to the citizens at affordable prices, where the government can do so by reducing the taxes on medicines or by providing tax breaks to pharmaceutical companies that develop new treatments for diseases. Government can also use pharma taxation policy to encourage to invest in R&D<sup>3</sup>.

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1. B.B.A.LL.B (Business Law), Alliance School of Law, Alliance University, Bangalore.
  2. B.B.A.LL.B (Business Law), Alliance School of Law, Alliance University, Bangalore.
  3. ZAHEER-UD-DIN BABAR, GLOBAL PHARMACEUTICAL POLICY 164-66 (Palgrave Macmillan 2020).

The major problem in the pharmaceutical taxation policy revolves around that how these taxation policies impacts access to affordable medicines at the same time it contributes to the revenue of the government. The pharmaceutical industry is a diverse global sector and the problem is to analyse the wide range of policies adopted by different countries. Development in the economy influences how the taxation policies are structured. The main challenge is that how these disparities in development stops the economic growth and public health. To recognise the shortcomings and loopholes in the current policies is a challenge for the policy makers. Solving out these problem is a crucial one to ensure that there is a worldwide access to the affordable medicines without compromising the stability of the economy and the health of the public at large.

## **CURRENT SCENARIO OF PHARMA TAXATION**

Different countries have their different pharmaceutical taxation policies. Some of the economies have higher taxes on the pharmaceuticals products while on the other hand some have lower taxes<sup>4</sup>. Some different approaches are there which the countries adopt to tax the pharmaceutical products which includes value-added tax and tiered tax etc. This study provides an outlook of the comparative analysis of the taxation policies of the pharmaceutical products around the globe which includes incentives, tax rates etc.

Some of the policies are listed below-

### **Tiered Tax Systems**

Many countries adopt a tiered tax system for pharmaceutical products in which branded drugs have higher taxes and generic drugs have lower drugs. These kind of tax policies are designed to encourage more affordable generic drugs. Taking the example like in U.S. the federal tax code is Internal Revenue Code (IRC). Section 11 of the IRC, 1986<sup>5</sup> imposes the corporate income tax where the corporate income tax rate of 21% is charged on the branded drugs while on the other hand corporate income tax of 17.9% is charged on the generic drugs.

### **Value-Added Tax (VAT)**

It is a consumption tax which is applied to the value added at each stage of the production and distribution process of goods and services. VAT is charged on the pharmaceutical products

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4. LAKSHMIKUMARAN & SRIDHARAN ATTORNEYS, *Key issues impacting the pharmaceutical sector*, <https://www.lakshmisri.com/insights/articles/key-issues-impacting-the-pharmaceutical-sector-1/#> (last visited August 06, 2024).

5. Internal Revenue Code, § 11 (1986).

in many countries around the globe. For example, in the U.K., the tax authority in U.K is His Majesty's Revenue and Customs<sup>6</sup>. The VAT is charged at 20% on the pharmaceutical products.

### **Tax Rates**

The effective tax rate varies widely on the pharmaceutical products from country to country. In U.S., the effective tax rate is around 20% while in India it is around 15%. The pharmaceutical industry in India has to comply with the Income Tax Act, 1961<sup>7</sup> and Goods and Services Tax (GST) regulations. The Income Tax Act, 1961 offers various incentives such as R&D tax deductions and exemptions on specific capital investments whereas the Goods and Services Tax regulations ensures timely filing of returns and payment of dues. The pharmaceutical industry must comply with these rules and regulations where the non-compliance can lead to financial penalties, audits and legal action.

### **Tax Breaks for Research and Development**

Many countries like U.S. offers tax breaks up to 50% for the pharmaceutical companies to promote the investments in R&D. Through this policy the cost of developing new drugs reduces and also helps to make new drugs available in the market more quickly.

## **IMPLICATIONS OF TAXATION POLICIES**

The implications of taxation policies mainly depend upon the type of pharmaceutical taxation policy which the country adopts. The countries which have high taxes on the pharmaceutical products generally in those countries the pharmaceutical companies prevent to invest more in R&D as it reduces the profitability of new drugs. It also leads to the difficult situation for the pharmaceutical companies to compete in the global market. Moreover, the countries with low taxes on pharmaceutical products can make the products more affordable. This leads the pharmaceutical companies to make higher profits but at the same time it discourages the investment in research and development.

The implications of different pharmaceutical taxation policies for the pharmaceutical industry and for patients are complex and nuanced. There are both positive and negative implications for each stakeholder group. The positive impacts for the patients or the consumers if the taxes are low in the country are such as, if the taxes are low on the pharmaceutical products, they become more affordable for the patients as then the pharmaceutical companies have to pay less taxes which passes to the consumers in the form of lower prices and also low

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6. Huseyin Naci & Robin Forres (2023) *A Primer on Pharmaceutical Policy and Economics*, The London School of Economics & Political Science. Available at [https://www.health.org.uk/sites/default/files/2023-03/report\\_1\\_a\\_primer\\_on\\_pharmaceutical\\_policy\\_and\\_economics\\_final](https://www.health.org.uk/sites/default/files/2023-03/report_1_a_primer_on_pharmaceutical_policy_and_economics_final)

7. Income Tax Act, 1961. Available at <https://legalaffairs.gov.in/actsrulespolicies/income-tax-act>



taxes improves the access to medicines for the patients as then the patients have to pay less for the medicines<sup>8</sup>.

There are also number of negative implications for the pharmaceutical companies if the taxes are high in the concerned country such as firstly, reduction of investment in R&D as the higher taxes reduces the profitability of the new drugs so, in order for the pharmaceutical companies to stay in the profit margins, they do not tend to invest much in the R&D which leads to the decrease in the production of new drugs; secondly, the competition will increase from the generic drugs as high taxes on the pharmaceutical products makes the branded drugs more costlier which makes the generic drugs more attractive to the consumers as they are more affordable which therefore increases the competition for the branded drugs and at last resulting in the reduction in the profitability of the pharmaceutical companies.

Nextly, there will be difficulty competing in the global market for the pharmaceutical companies when the taxes are high due to the reason that pharmaceutical companies may have low taxes in the other countries which gives them the competitive advantage; also there will be increase in the price of the drugs in the market when the pharmaceutical companies don't pay higher taxes which leads to higher profits and lastly, there will be difficulty in regulating the drug prices as it is the main challenge which the government faces while regulating the drug prices when the pharmaceutical companies don't pay high taxes due to the reason that pharmaceutical companies will have more money to invest it in lobbying and other methods to prevent the government from regulating the prices of the drugs.

## **NEED FOR REFORMATIVE POLICY**

Pharmaceutical taxation policy is a complex issue which has impact on the overall pharmaceutical industry and the patients and government. The current scenario regarding the pharmaceutical taxation policy in various different countries is that they adopt wide range of approaches in order to balance their need to raise the much-needed revenue so that they have enough access to the affordable medicines for their countries. This article mainly focuses on the options available for the pharmaceutical taxation policies to reform its methods and how will it benefit and the disadvantages by reforming them and at lastly suggesting some measures for government to reform the pharmaceutical taxation policies which benefits both the parties namely, pharmaceutical industry and the patients.

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8. Brad W. Setser, *Cross-border Rx: Pharmaceutical Manufacturers and U.S. International Tax Policy*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/report/cross-border-rx-pharmaceutical-manufacturers-and-us-international-tax-policy> (Last visited 23 July 2024, 10:00 AM)

One of the common reform which can be followed in the pharmaceutical taxation policy is to reduce taxes on the pharmaceutical products so that they will be made easily available to the patients at affordable rates. The advantage of this reform is that the patients get affordable pharmaceutical products at affordable prices whereas the disadvantages is that investment reduces in the research and development and also mainly it reduces the government revenue. The other reform can be made to provide tax-breaks for research and development, which has the advantage to encourage pharmaceutical companies to develop new drugs which automatically increases the investment in research and development but, the disadvantage here is again the loss of government revenue<sup>9</sup>.

A tiered tax system can also be followed which imposes different tax rates on different types of products where it would impose higher taxes on well-established and brand named products and a little lower tax on generic drugs and medicines which would therefore increase the use of generic drugs and make the patients to get the needed pharmaceutical products at an affordable rates and reduce the government spending on prescription drugs. The disadvantages associated with this reform is that it reduces the profitability of pharmaceutical companies due to this variance in the tax rates and it reduces the investment in research and development and lastly it exempts prescription drugs from the Value-Added Tax (VAT).

Value Added Tax (VAT) is a consumption tax which is applied to the value added at each stage of the production and distribution process of goods and services, where this tax is applied to pharmaceutical products in most of the countries around the world. Exempting the prescription drugs from calculating in VAT would make these prescription drugs more affordable for the patients. The disadvantage associated with this reform is that it reduces the government revenue. Another option which can be made for reforming pharmaceutical taxation policy is that the governments to negotiate drug prices with the pharmaceutical companies so the government can reduce the spending on prescription drugs but the disadvantages associated with it are that the profitability of pharmaceutical companies reduces and also reduction in the investment in research and development.

## CONCLUSION AND SUGGESTIONS

After understanding the implications of the different taxation policies on the consumers and the need for the reformative policy, the following suggestions and recommendations can help for better approach for the taxation policies for the pharmaceutical companies which are:

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9. OECD, [https://www.google.co.in/books/edition/Tax\\_Policy\\_Reforms\\_2020\\_OECD\\_and\\_Selecte/Wvr6DwAAQBAJ?hl=en&gbpv=0](https://www.google.co.in/books/edition/Tax_Policy_Reforms_2020_OECD_and_Selecte/Wvr6DwAAQBAJ?hl=en&gbpv=0), (Last visited 23 July 2024, 10:00 AM)

Firstly, better engagement with the key stakeholders such as pharmaceutical company representatives, government officials and other healthcare professionals can help in the more effective taxation policy.

Secondly, by conducting the health impact assessment, evaluation of the negative consequences of the taxation policies on public health can be made which is useful for better analysis and as to what further steps to be proceeded with.

Thirdly, by assessing as to how these policies will affect the affordability and accessibility of the essential medicines and their impacts on the public health.

Nextly, by utilizing the economic modelling techniques and by addressing the ethical concerns, assessing the implication of the various taxation policies.

Lastly, to adopt some policies which should aim to strike the balance between public health and economic development so that it ensures equitable access to affordable medicines and also to organise the educational awareness to inform the public about the impacts of the pharmaceutical taxation policies on healthcare sector which empowers individuals for advocating for fair taxation policies.

To conclude, the web of pharmaceutical taxation policies plays a key role in shaping the dynamics between public health, government revenue and the progress of the economy. By understanding the tax rates, incentives and the regulatory framework, this analysis highlighted the relationship between affordability and accessibility of the medicare, innovation and taxation in the pharmaceutical sector. The challenges faced by the pharmaceutical taxation shows the need for a nuanced approach to policy formulation.

A well-structured taxation policy is not merely just a fiscal tool but it also acts like a catalyst for broader societal benefits. It can spur innovation ensuring that the new and effective treatments reach the marketplace while balancing the need of affordability and access for the public. The taxation policies also generate revenue for the government, which when re-invested in healthcare systems can further enhance public health outcomes.

The insights provided in this study serve as a valuable resource for researchers, stakeholders and policymakers in the pharmaceutical industry in order to navigate the multifaceted challenges of the pharmaceutical taxation. The ultimate aim is to craft the policies that not only increases the economic growth but which also ensures the fruits of the pharmaceutical innovation and advancement are reachable to all the citizens of the society thereby contributing to a more equitable society. The transparent, fair and balanced taxation solutions is crucial to foster an environment where both the pharmaceutical industry and the public can also thrive together.

## **SCENTED SIGNATURES: REDEFINING TRADEMARK PROTECTION IN THE FRAGRANCE INDUSTRY IN INDIA**

Sahiba Verma<sup>1</sup>

### **INTRODUCTION**

The concept of scented signatures in the fragrance industry represents an emerging paradigm in intellectual property rights (IPR). Smell marks have significance because smells or fragrances are deeply immersed in the human brain, which triggers the memory associated with the fragrance. Smells are unique as they have the potential to bring back memories that aren't always easily recalled by humans, according to Rachel Herz, an adjunct professor of human behaviour and psychiatry at Brown University. This paper explores the emergence and challenges in smell mark registration in India.

Protecting different fragrances is important as it may be a great way to advertise. People generally take smells for granted. When compared to our senses of touch and sight, our sense of smell is something we are not always conscious of. However, research has revealed that our sense of smell is crucial in our lives without it, our memories would not be the same. Our olfactory system, which connects the smell receptors to the brain, is related to our limbic system, which regulates emotion and memory. This is not surprising to businesses that employ fragrances that convince us to buy products; for example, imitation bread aromas are used to recall or encourage us to buy fresh bread.

Although unconsciously, we already use scents to bring back memories. Perhaps the aroma of the sea transports you back to a fun family vacation, or sometimes a perfume carried by the wind brings back memories of past feelings. Since odors are such strong emotional triggers, the concept of putting scents in a system like Madeleine may someday become just as common as photos.

Historically, a trademark has been connected to symbols, names, words, or other indications that help in identifying the products or services that the manufacturer provides. Due to technological advancements, trademark offices and courts in several countries have begun to provide protection for a distinguishing smell that could be represented graphically to signify the source of goods and services.

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The 1999 Indian Trademark Act's requirement for pictorial representation during trademark registration presented serious difficulties for scent trademarks. The article offers insights into global viewpoints, including the actions taken by the European Union (EU) and the United States (US), which recognize scent marks under the Lanham Act but differ from Australia and New Zealand in that they are not functional'. Scent marks have a bright future ahead of them for companies trying to stand out from the competition and provide memorable brand experiences<sup>2</sup>. To fully realize this potential, though, will need persistent innovation, flexibility in dealing with the challenges of changing laws, and an in-depth understanding of the preferences and behaviours of customers.

This article discusses the evolution of trademark law into an unconventional type of mark known as smell marks, which relate to the protection of a certain smell or aroma that a product has. It also tries to define the many issues of the development and protection of smell-marks in India.

## EMERGENCE OF SMELL MARKS

Scent marks, also known as olfactory trademarks, are a relatively new idea in the world of intellectual property. The trademark that identifies the source of original goods using the consumer's sense of smell<sup>3</sup>. Every unique fragrance is known to be trademark and used to identify between different goods or services. Its purpose is to establish the legal protection of existing smells that may be used as trademarks. Sensory branding is an advertising strategy that uses the consumer's senses to influence their preferences<sup>4</sup>. All it takes is to use the power of the senses to attract and retain customers. These days, companies want to influence through this sense simply because they think that the more senses get involved, the stronger the message will be.

Spence (2003) believes that smell (olfactory marketing) generates 75% of emotions and that companies use both natural and manufactured odours.<sup>5</sup>

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2. Yafei Pan, *Research on the distinctiveness examination criteria of scent trademarks*, 2(11) SCIENCE OF LAW JOURNAL, 48-51 (2023).
  3. Abhijeet Kumar, *Protecting Smell Marks: Breaking Conventionality*. 21 JOURNAL OF INTELLECTUAL PROPERTY RIGHTS, 129-139 (2016)
  4. Dodamgoda, N., & Amarasinghe, K. *The Impact of Sensory Branding on Consumer Preference of Coffee Shops in Colombo, Sri Lanka*, 21 IOSR JOURNAL OF BUSINESS AND MANAGEMENT (ISOR-JBM), 21-31. (2019).
  5. Kumamoto, J., & P. Tedjakusuma, A. *A study of the impact and effectiveness of scent used for promotion of products and services with low olfactory affinity*, 186 INTERNATIONAL SYMPOSIUM ON MANAGEMENT (INSYMA) 158-161 (2018).

In a study by Sayadi et al. (2015), it was found that customers tend to form connections with certain brands based on their sensory experience. The use of sensory branding is aimed at establishing subconscious cues that influence consumer perception and decisions about a product. He emphasizes the importance of sensory branding in today's fast-paced world since customers are less likely to be attracted by commercials.

In India, it is still developing and there have been very few registrations due to the challenges associated with their graphical representation and distinctiveness. But globally there have been a few successful examples of smell trademarks that include the scent of raspberries, bubble gum scent for sandals, and so on. Smell markings are under the category of Non-Conventional Trademarks, commonly referred to as "Non-Traditional Trademarks," which is a brand-new class of marks that differs from regular trademarks in terms of appearance. It doesn't have the fixed properties of two-dimensional flat forms—pictures, words, numbers, etc.—and can vary or volatile when interacting with connected products or services, leading to low stability and frequent changes.<sup>6</sup>

Additionally, this trademark encompasses marks that go beyond the conventional definition of a trademark. This includes slogans, sensations, scents, taste marks, three-dimensional designs, sound, movements, position, holograms, and other unique marks. It also includes marks that are not limited to words, symbols, names, devices, packaging, or combinations of colours.

The global expansion of law has aided in the formation of smell marks. One such convention that expressly recognized unconventional trademarks was the Singapore convention on Trademarks, which was signed in 2006. However, it also made it clear that member governments have no obligation to set up "new types" of trademarks.

The World Intellectual Property Organisation<sup>7</sup> established the Standing Committee on Trademark Law to do a study on trademarks. After classifying non-conventional trademarks into visible and non-visual mark categories, the committee studied them. Colours, holograms, and shapes are a few examples of visual trademarks; sound, smell, taste, and texture are examples of non-visual trademarks. It was discovered later, in 1956, that the concept of a trademark was quite inclusive. At the Vienna summit, the subject was first discussed; later, it was in Brussels.

In 1994, the development of trademark rights was approved under the TRIPS agreement. This TRIPS agreement defines trademarks broadly based on the types of marks that may be mistaken for trademarks, and additionally, trademarks must have a distinguishing characteristic

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6. *ibid*

7. *Smell, Sound and Taste – Getting a Sense of Non-Traditional Marks*, WIPO MAGAZINE, (March 13, 2024, 10:50 AM) [https://www.wipo.int/wipo\\_magazine/en/2009/01/article\\_0003.html](https://www.wipo.int/wipo_magazine/en/2009/01/article_0003.html)



in order to be protected according to the functional definition. Signs, symbols, characters, logos, and combinations of colour or signs are among the rather arbitrary list of products that may be classified under Article 15 of the TRIPS agreement. According to the TRIPS agreement, unconventional trademarks should be protected since they are used as trademarks and have a specific character that can help in figuring out the difference between a certain product.

There have been several excellent academic studies and discussions about protecting non-conventional trademarks in Europe since the 19th century. Due to their unique characteristics and ability to be graphically represented, non-conventional marks like sound, shape, etc. were also the subject of discussion in Bolivia at the beginning of the 20<sup>th</sup> century about their protection.

Despite the fact that non-traditional trademarks and protection have increased in popularity over the past 20 years, there are still numerous issues with these marks, especially when it about graphical non-perceptible non-traditional trademarks like touch, smell, and taste, which can confuse consumers and cannot be graphically represented.

The purpose of smell marks is to signify their worldwide presence. Smell marks can be registered by legal methods or through law in a number of jurisdictions, including the US and the EU.

### **Challenges in Smell Mark Registration**

The term trademark is defined under the Trademarks Act of 1999, Section 2(1) (zb). Marks that do not fit the Act's criteria are considered non-conventional marks<sup>8</sup>. Holograms, smells, sounds, and tastes are examples of these markings. These trademarks may consist of symbols, words, names, packaging, gadgets, and colour combinations. Although non-conventional marks must be addressed, the Draft Manual for Trademark Practice and Procedure 2009 stated that there is a need to address, but more clarity is still needed.<sup>9</sup>

A trademark requires “graphical representation.” Anything that may be stated both visually and on paper is considered a graphical representation according to Rule 28 of the Trademark Rules 2017 (the ‘Rules’).

The following requirements must be met for a mark to be eligible for trademark registration under the Act:

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8. Bhanu Pratap Singh Sambhyal and Faseeha Khatoon, *Moving from Conventional to Non-Conventional Trademarks-Recognising Smell Marks*, IV NUALS INTELLECTUAL PROPERTY REVIEW, 18-41, (2021-22)
  9. Vatsala Sahay, *Conventionalising Non-Conventional Trademarks of Sounds and Scents: A Cross-jurisdictional Study*, 6 NALSAR STUDENT LAW REVIEW (NLSR), 128–141. (2011)



It must: Be able to be graphically represented. Be simple to distinguish from other items and comply with the rules in order to qualify as a “mark” under Section 2(1)(m) of the Act.

Trademark Rules of 2002, specifically Rules 28 and 30 mandate consistent representation in writing. This need, therefore, poses a significant challenge.

The Indian Trademark Act 1999 has an open-ended definition of “trademark” that does not specifically exclude non-traditional marks such as smells still there is the lack of clear guidance on the requirement for graphical representation that has made it difficult to register smell marks under Indian trademark law. It is not possible to represent the ‘smell’ in words or chemical formulae accurately. Then Rule 26 requires a graphical representation of the mark on the registration form. It is nearly difficult with a smell mark to present on paper when submitting for registration.<sup>10</sup>

Showing the distinctiveness of a smell can be challenging as it often comes from the ingredients used in the product. An individual cannot easily refresh a smell once they have built up a memory of it. Identifying similar smells without expertise is possibly hard, making the process of registering smell marks misleading. Thus, it is impossible to prove originality and uniqueness, and this is the primary limitation of smell mark registration.<sup>11</sup>

Features of products that are also functional are not protected under the doctrine of function. Disproving that a certain product’s aroma is not a utilitarian feature may be rather challenging. A common argument is that since human smell is subjective, it cannot be used as a legally recognised brand.

If a product’s smell provides a means of identifying its origin, its manufacturer aiming to prevent infringement on that mark must be able to prove that consumers will likely become confused by similar smells. The practical challenges in administering smell marks could prove to be far more than in the establishment of colour marks, since it may be hard to distinguish the same smell blended with similar colours without professional assistance.

Even though smells of products may be registered and protected as trademarks in many countries, the procedure of registering a smell trademark still is challenging since it cannot be

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10. Ms. Ananya Pandey, *Recognition Of Smell As A Trademark In India*. (AMLEGALS). (May 13,2024, 10:50 AM) <https://amlegals.com/recognition-of-smell-as-a-trademark-in-india/#>
  11. Kurup, R. R., & Aksa Pradeep, N., *Non-Conventional Trademarks In India: The What, The Why And The How*, 1 E-JOURNAL OF ACADEMIC INNOVATION AND RESEARCH IN INTELLECTUAL PROPERTY ASSETS (E-JAIRIPA) 131-148 (2020)

graphically represented, and it takes a huge amount of work to demonstrate how it differs from the product.<sup>12</sup>

Since India follows a system that is comparable to that of the EU, which raises the bar for the trademark's graphic representation, registering non-conventional trademarks requires a lot of attention to detail. Indian courts are free to interpret and apply the law differently from that of the UK Trademark Laws, even if the criteria are the same as those followed in the UK. Additionally, the precedents established by the ECJ are followed by UK courts. India must thus emphasis on coming to a solution that permits a more "open system" of establishing standards for granting trademarks for smell marks. This is because it is fair to predict that non-conventional trademark demand will increase in the near future, even if non-conventional trademark registration is not expanding at a similar rate as conventional trademark registration.

Smell mark registration is among the most challenging since, according to the previously mentioned requirements, the mark cannot be represented graphically or visually. Moreover, there is uncertainty due to the fact that different nations have varying rules regarding smell marks.

In *Sherrell Perfumers Inc. v. Revlon Inc.*, the court determined that when new fragrances hit the market, consumers will undoubtedly get confused in the absence of a single, widely accepted way to identify smells. In these kinds of circumstances, proving infringement would likewise be challenging. Durability is another problem with smell marks. Furthermore, the impact of climatic conditions cannot be ignored, the scent strength naturally fades with time, and there should be some sort of variation in the sample deposition of smell marks. However, this can be mitigated by making sample collection possible from local laboratory suppliers on a certain timeline. Another solution is to use scenography. It is an instrument of technology that can store smells in nanoscopic levels and then use them as required.

The requirement that the smell not be brought on by the nature of the product presents another difficulty in establishing a smell mark. Certain smell mark descriptions such as tennis balls scented with freshly mown grass from a Dutch manufacturer.

The significance of product distinctiveness is discussed in the *Myles Limited* case . This case discusses whether or not one can identify the fragrance of raspberries in connection with fuels, namely motor fuels and diesel in particular as an engine, heating, and fuel. As per the

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12. Port, K. L., *On Nontraditional Trademarks*, 38 NORTHERN KENTUCKY LAW REVIEW, 2012

verdict, the registration of raspberry fragrance was refused. The “scent” was not visible though being represented graphically.<sup>13</sup>

The most major obstacle to the process is the prohibition of registering smell as a trademark under Indian trademark law, which also provides no precedent for support. Graphical representation is required for registration. It won’t be feasible in India until a few loopholes are closed.

A lack of uniformity in smell mark registration might be harmful to national economics, even though it is unclear whether smell markings will be utilized more frequently and recognized as legitimate trademarks in different nations. It is unclear if the scent mark will be included among the most valuable commercial marks in the future or if they will only be a fad due to their present relative rare.

## INTERNATIONAL PERSPECTIVES

### The European Union

The first smell-related<sup>14</sup> case was determined by an English court. The United Kingdom Trademarks Act of 1994 implemented the European Community Directive 89/104/EEC (Directive). Chanel was the first brand to file for a smell registration under the 1994 Act for the scent Chanel No. 5. The product itself smelled bad, thus the application was rejected based on its functionality. The same day, Sumitomo Rubber Co. requested registration for a floral fragrance/smell suggestive of flowers applied to tires, while Unicorn Products sought registration for a strong bitter beer smell attached to flight darts. The applications were approved for both.

A landmark case determined by the European Court of Justice was Ralf Sieckmann v. Deutsches Patent und Markenamt<sup>15</sup>. In this case, Mr. Sieckmann applied for trademark protection for his collection of businesses. By providing the chemical formula, describing the mark’s chemical composition, and noting that samples are available from nearby labs listed in the Dutch Yellow Pages, he shows the mark. He additionally provided a sample, stating that

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13. Gautham Balaji, *Unconventional Trademarks: Can Sounds, Smells, Colours and Other Non-Traditional Trademarks Be Protected in India?* MONDAQ (July 24, 2024, 10:00 AM) <https://www.mondaq.com/india/trademark/1446194/unconventional-trademarks-can-sounds-smells-colours-and-other-non-traditional-trademarks-be-protected-in-india>
  14. Geiregat, S., *Trademark Protection for Smells, Tastes and Feels – Critical Analysis of Three Non-Visual Signs in the EU.*, 53(2) IIC INTERNATIONAL REVIEW OF INTELLECTUAL PROPERTY AND COMPETITION LAW, 219–245. (2022)
  15. Ralf Sieckmann v. Deutsches Patent und Markenamt, Case C-273/00, 12 December 2002, European Court of Justice.

“balsamically fruity with a slight hint of cinnamon” was how people usually described the perfume. The application was repeatedly rejected due to its failure to comply with Article 2 guidelines.

Whether smells were registerable and whether the recommended graphical representation techniques were sufficient were the main points of debate in the preliminary ruling. The Court came to the conclusion that smell can get trademark protection provided it is graphically represented, noting that the indicators listed in Article 2 were not an exhaustive list. This kind of representation needs to be self-contained, and comprehensible, and “must enable the sign to be represented visually, particularly using images, lines, or characters.” By consulting the public register, the public and responsible authorities would be able to recognize the distinctive sign for which protection was asked for via to the graphical representation.

The Court made an observation on the graphical representation method, noting that certain people could identify the scent by reading a chemical formula, and that the formula itself indicated the substance rather than the smell. Written descriptions were inadequate and unclear. A little sample lacked stability, longevity, and graphing ability. Consequently, the Court came to the conclusion that none of these techniques—either in isolation or in concert—constituted legitimate representation. The application was thus rejected. It is important to note that the Court did not specify what an appropriate graphical representation of Article 2 is. By failing to do so and nullifying the aforementioned procedures, the ECJ has drastically reduced the scope of scent registration.

## USA

The Lanham Act governs trademark protection and registration. The U.S. Patent and Trademark Office (U.S.P.T.O.) is involved in the registration process. Section 1052 of the Lanham Act is the key provision that defines what can be trademarked. In a negative way, the legislation outlines what is not regarded as a trademark. The only prerequisite for approval is that the mark must be nonfunctional and either unique or have become unusual enough for customers to be able to tell the owner’s products apart from others. Trademarks are explained in 15 U.S.C. Section 1127.26. ‘Symbols’ and ‘devices’ fall under this general category. Congress deliberately kept these two sentences in place in 1988 so that sounds, forms, and smells may be registered as trademarks.

Thus, the Act does not prohibit recording sounds or fragrances. The ruling in *Qualitex Co v. Jacobson Products Co* by the US Supreme Court, holding that a trademark can be “almost anything at all that is capable of expressing meaning,” makes it easier to register non-conventional marks. The first fragrance to receive trademark protection was characterized as having a “high impact, fresh, floral fragrance typical of Plumeria blossoms.” Conventional limitations were imposed on what could be trademarked. The fragrance must be exclusive to

the product; it cannot be useful or advantageous. As a result, it is impossible to smell perfume. The court decided that while visual aids for visual representation were not required, describing the fragrance was.

### **New Zealand**

The Trademark Act of 1953 in New Zealand was modified by the Amendment Act of 1999, which included taste, sound, and smell to the description of appropriate uses for a “sign,” in addition to name and logo. While international agreements for instance TRIPS do not mandate the inclusion of certain sensory aspects, they may be eligible for trademark registration if they are easy to distinguish goods from other. But for a smell to be eligible for trademark registration, it needs to be highly distinctive or rare so customers will recognize it and while purchasing they will link it to a certain source. Only advertising description is not enough for them to recognize the smell, they need to first smell the product in real. Lastly, In New Zealand, smell marks are protected by statutes and court interpretation, meaning that distinct smells may be eligible for trademark registration provided they fulfill the necessary standards of uniqueness and association with a specific source.

### **Australia**

The Australian Trademark Act of 1995 recognises that sounds, shapes, colors, and smells may all be registered as trademarks for products under its definition of “sign.” Nonetheless, the Sieckmann test is used by Australian courts to identify non-standard marks. Put otherwise, a trademark application will be denied if it is not visibly represented.

## **CONCLUSION**

The ownership of a particular smell is protected by smell trademarks. Manufacturers used smells or aromas to differentiate their goods from similar ones, which led to the development of smell marks. In the future, it will be impossible to ignore the potential advantages that smell marks, and their special qualities provide. It has been frequently observed that since humans have one of the strongest senses, smell may be a very useful tool in aiding customers in remembering and identifying a product.

Among customers who are blind or visually challenged, they are also quite significant. Also, one potential solution to get beyond the limitations of graphical representation is to employ highly developed scent sensors. Various technologies, including Gas Chromatography and E-Nose, are being developed and may be utilized to collect fragrance specimens for this objective.

Scent marks have a bright future ahead of them for companies trying to stand out from the competition and provide memorable brand experiences. To fully realize this potential, though, will need persistent innovation, flexibility in dealing with the challenges of changing laws, and an in-depth understanding of the preferences and behaviours of customers.

## COMPARATIVE STUDY ON PROTECTION OF FASHION INDUSTRY UNDER IP LAW WITH RESPECT TO INDIA AND EUROPEAN UNION

Ishita Shukla<sup>1</sup>

*“Fashion goes only in one direction i.e., forward and I am a firm believer in thinking that way too”.*

-Anna Wintour

### INTRODUCTION

India is a country with a rich cultural heritage and a prolonged history of fashion. The diversity in the regional styles, elaborate textiles, and traditional clothing all reflect the historical influences, social classes, and artistic expressions of the nation. Indian fashion exhibits a continuous evolution that celebrates its cultural heritage while adjusting to global trends. Its roots can be traced back to the grandiose attire of royal dynasties, the ancient practices of the Indus Valley Civilization, and the modern mixture of traditional and modern styles. Each region and state in India have its own unique costume, traditional clothing, and accessories, contributing to the country's diverse and rich textile heritage. In this age of globalization, India's fashion sector is quickly developing to keep up with global trends. Significant growth over the past ten years has been attributed to the rise of domestic designers, some of whom have recently received recognition on a global scale. The expansion of the fashion business is evidenced by the rise in the number of important fashion events in India. In the modern world, fashion encompasses much more than merely attire and accessories. The rapidly expanding fashion business has been significantly influenced by intellectual property. Intellectual property law can protect a variety of developments in the fashion industry, including elements of fashion design, literary and artistic works, images, and symbols used in trade and commerce. It should be emphasized that the many categories of intellectual property and their importance to the fashion industry have only been briefly touched upon. By comparing the intellectual property protection in India and the west, the current study gives light on how to safeguard the fashion industry. Fashion has made significant progress to get to where it is today, along with fast-paced living. With the popularity of shows like Gossip Girl, Sex in the City, Emily in Paris, and Scandal, consumers are feeling more pressure to dress like celebrities. This has resulted in fake fashion accessories and clothing.

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The Government is unaware of where the 250 billion dollars generated by the counterfeit sector were each year ago. The fashion sector also has a significant impact on the economy, which facilitates black marketing. The sad thing is that people are completely unaware of buying counterfeit goods; to them, it is completely safe. In America and Europe, it is addressed by codified laws, but in India, we don't have a codified law as such. The only difference between his hand-embroidered jackets, which he was selling for Rs 40,000, and those being sold on the streets for Rs 1500 is that the designs are digitally printed, according to an Indian designer. When the owner was questioned, he said that the designs were an "honour" to the creator and not a copy. Thus, it is very essential to understand the importance of the protection of the fast-growing fashion industry especially in India to protect the designs. This research paper primarily talks about such protection under the IP law in both India and European Nations. This paper aims to fulfill its objective by adopting a doctrinal method of research by referring to sources like research papers, articles, journals, online sources.

## **STATEMENT OF PROBLEM**

The fashion business is a vibrant and lucrative sector that creates unique items and styles that are simple for rivals to copy. Fashion designers must have their intellectual property (IP) protected if they are to be properly acknowledged and paid for their efforts. Fashion designers may find it more difficult to assert their IP rights and stop infringement since different jurisdictions have varying regulations governing the protection of fashion designs under IP laws. India and European Union both differ in their approach when it comes to protection of fashion industry under IP laws. There have been several claims about the laws of India being better than EU laws while some argue that the laws of EU have provided better protection to the fast-growing fashion industry.

After clearly analyzing the issue, the problem that emerges can be stated as follows What are the similarities and differences in the legal frameworks and enforcement mechanisms pertaining to fashion design, and how well do the intellectual property laws in different jurisdictions protect the intellectual property rights of fashion designers?"

## **THE IP PROTECTION RELATED TO FASHION IN INDIA**

The five laws that protect fashion design in India are the Indian Copyright Act<sup>2</sup>, the Designs Act<sup>3</sup>, the Trademarks Act, <sup>4</sup>the Geographical Indications Act<sup>5</sup>, and the Patents Act<sup>6</sup>. These laws

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2. The Copyright Act, 1957 (Act 14 of 1957)

3. The Designs Act, 2000 (Act 16 of 2000)

4. The Trademarks Act, 1999 (Act 47 of 1999)

5. The Geographical Indications of Goods (Registration and Protection) Act, 1999 (Act 48 of 1999)

6. The Patents Act, 1970 (Act 39 of 1970)



only govern specific elements of a garment, such as its design, shape, pattern, colour, and size, rather than the garment. The Fashion Industry is protected under the following sub-heads under IP

### **Protection through Copyright**

Copyright is a legal safeguard that protects original works of authorship, such as artistic and creative expressions, by guaranteeing the owners' exclusive rights to their original creations and forbidding unauthorised use or duplication. According to India's Copyright Act of 1957, works that are protected by copyright are shielded from infringement for 60 years after the creator's passing in addition to their lifetime. Copyright safeguards, inspires, and guarantees the existence of protection and redress for the creator if his creativity is used unlawfully, or his right or expertise is violated. The best way to safeguard fashion designers' artistic expressions is through copyright. There is no other efficient way to safeguard the intrinsic complexity of the industry, as well as the property interest and worth of the garment design. In rejecting the protection, the courts copyright protection would still offer an easily implementable solution to the issues of design theft, without affecting the free market of ideas, according to proponents of copyright and other legal remedies. Now, one must accept the reality that Design laws and copyright laws operate essentially simultaneously in reference to fashion technology to grasp the relationship between copyright and that industry. Now, how copyright is even related to fashion technology is likely to cross someone's mind. It is a reality that computer programmers, tables, and collections of computer databases fall under the definition of "literary works" for copyright purposes. For fashion design, software tools are employed, software-based models are used to evaluate the design, logistic management is used to analyse every step of the value chain and the outcome of the market's desire for that specific design. It is essential for establishing oneself in the cutthroat global economy. One prominent example is ZARA, which shortened its production cycle from 4 to 12 months to just 30 days by adopting a clever IT (information technology) system.<sup>7</sup> The finished fashion products are sent and arrive in stores within 48 hours of their manufacturing thanks to a high-tech distribution system that uses over 400 chutes and 200 kilometers of underground traces. Shirdotnet is another illustration. It is a clothing platform that gives users the chance to design and purchase items straight from its online store. The provision of mass customization clothing solutions has been accomplished using proprietary software that is shielded as a trade secret.

In general, one may state that a work must be aesthetic, pleasing to the eyes of the public, or must have been made as an artistic work; this includes drawings, sculptures, and creative

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7. Arendhu Shekhar Nanda, Shikha Behera," IP Rights and Fashion technology – Comparative Analysis in Fields and Continents" 2 *Indian Journal of Law Management and Humanities*,6 (2019)

workmanship. The meaning of it has been taken into consideration in several situations to determine whether it would fall under the purview of copyright and be protected by it or not. The House of Lords unanimously decided that a prototype for a distinctive three-piece lounge suite that was meant for mass manufacturing was not artistic in the landmark case of **Hensher V. Restawhile**<sup>8</sup>. Cardigans and sweaters, which are even on display in the Victoria and Albert Museum, are another illustration of the value of creativity and a work of art, but they are not to be sufficiently artistic or creative; rather, they are merely examples of how fashion has developed and changed over time. In a more recent case, **Lucas Film Ltd v. Ainsworth**<sup>9</sup>, the maker of the Star Wars movie lost the battle for the copyright for the helmets used by storm troopers. It was viewed as practical rather than artistic or even aesthetically pleasing. Dismissing all the claims, it was contented by the Supreme Court of United Kingdoms that helmets would not come under the purview of sculptures and cannot be protected by copyrights. These few examples give us a certain idea about how the fashion industry is protected under the IP laws.

### **Protection through Trademark**

Fashion and trademarks have long histories. What comes to mind when someone mentions the word “fashion?” Immediately a brand name or perhaps anything connected to a specific fashion house. When a person thinks of a brand, the mark, symbol, or writing style immediately comes to mind. That is the brand. It is the brand’s trademark that immediately springs to mind. It supports the fashion sector in several ways. The fashion house uses trademarks to establish enduring relationships with their patrons. They benefit greatly from getting their brand equity protected against infringement. They are crucial for businesses that compete in the market and are well-known to most of the population. By becoming a part of the design, the trademark serves as a link between the fashion house and its clients.

Louis Vuitton is an example. As well as using the mark “LV” in its designs, the company utilizes it as its logo. Burberry is another example; it has trademarked both the word “Burberry” and the Burberry check design. It is not always necessary for a trademark to be clearly visible on the item of clothing, but it can be displayed in a subtle manner too. For instance, on the buttons, the rear, or a small “label” inside or on the back. Trade dress, or the overall image of the goods, including its size, shape, colour or colour combinations, texture, graphics, or even specific sales strategies, was also made possible by trademark law. Many designers have attempted to defend their marks and products against allegations of trademark infringement by filing lawsuits alleging unfair competition. Because the public has come to associate the mark with a “secondary meaning,” a designer must demonstrate that the sale of a copy is likely to

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8. Hensher V. Restawhile [1976] AC 64

9. Lucas Film Ltd v. Ainsworth [2011] UKSC 39

cause confusion among customers. Although some designers, like Chanel, Gucci, and Louis Vuitton, who frequently use their trademarks with their clothing and fabric patterns, may be successful in pursuing such a claim, the industry's ephemeral and seasonal character will defeat most of the designers.

### **Protection under Patent**

Patents typically and generally protect technical innovations that are truly new, novel in nature, and non-obviously created. So, when thinking about fashion technology and the fashion business, a patent is not an IP tool that comes to mind so readily. Technical advancements are still one way to give the textile manufacturer a competitive edge. Patent can be of great use when thinking about the fashion industry in terms of the design and fabrics which are used to create the clothing materials. The new and novel ideas of a particular clothing material can be protected greatly by patent. Several instances of it include Geox Breathes, Suberis, and Novozymes. Having a patent demonstrates a company's technological supremacy in the market, making it clearly superior to its immediate competitors. For instance, a new fabric that is altogether softer, does not require ironing, does not wrinkle, etc., would draw a lot more customers and, consequently, more partners and investors in it. As was already noted, Novozymes is a Danish biotech business that created a technique for protecting fabrics using an enzyme and microbe called cellulose. It gives the denim a worn-out look by removing some of the indigo dye. Regarding the granting of fashion technology patents, there are some substantive and procedural concerns. It is only possible to patent new designs that are unique and non-obvious, which is a little difficult to show; designs that are being improved upon are not subject to patent; and occasionally, functioning is an issue. Now let's talk about procedural issues. The preparation of a patent application is a time-consuming, costly, and uncertain procedure that results in rejection of about one-third of all submissions. This is how patents protect the fashion industry.

### **Protection under Designs**

Understanding the definition of designs or, for that matter, industrial designs themselves is necessary before one can comprehend how fashion and designs are related. A design is a representational plan or drawing and is artistically appealing and has a dimensional quality to it; whether it is two dimensional, which includes knitting techniques, or three dimensional, which includes the shape of the product, like that of the shape of clothing or accessory. In the fashion industry, it is essential because it safeguards the unique expression of patterns, graphics. However, it has serious drawbacks, such as widespread imitation and counterfeiting due to copyright not covering functional items or general concepts. The short protection period, vague regulations, and the quick-paced nature of fast fashion make enforcement of the law more difficult for designers. In addition, new digital forms of fashion like NFTs are difficult for

traditional copyright laws to handle. Therefore, it is imperative that intellectual property laws be changed in order to give fashion designers and their creative works stronger protection. By registering designs, the creator, founder, or designer gains exclusive control over the design, preventing other market competitors from making use of the designer's unique invention. One of the main IP tools that is obviously and immediately relevant to the fashion business is designs. The invention of the knitting frame in 1589 marks the beginning of the concurrent evolution of design and technology<sup>10</sup>. Design piracy is punishable by paying damages, as stated in Section 22(2) of the Design Act<sup>11</sup>. In the matter of **Pranda Jewelry v. Aarya 24K**<sup>12</sup>, the Bombay High Court rendered a decision. This case involves copyright infringement in relation to gold sheet goods depicting gods and non-secular symbols. To illustrate how the features of shape and configuration are not applied when the picture is reproduced but the painting itself is recreated, the court used the example of replicating a painting onto a canvas or piece of paper. Nonetheless, the court found that when characteristics or patterns are included in drawings, diagrams, or blueprints even despite they would have a commercial value, they are not protected. This applies to commodities like a refrigerator or a mixer.

### Protection by Geographical Indicators

The fourth Schedule of the GI Act categorizes the products covered by legal protection. GI registration stands for the preservation of texture and creative value used to make fashion apparel or accessories. GI can develop and integrate into a creative economy, making it essential to rural areas when integrated with trademark and copyright. GI helps in protecting the fashion industry in numerous ways one of which is to safeguard the products which are related to fashion industry and have some uniqueness in them and they belong to that particular place.

## THE IP PROTECTION IN EUROPEAN UNION IN RELATION TO FASHION INDUSTRY

Fashion design is protected by numerous intellectual property laws, including copyright, design patents, and trademarks. In general, a trademark is a term or symbol that designates the source of goods or services. A patent protects the decorative design of a useful product or commodity. Article design is included in the range of expression covered by copyright. Nonetheless, these laws virtually overlap when it comes to protecting fashion design. A patent's scope is widened to cover a variety of fields in most countries, including the US and Thailand. The European Council established Legal protection of Design (a European Directive) in 1998.

10. Arendhu Shekhar Nanda, Shikha Behera," IP Rights and Fashion technology – Comparative Analysis in Fields and Continents" 2 *Indian Journal of Law Management and Humanities*, 10 (2019)

11. The design act, 2000 § 22(2)

12. *Pranda Jewelry v. Aarya 24K* AIR 2015 BOM 157

It established criteria for protection eligibility. Over a period of 25 years, the owner is given sole possession. Both registered and unregistered designs are protected by this legislation. An innovation is a product or a technique that typically offers a new technical solution to a problem or a new way of doing something.

### **Protection under Patent**

A patent is a form of an intellectual property right which is exclusive in nature and is generally granted for an invention to the patent holder conferring upon him the rights to make, use or sell or import for a limited period of time. The design patent, which is based on decorative, non-functional components, is the one that is most closely tied to fashion design. The sole authority to grant a license to third parties for an invention or design belongs to the patent holder. The exclusive right expires after the patent period, which is typically 10 to 15 years for a design patent and 20 years for an invention. The signature image for the Italian clothing brand Pickwick is an example of patent in which there is a young, faceless guy with spiked hair. Indeed, it was quite fashionable and appealing to young people's eyes. And over time, it was discovered that due to the brand equity of Pickwick, young people were prepared to spend more on clothing and accessories with its emblem. Because the company started off working out of a garage, the cost of the garments was kept low. Because of its appealing logo, it eventually gained market share. Today, the company has outsourced clothing manufacturing and concentrates mostly on marketing, distribution, monitoring, and controlling trademark usage.

Although fashion design can be protected in the United States through trademark, design patent, and copyright, each form of protection has its own set of difficulties. But only a few decisions by the US Supreme Court have addressed whether and how much fashion design should be covered by intellectual property rules.

### **Protection under Copyright**

According to clause 102(a)(5) of the Copyright Act<sup>13</sup>, clothing designs are considered "useful objects" or utilitarian functions, hence copyright protection for fashion design has been restricted. The separability of protected and unprotected portions has been shown using unique techniques developed by some US courts of appeals. The issue of copyright separability was ultimately resolved by the US Supreme Court in **Star Athletica, LLC v. Varsity Brands Inc.** **Another**<sup>14</sup> is Suberis, which was developed by the Italian business GrindiSrl. It is a cutting-edge cork fabric that is claimed to be waterproof, fireproof, washable, as smooth as velvet, as light as silk, and incapable of being scratched. This is mostly utilized in the production of apparel, footwear, and athletic wear, among many other uses.

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13. The copyright act, 1957 § 102(a)(5)

14. *Star Athletica, LLC v. Varsity Brands Inc.* Another 580 U.S. (2017)

## COMPARATIVE ANALYSIS

There are both similarities and variations between the rules governing intellectual property in India and the European Union (EU). This is a comparison of Indian and EU intellectual property laws:

1. **Patent Law:** To protect inventions, there are patent laws in both India and the EU. The Patents Act of 1970 governs the granting of patents in India, and the European Patent Convention governs granting of patents in the EU (EPC). These laws provide for the granting of patents for novel inventions that are inventive, beneficial, and have potential for industrial use. Nonetheless, there are some discrepancies between the two jurisdictions' patentability standards and processes.
2. **Trademark Law:** Brands and logos are protected by trademark rules in both the EU and India. Trademarks are registered under the Trade Marks Act of 1999 in India and the European Union Trade Mark Regulation in the latter (EUTMR). These regulations allow for the registration of distinctive trademarks that are not confusingly similar to marks already in use. The two laws' protection levels and registration procedures, however, are different.
3. **Copyright Law:** Original works of authorship are protected by copyright laws in both India and the EU. The Copyright Act, 1957 governs copyright protection in India, whereas the Copyright Directive governs copyright protection in the EU. Both statutes offer protection for a variety of works, including musical, artistic, literary, and visual works. The terms of copyright protection and the extent of protection offered by the two statutes, however, are different.
4. **Design Laws:** To safeguard a product's outward look, design regulations are in place in both India and the EU. Designs are protected in the E U under the Community Designs Regulation and in India under the Designs Act, 2000. These regulations allow for the registration of brand-new designs with distinctive characteristics. However, there are differences in the procedures for registration and the scope of protection provided under the two laws.
5. **Geographical Indications (GI)** are signs used on items that have a specific geographical origin and exhibit attributes or a reputation that are related to that origin. Both India and the EU have laws that protect GI. The Geographical Indications of Products (Registration and Protection) Act, 1999 governs the registration and defence of geographical indications in India. The EU's Regulation on the Protection of Geographical Indications and Designations of Origin for Agricultural Products and



Foodstuffs provides protection for GIs. Although the goals of the legislation in both jurisdictions are similar, there may be differences in the level of protection offered.

In conclusion while there are some parallels between the intellectual property (IP) laws of India and the EU, there are also some notable disparities in the processes and levels of protection offered by the various laws. Understanding these distinctions is crucial for companies doing business in both jurisdictions if they want to make sure that their intellectual property is properly safeguarded.

## CONCLUSION AND SUGGESTIONS

Since fashion law is a relatively new area of the law, it is crucial to adopt a fresh perspective. Fashion law has an unavoidable impact on society and the economy. Due to the inventive and derivative nature of the items, the fashion sector is unpredictable. Given how widely consumed it is, it has had a significant impact on the economy. High price and excessive usage are incompatible. It is there that “piracy” is born. Even though the challenge is the same in every state, the protection is different, therefore it is necessary to approach this area with a creative perspective. The laws vary widely. First instance, the latest changes in the fashion sector have caught people’s attention through the intellectual property laws. As time goes on and society’s requirements continue to grow, several legal experts and academics identify fashion law as one of the crucial institutions that creates intellectual property rights as the only protector of fashion designs. The various levels of protection given to various fashion trends must be known by fashion industries. There are notable differences between the Legal Protection of the European Union and the US’s Innovative Design Protection Act (IDPA). Furthermore, because there is no fashion law in the nation, the differences between IDPA and the European Union are incomparable. The creators have sought protection under copyright laws, but that is insufficient. This conclusion can be drawn from the *Star Athletica, LLC v. Varsity brands* case since copyright law was incredibly reliable in that. Thus, it can be clearly understood that the fashion industry has been widely protected by the IP laws both in USA and European Unions but needs a wider protection keeping in mind the growth of the industry at a fast-pacing rate. Indian laws have sought to protect the fashion industry through IP laws but needs a greater sense of reform to protect it further as compared to the laws of European Union. The fashion industry is one of the leading industries in today’s world. It is one of the greatest contributors to the economy of the world. It has been widely protected by the IP laws but there is always a scope of improvement and thus, here are certain recommendations-

1. Register Designs- In the fashion sector, design protection is crucial, thus you want to think about registering your designs. Depending on the type of design, you can register your creations as either trademarks or designs.



2. Protect your brand- You should take precautions to maintain your brand because it serves as your identity in the fashion industry. This can involve filing trademark applications for your company name, logo, and other distinguishing characteristics.
3. Avoid infringing on other's IP rights- Ensure sure you don't violate someone else's copyrights, trademarks, or other intellectual property rights. This can include refraining from using their brand names or trademarks or replicating their designs without their consent.
4. License your designs- To make money and broaden your market, you can license your ideas to companies like manufacturers or merchants. But you must make sure that your licensing agreement is precise and spells out all of the requirements for the license.

# **DERIVATIVE WORKS, TRANSFORMATIVE WORKS, AND FAIR USE UNDER THE COPYRIGHT LAWS: A DOCTRINAL UNDERSTANDING**

Shrivanika. S<sup>1</sup>

## **INTRODUCTION**

Intellectual Property Rights (IPR) constitute a dynamic and evolving area of law in India, with ongoing efforts to further solidify their foundations. This research paper adopts a doctrinal approach to analyse a growing area of confusion in copyright law: the treatment of derivative works and their associated copyrights. This research commences by establishing a comprehensive understanding of the concept of “derivative works.” Given the absence of a specific legal definition within Indian copyright law, the analysis will consider relevant provisions of international copyright acts alongside scholarly definitions. This multifaceted approach is crucial to effectively address this concept, which serves as a foundational element for the subsequent research.

A thorough research of the criteria for identifying a derivative work has been made and is comprehensively briefed. Furthermore, a clear understanding of copyright infringement, and its triggering factors. The research paper further delves into the legal position of copyright in special circumstances when the derivative work in itself is based on a derivative work. A significant source of ambiguity within copyright law pertains to the ownership rights associated with derivative works. The objective of this research is to examine the legal underpinnings of copyright ownership in derivative creations. This paper will provide a comprehensive analysis of copyright protection for derivative works under Indian and international law, with a focus on relevant case precedents.

Author believes that the popular myth that Shah Jahan ordered to chop off the hands of all the laborers who worked on the construction of the Taj Mahal set the beginning of Intellectual Property Rights in India. May it be a myth or a truth or maybe Shah Jahan had made a contract that forbade them from ever taking up another building project for any other ruler, which might be similar to losing their hands, but the underlying principle or interpretation is that he didn't want anyone else to build something that might be similar to Taj Mahal. Intellectual Property Rights are the most widely used negative rights that prohibit others from using what is yours. This paper attempts to understand three interconnected topics under the copyrights from the

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1. Law student, St Joseph's College of Law, Bengaluru.

perspective of Cinematographic film. This paper examines the legal concepts of derivative works, transformative works, and fair use. It analyzes how these concepts have been defined and applied in previous cases. The paper then applies these legal standards to determine whether using a film can be considered a derivative work, transformative work, or fair use. Using the movie “Baahubali” as an example, creating a dubbed or remade version would be considered a derivative work, requiring the original copyright holder’s approval. Conversely, writing a biography about the character “Devasena” based on her portrayal in the film would likely be seen as a transformative use, as it creates a new work by adding substantial original content. Finally, staging a school drama based on the movie for an annual day event would generally be considered fair use, exempt from copyright infringement as it’s a non-commercial, educational use. While the provided examples may offer a preliminary understanding of Derivative Works, Transformative Works, and Fair Use, the intricacies involved in distinguishing between these categories and assessing their corresponding copyright implications are substantial. India’s Intellectual Property Rights (IPR) regime, still in its developmental stages, underscores the complexities inherent in navigating these legal concepts.

## **DERIVATIVE WORKS**

### **Derivative Works- a Simple Understanding**

The word “Derive” simply means *to get something from something* and that’s where the understanding of Derivative work begins. The delineation of derivative works, including their definition and copyright protection, presents a complex and evolving legal landscape within India. While international copyright frameworks have established relatively clear parameters in this domain, the Indian legal system continues to grapple with the challenges posed by derivative works. To be considered a derivative work, a new creation must incorporate a significant part of or exhibit striking similarities to a previously copyrighted work, allowing an ordinary observer to readily identify the derived nature of the new material. A remix of a song serves as a common example. Unless a work falls under the fair use doctrine, which is explored in depth later, it is essential to secure proper permissions and licensing from the copyright owner. Unauthorized use infringes upon the copyright holder’s exclusive right to create or authorize derivative works.

### **Definitions and Interpretations**

Under Article 2(3) of the Berne Convention for the Protection of Literary and Artistic Works (1971),

*a derivative work is defined as an adaptation, translation, arrangement, or similar alteration of a pre-existing work. Such derivative works are afforded copyright*

*protection independent of, but without prejudice to, the copyright in the underlying work.*<sup>2</sup>

The United States Copyright Act of 1976, 17 U.S.C. Section 101 states,

*“derivative work” is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a “derivative work.”*<sup>3</sup>

The TRIPS (Trade-Related Aspects of Intellectual Property Rights) agreement in Module II under the “Copyrights and Related Rights” has listed some simple examples to understand the concept of Derivative work,

- a) a translation of a book into a different language,*
- b) an arrangement of a song for an orchestra,*
- c) a film adaptation of a play.*
- d) a publisher who wishes to publish a translation of a novel into a different language*<sup>4</sup>

Delhi High Court, American Express Bank Ltd. vs Ms. Priya Puri on 24 May, 2006 held that

*“in order to claim right in the derivative work containing the original material, the plaintiff is to show adaptation, abridgement, arrangement, dramatization or translation in his work entitling him to have certain rights”*<sup>5</sup>

The court in the case Eastern Book Company & Ors vs D.B. Modak & Anr on 12 December, 2007,

*“However, in order to qualify for a separate copyright as a derivative or collective work, the additional matter injected in a prior work or the matter of rearranging or otherwise transforming a prior work, must constitute more than a minimal contribution.”*<sup>6</sup>

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- 2. Berne Convention for the Protection of Literary and Artistic Works (1971)
  - 3. The United States Copyright Act of 1976
  - 4. WTO, [https://www.wto.org/english/tratop\\_e/trips\\_e/ta\\_docs\\_e/modules2\\_e.pdf](https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules2_e.pdf), ( last visited 5<sup>th</sup> August, 2024 )
  - 5. American Express Bank Ltd. vs Ms. Priya Puri on 24 May, 2006; (2006)IIILLJ540DEL
  - 6. Eastern Book Company & Ors vs D.B. Modak & Anr, AIR 2008 SUPREME COURT 809

From the above definitions, it can be understood that a Derivative work is a work that is based on an existing work and should have adaptation, translation, arrangement, or similar alteration. If it qualifies the essentials it is considered as a separate work, and if it does not amount to infringement of copyrights of the original copyright holder the work is granted a copyright.

Certain essentials factors/ pre-requisites that can be pulled out are,

1. based on a pre-existing work,
2. there must be alteration, adaptation, translation, etc
3. must not constitute infringement of copyright,
4. must be identifiable as the original work by a lay man, and
5. minimal contribution to the original work.

### **Derivative Works and Their Copyrights**

Copyright owners control the creation of works based on their original content. Simultaneously, a derivative work itself constitutes a distinct copyrighted work, independent of the copyright in the underlying work, to the extent it incorporates original elements.<sup>7</sup> At this juncture, it is pertinent to understand the concept of public domain, copyrights are not rights that are immortal and they will not stay forever. Once the period of copyrights expires it will be termed being in the public domain and may be used by anyone i.e it is open to the general public.<sup>8</sup> A notable aspect of derivative works is that they can be based on other derivative works without legal restriction. This is exemplified by the progression from the ancient tale of Pyramus and Thisbe to Shakespeare's Romeo and Juliet and ultimately to the musical West Side Story.

## **TRANSFORMATIVE WORKS**

### **A Simple Understanding of Transformative Work**

In simple words, Transformative Works are works where there is a new addition made to the original work that makes the original work have a different purpose/ character rather than just

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7. Edward A. Haman, J.D, *What Are Derivative Works Under Copyright Law?*, LEGAL ZOOM , (last visited 5<sup>th</sup> August, 2024) <https://www.legalzoom.com/articles/what-are-derivative-works-under-copyright-law>

8. Akash Varadaraj, *Derivative Works Under Copyrights Law*, VAKIL SEARCH ,( last visited 5<sup>th</sup> August, 2024 ) <https://vakilsearch.com/blog/derivative-works-under-copyright-law/>

mimicking the original work.<sup>9</sup> Under Indian copyright law, the concept of “transformative use” as a defence against infringement claims is not explicitly recognized within the provisions of Section 52. A landmark case that has extended the underlying understanding of Transformative work was the “Oh, Pretty Woman” case. A parody of that song was made and the issue raised was whether it constituted to infringement of copyrights or gets the fair use defence as a transformative work the court held that the parody had its unique way of expression and cannot be considered as a mere copy of the original work and that should be considered as a transformative work.

Another instance when 16 distinct art works were created on the inspiration taken from the a photograph of Prince taken by Lynn Goldsmith in 1981, the main question or observation that was required to be made was whether the work is a mere duplicate of the original work or has its own creative intention that gives a new view. For a work to be qualified as a transformative work, the original work must only act as the basement of inspiration and there must be substantial transformation done. Some must recognised and widely used transformative works that one encounters in their daily life is reviews, critiques, parody, etc.,<sup>10</sup> Transformative works form a part of the fair use and which in detail is discussed in the latter part of the paper.

The United States has a very detailed copyrights law which has foreseen the future and has included provisions deals with transformative works and their copyrights. India is still in its growing and developing stage in the copyrights and only in the recent years India is coming across issues related to derivative/transformative works.<sup>11</sup> The Delhi High Court in the year 2011, in the case of University of Cambridge Vs BD Bhandari dealt with the issue of whether making a guidebook is a transformative work and the court made its point clear by stating that when the expressive purpose is different and there exists a substantial change that has undergone the work gets eligible to be considered as transformative work. Let’s break down and understand this concept with real time examples, use of a very short clip from a TV show in

9. BYTES CARE BLOG <https://bytescare.com/blog/copyright-transformative-vs-derivative#:~:text=Derivative%20works%20are%20distinct%20from,a%20new%20meaning%20or%20message> ( last visited 5<sup>th</sup> August, 2024 )

10. BYTES CARE BLOG <https://bytescare.com/blog/transformative-copyright#:~:text=Transformative%20Copyright%20refers%20to%20a,stands%20as%20an%20original%20creation>. (last visited 5<sup>th</sup> August, 2024 )

11. *AI and Copyright: Legal Perspectives on Transformative and Extractive Uses of Copyrighted Work*, MEDIANAMA, <https://www.medianama.com/2024/07/223-ai-copyright-legal-perspectives-transformative-extractive-uses-copyrighted-works/#:~:text=the%20creator's%20market-,The%20Division%20Bench%20of%20the%20Delhi%20High%20Court%20in%20University,protection%20or%20its%20subject%20matter>. (last visited 5<sup>th</sup> August, 2024 )

a musical work would not constitute infringement as the purpose of the usage and the audience is different and this usage does not cause any damage.<sup>12</sup>

## FAIR USE

### Meaning of Fair Use

Law can never have a practical implementation without the existence of some exceptions attached to it. The exception that is inalienable from any Intellectual property rights is the doctrine of Fair use. India under the section 52 of the copyrights law has exclusively allowed certain kinds of reproduction of the original work, and there is no need to avail permission from the original work owner. Some basic activities includes what is happening right now, the usage of original work in personal research, anything that's for the education, news reporting or any non-commercial reasons.<sup>13</sup> Additionally, the Delhi High Court reinforced the fundamental intent of Section 52 in the landmark case of Wiley Eastern Ltd. versus Indian Institute of Management. The ruling emphasized that this provision acts as a bulwark for the freedom of expression enshrined in the Constitution, specifically shielding activities such as research, private study, critique, review, and the dissemination of current affairs

### United States and Fair Use

**Fair use** is a legal principle exclusive to the United States that grants permission for the limited employment of copyrighted material without requiring explicit consent from the copyright holder. This doctrine serves as a counterbalance, aiming to reconcile the rights of copyright holders with the public's prerogative to access and utilize creative works. By establishing a framework for permissible use, fair use fosters innovation, education, and critical discourse.

Common examples of activities generally protected under the fair use doctrine include but are not limited to: commentary, search engine indexing, critique, satire, news reporting, research, education, and scholarly works. It's crucial to understand that determining fair use is a complex process conducted on a case-by-case basis. The permissibility of using copyrighted material hinges on several factors, including the type of work involved, the quantity and significance of the borrowed content, and the potential impact on the original work's market.<sup>14</sup>

### United States Copyrights Law,

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12. JUSTIA, <https://www.justia.com/intellectual-property/copyright/fair-use/transformative-use/> (last visited 5<sup>th</sup> August, 2024).
  13. Mihir Wagh, *Fair Dealings And Fair Use: Critically Analysing The Copyright Exemption Doctrines In Place In India And The United States*, MANUPATARA (last visited 5<sup>th</sup> August, 2024) <https://articles.manupatra.com/article-details>.
  14. *Supra Note. 11*



## 107. Limitations on exclusive rights: Fair use

*“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including **such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.***

*In determining whether the use made of a work in any particular case is a fair use the factors to be considered **shall include—***

- 1. the **purpose and character** of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;*
- 2. the **nature** of the copyrighted work;*
- 3. the **amount and substantiality of the portion used** in relation to the copyrighted work as a whole; and*
- 4. the **effect of the use upon the potential market** for or value of the copyrighted work.*

*The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”<sup>15, 16</sup>*

All four factors typically considered in fair use analysis are applicable within the Indian legal framework. However, the first and fourth factors generally carry greater weight in judicial determinations. The primary consideration for courts assessing fair use is the purpose/ Mens Rea behind the alleged infringement. Subsequent to this, the impact of the use on the original work’s market is evaluated. If the intention behind the usage was genuine but the use has caused a huge loss for the owner of the original work, it will most likely be considered as an infringement.

### Landmark Judgments

In the case of *India TV Independent News Service Pvt. Ltd. v. Yashraj Films Pvt. Ltd.*, decided by the Delhi High Court on August 21, 2012, the court held that the doctrine of fair use, as expanded by the Copyright Amendment Act of 2012, extends its protection to derivative copyrighted works.<sup>17</sup>

15. Copyright gov.in, <https://www.copyright.gov/title17/92chap1.html#107> (last visited 7<sup>th</sup> August, 2024)

16. United States Copyrights Law

17. *India TV Independent News Service Pvt. Ltd. v. Yashraj Films Pvt. Ltd.*, <https://indiankanoon.org/doc/115992789/> (last visited 7<sup>th</sup> August, 2024)

The Kerala High Court in *Civic Chandran v. Ammini Amma* established a foundational principle for fair dealings. The Court articulated that the reproduction of an entire copyrighted work, or a substantial portion thereof, is generally impermissible. Instead, the doctrine permits only the utilization of extracts or quotations from the original work. To determine whether a particular instance of reproduction constitutes infringement, the Court outlined specific factors for consideration.<sup>18</sup>

These were:

- 1. The quantum and value of the matter taken in relation to the comments or criticism;*
- 2. The purpose for which it is taken;*
- 3. And the likelihood of competition between the two works”<sup>19</sup>*

In the groundbreaking case of *Sony Corporation of America versus Universal City Studios, Inc.*, the U.S. Supreme Court established a pivotal precedent for the fair use doctrine. The Court ruled that the practice of recording entire television programs for personal viewing at a later time, commonly known as time-shifting, does not constitute copyright infringement. This landmark decision extended its protection to manufacturers of home video recording equipment, such as Betamax VCRs, absolving them from liability for copyright infringement.<sup>20</sup>

Three prominent academic publishing houses, the American Chemical Society, Elsevier, and Wiley, are engaged in legal proceedings against Sci-Hub, an online platform that facilitates unrestricted access to scholarly articles. The publishers contend that Sci-Hub’s practice of disseminating copyrighted materials constitutes copyright infringement. In contrast, Sci-Hub asserts its actions are justifiable under the doctrine of fair dealing and Section 52(1I) of the Indian Copyright Act, arguing that its service promotes education and scientific advancement. This ongoing case’s judgment will soon become the landmark judgment on the concept of fair use.<sup>21</sup>

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18. *Civic Chandran v. Ammini Amma* 16 PTC 329

19. Fair Dealings And Fair Use: Critically Analysing The Copyright Exemption Doctrines In Place In India And The United States , <https://articles.manupatra.com/article-details> (last visited 7th August, 2024)

20. JUSTIA US supreme court, <https://supreme.justia.com/cases/federal/us/464/417/> (last visited 7<sup>th</sup> August, 2024)

21. All you need to know about the lawsuit against Sci-Hub and LibGen <https://www.medianama.com/2024/05/223-delhi-hc-lawsuit-sci-hub-libgen/#:~:text=In%202020%2C%20publishing%20giants%20Elsevier,be%20permanently%20blocked%20in%20India.> (last visited 8<sup>th</sup> August, 2024).

## CINEMATOGRAPH FILM

### Meaning of a Cinematograph Film

To begin with, let's catch hold of the meaning of a cinematograph film through the provisions of law, The Copyright Act, of 1957,

*"S.2. Interpretation,*

*(f) "cinematograph film" means any work of visual recording and includes a sound recording accompanying such visual recording and "cinematograph" shall be construed as including any work produced by any process analogous to cinematography including video films;*<sup>22</sup>

*(y) "work" means any of the following works, namely: —*

*(I) a literary, dramatic, musical or artistic work.*

*(ii) a cinematograph film.*

*(iii) 2 [sound recording];"*<sup>23</sup>

A segment of scholarly opinion posits that cinematographic films, given their composite nature, should be categorized as derivative works. However, the Indian Copyright Act diverges from this perspective, classifying cinematographic films as independent 'works' subject to derivative, transformative, and fair use provisions. Although the Indian film industry is one of the most huge industries in the world releasing almost 1,500 to 2,000 films every year the Legislation lacks a separate part to deal with cinematographic films and their copyrights, infringements exclusively the courts have taken a keen interest in interpreting the confusions

### The Precedents

The judiciary plays a pivotal role in shaping the legal landscape of cinematographic films. Given the dynamic and constantly evolving nature of this medium, it is essential to approach each case individually. A rigid, one-size-fits-all legal framework is impractical due to the diverse and complex circumstances inherent to the film industry. Some landmark judgments are understood individually and latter an analysis is drawn to understand how the Judiciary has interpreted and how they want to handle the situations that came up to them.

Supreme Court of India in R.G Anand v. M/S. Delux Films & Or's held that

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22. The Copyright Act, 1957 § 2(f), No. 14, Acts of Parliament 1957 (India)

23. The Copyright Act, 1957 § 2(y), No. 14, Acts of Parliament 1957 (India)

*“...an idea, principle, theme, or subject matter or historical or legendary facts being common property cannot be the subject matter of copyright of a particular person. It is always open to any person to choose an idea as a subject matter and develop it in his own manner and give expression to the idea by treating it differently from others. Where two writers write on the same subject, similarities are bound to occur because the central idea of both are the single but the similarities or coincidences by themselves cannot lead to an irresistible inference of plagiarism or piracy.”<sup>24</sup>*

**Thom Andersen’s 2003 documentary, “Los Angeles Plays Itself,” garnered critical acclaim for its exploration of the city’s multifaceted relationship with cinema and architecture.** The film, however, has a unique distribution history. While lauded in film festival circles, it lacked a traditional theatrical or commercial release for a significant period. (Alternatively: “Despite critical acclaim on the film festival circuit, ‘Los Angeles Plays Itself’ remained largely unavailable through traditional channels.”) **The potential for substantial copyright royalty payments is a key factor behind the film’s limited accessibility.** “Los Angeles Plays Itself” relies heavily on footage excerpted from numerous other films. Obtaining licenses for all the clips, along with associated royalty agreements, would likely have been a significant financial hurdle for the filmmaker. (Alternatively: “The extensive use of copyrighted material from other films presented a significant obstacle to securing widespread distribution, potentially due to the high cost of licensing and royalty fees.”) **The documentary’s reliance on pre-existing footage creates a unique challenge for securing traditional distribution.** The sheer volume of copyrighted material necessitates a complex rights clearance process, potentially hindering a typical commercial release. (This option provides a slightly different angle, focusing on the logistical challenges of rights clearance.)<sup>25</sup>

The Bombay High Court in 2003 delineated the scope of copyright infringement in relation to cinematographic films. The court held that mere substantial resemblance between two films does not constitute copyright infringement. Copyright protection for films is limited to instances of direct duplication or copying through mechanical means. The court emphasized a distinction between cinematographic films and other copyrighted works, such as literary or artistic works. Unlike these latter categories, which require originality, cinematographic films do not necessitate this element for copyright protection.<sup>26</sup>

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24. R.G Anand v. M/S. Delux Films & Ors <https://indiankanoon.org/doc/1734007/> - (last visited 8<sup>th</sup> August, 2024)

25. Revisiting Thom Andersen’s ‘Los Angeles Plays Itself’ and Three New Movies for the Remake - <https://www.filmindependent.org/blog/revisiting-thom-andersens-los-angeles-plays-itself-and-three-new-movies-for-the-remake/> (last visited 8<sup>th</sup> August, 2024 ).

26. *Star India Pvt Ltd vs. Leo Burnett(India) Pvt. Ltd*, [https://www.lawinsider.in/judgment/star-india-pvt-ltd-vs-leo-burnettindia-pvt-ltd-copyright-landmark-case#google\\_vignette](https://www.lawinsider.in/judgment/star-india-pvt-ltd-vs-leo-burnettindia-pvt-ltd-copyright-landmark-case#google_vignette), (last visited

*India TV Independent News Services Pvt. Ltd. v. Yash Raj Films Pvt. Ltd.*

Nevertheless, the judiciary has generally applied a stricter standard to the fair dealings doctrine in other contexts. For instance, the use of brief excerpts of copyrighted music in entertainment television programs was deemed ineligible for the fair dealing exception under the “reporting of current events” provision in *India TV Independent News Services Pvt. Ltd. v. Yash Raj Films Pvt. Ltd.*<sup>27</sup>

**Yash Raj Films Private Limited initiated legal proceedings against Sri Sai Ganesh Productions and others alleging Copyright infringement.** The dispute, adjudicated by the Delhi High Court on July 8, 2019, centred on the alleged similarity between YRF’s film, “Band Baaja Baarat,” and the defendants’ production, “Jabardasht.” The crux of the plaintiff’s claim was that the defendants had unlawfully appropriated the plot, characters, and narrative structure of “Band Baaja Baarat” for their film, constituting a copyright violation.

The Delhi High Court was presented with the task of adjudicating whether two films shared material and substantial similarities. A central point of contention was the interpretation of Section 14 of the Copyright Act. The court was required to elucidate whether the phrase “copy of the film” within the Act had a restricted meaning, limited to physical reproductions, or a broader scope encompassing the notion of independent copyright protection for cinematographic works. The court determined that the two films exhibited material and substantial similarities. Consequently, it was held that “Band Baaja Baarat” constituted an infringement of “Jabardasht”’s copyright due to the appropriation of its distinctive and core creative elements.<sup>28</sup>

The Court further determined that the term “to make a copy of the film” as defined in Section 14(d)(i) of the Act extends beyond the creation of physical duplicates. The Court held that it encompasses the reproduction of a film’s conceptual, expressive, and other intangible elements within a new cinematographic work. The crux of the matter is whether the ordinary viewer, upon comparing the two films, would unequivocally perceive one as a derivative of the other.<sup>29</sup>

From the above judgments, it can be understood that,

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8<sup>th</sup> August, 2024).

27. *India Tv Independent News Service Pvt. vs Yashraj Films Pvt. Ltd. on 21 August, 2012* <https://indiankanoon.org/doc/115992789/> (last visited 8<sup>th</sup> August, 2024).
28. *Copyright protection for cinematography and sound recording*, <https://aishwaryasandeep.in/copyright-protection-for-cinematography-and-sound-recording/>, (last visited 8<sup>th</sup> August, 2024).
29. *Case Brief: YRF v Sri Sai Ganesh Productions*, <https://www.bananaip.com/case-brief-copy-right-infringement/>, (last visited 8<sup>th</sup> August, 2024)

1. Each instance must be evaluated individually.
2. The volume of utilization is a critical factor in determining infringement.
3. The underlying intent plays a pivotal role.
4. Considering the viewpoint of an ordinary individual.
5. Determining if the new work represents independent intellectual effort or is a reproduction of previously published or created material.
6. The presence of resemblances is insufficient to establish copyright infringement.

### **Cinematograph Film and Derivative Works, Transformative Works, and Fair Use**

One can find derivative/ transformative works or fair usage of someone's copyrighted work daily but this paper reduced its scope to the work of cinematograph film and how these works are affecting the copyrights and what determines the infringement. There are no particular parts in the copyright law that deal with cinema and therefore it is understood through common provisions and interpretations.

A work from a cinematograph film can be considered as a derivative work when the changes brought are only minimal and any person looking into the work can easily identify it as the original work. In the same way a work from a cinematograph film becomes a transformative work when the new work just takes inspiration from the original work and does not merely copy the actual cinematograph film. The final concept of fair use considerably looks much simpler as the factors are clear and simple, the intention behind making the new work or using the original work is taken into due consideration to determine if it's an act of infringement or not.

### **CONCLUSION**

The concepts of derivative works, transformative use, and fair use remain relatively nascent within the Indian cinematic landscape. Indian legislation has yet to articulate comprehensive provisions to address these complexities. Consequently, the judiciary has been called upon to interpret and apply these concepts in the absence of clear statutory guidance. This has led to a profusion of conflicting judicial decisions, as courts exercise discretion in applying varying legal standards to analogous factual scenarios. A thorough analysis of these judgments reveals a patchwork of inconsistent outcomes, with some courts finding infringement while others reaching contrary conclusions.

This paper aims to distil essential factors from these disparate rulings to provide a framework for understanding the complexities of these legal concepts. By identifying and prioritizing key determinants, this work seeks to clarify the often-murky legal terrain. Ultimately, this paper

endeavours to simplify these intricate issues and offer practical guidance for navigating the challenges posed by the evolving legal landscape. The paper began by holding the hypothesis that India is lacking behind on the copyrights law in both the legislations and the judiciary and the paper ends by stating that yes, the hypothesis is thus proven that the legislation need to be advanced and the judiciary needs to reduce the confusions in the future.



## **GEOGRAPHICAL INDICATIONS AND ITS IMPACT ON SOCIAL TRANSFORMATION – A CRITICAL ANALYSIS**

Christinal Rubavathy G<sup>1</sup>

Kalpana S<sup>2</sup>

### **INTRODUCTION**

Social transformation refers to the constant and profound adjustments that have an impact on people's daily lives, occupations, and interpersonal relationships. Numerous reasons, such as globalization, technological development, changes in the population, and changing cultural standards, are responsible for these developments. In the modern era, intangible works of human intelligence which fall under the Intellectual Property Rights (IPR) is also an influencing factor, directly or indirectly, in the life of people.

Geographical Indications (GI), an element of IPR, is an indicator that can be used to identify goods that are natural, manufactured or agricultural, as having been manufactured or originating in a country, or in a locality or region within that country, where a particular good's quality, reputation, or any other attribute is particularly associated with its geographical origin. The purpose of GI is to protect the common interest of the people in the geographical region who are involved in the production of goods. Through IPR laws and the introduction of numerous initiatives like "Make in India" and "Atmanirbhar Bharat," India has established a robust IPR system<sup>3</sup> as it is necessary to safeguard intellectual property as well as our customary knowledge and abilities from different geographic areas.

According to economists and scholars, GI contributes to economic expansion, job creation, and revenue production and also creates interest for the indigenous group of people, contributing to the growth of economy and uplifting the life of people through which the social transformation is set in motion. An analysis on "GI as an influencing factor of social change" could be carried out by studying the changes in the life of indigenous people by the protection of their collective rights through laws, which could result in social transformation. A case study to analyze the

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  3. PRESS INFORMATION BUREAU, <https://pib.gov.in/PressReleaseIframePage.aspx>, PRID=2013169 (last visited 23 July 2024 12:00 AM).

improvement in the life of people in the Kancheepuram district in Tamil Nadu, the place which is famous for the Kancheepuram Silk Sarees, and received the GI Tag in 2005, revealed that additional measures need to be taken for a sustainable economy through which positive social transformation could be achieved.

## **GI AND PROGRESSIVE DEVELOPMENT OF SOCIETY**

According to Geographical Indications of Goods (Registration and Protection) Act, 1999, Section 2(1)(e) “Geographical indication, in relation to goods, means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be”.

GIs must have a few characteristics:

- a. Association with a specific region or locality
- b. Associated with certain qualities, natural factors, and reputation
- c. Serve as a link between product and territory.

When it comes to manufactured goods, one of the operations associated with their production, processing, or preparation ought to occur in the area, region, or locale. GIs constitute a significant form of intellectual property and currently there are more GI-tagged products available in India.

As a collective mark, GIs are exclusive to a particular bio-cultural region and differ from copyrights, trademarks, and patents because of their collective nature. GI applies to the original manufacturers of goods such as manufactured goods, food items, handicrafts, and other agricultural products. In summary, the primary methods for safeguarding GIs are as follows:

- Sui generis systems (i.e. special regimes of protection);
- Using collective or certification marks; and
- Techniques which focus on business practices, such as administrative plans for product approval.

For the purpose of protecting and promoting India’s rich cultural legacy, GI tags are essential. They serve as a live example of the distinct abilities, know-how, and customs that are ingrained in every product. GI tags guarantee the perpetuation and transfer of cultural customs to next generations by identifying them. Communities connected to these items also feel more

proud of themselves as a result, which strengthens their sense of cultural identity and links to their past. The importance of GI tags goes beyond economic variables in India. It is an effective tool for preserving traditional knowledge, abilities, and cultural legacy<sup>4</sup>.

Products recognized by a GI are frequently the outcome of customs and knowledge that have been passed down over the generations by a group in a certain area. In the same manner, certain goods designated with a geographical indication (GI) may incorporate distinctive features of the customary creative legacy created in a certain area, referred to as “traditional cultural expressions” (TCEs). This is especially true for material goods like handicrafts, which are created from natural materials and have characteristics specific to their place of origin<sup>5</sup>.

Numerous traditional Indian crafts and goods, like Tamil Nadu’s Kanchipuram silk sarees and Kashmir’s Pashmina shawls, are susceptible to copying and exploitation. Legal defense against unlawful usage is provided by GI tags as it guarantees that the advantages gained from these goods stay in the communities that have raised them for generations.

Geographic indicators (GIs) can serve as a significant lever to support local sustainability and sustainable food systems. Long-term sustainability is accelerated by GI systems because they guarantee the ongoing use of conventional manufacturing, processing, and marketing techniques. The economic, environmental and social sustainability are the three pillars of GI, the operation of which can enhance sustainability<sup>6</sup>. GI systems, in particular, have the potential to improve the lives and sustainability of small-scale producers (farmers and processors) as well as other players in local value chains by increasing their earnings. Furthermore, higher earnings enable GI producers to make investments in GI systems, enhancing their performance across the three pillars.

GI producers, or farmers and processors that create GI goods, own collective intellectual property rights known as GIs. The Food and Agriculture Organization FAO of the UN has completed several studies that show how important it is for farmers and other value chain players to maintain genetically isolated areas GIs in order to ensure their continued contribution to sustainability and the supply of goods for public.

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4. THE UNITED INDIA, <https://theunitedindian.com/news/blog/GI-tag-in-India> (Last visited 23 July 2024 12:00 AM)
  5. THE UNITED NATIONS PERMANENT FORUM OF INDIGENOUS ISSUES <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2019/04/Traditional-Knowledge-background-FINAL.pdf>. (last visited 8 August 2024 4:00 PM.)
  6. FOOD AND AGRICULTURAL ORGANIZATION OF THE UNITED NATIONS <https://openknowledge.fao.org/server/api/core/bitstreams/dafcf329-0d88-4184-8249-54d411d25307/content> (last visited 8 August 2024 7:00 PM.)

GIs have the potential to improve sustainability in a number of areas, including nutrition, environmental protection, and social benefits for those who are less fortunate. Local stakeholders are essential to identify local resources, concerns to be addressed and ensure the sustainability of GI systems in all of these areas. When it comes to GIs' contribution to sustainability, more research must be done in order to develop best practices.

## **INTERNATIONAL INSTRUMENTS ON GEOGRAPHICAL INDICATIONS**

The primary objective of registering a GI is to assert and safeguard goods manufactured inside a designated geographic region, hence stimulating marketers to broaden their business operations worldwide. GI is usually linked with goods made over many generations by rural, and indigenous populations that, because of some of their distinctive characteristics, have gained enormous recognition both nationally and internationally. Only registered users are granted the ability to use the product name because of the GI tag, which also prohibits anybody else from using the name if it does not adhere to the guidelines.

World Trade Organization (WTO) defines GIs as: "indications that identify a good as originating in the territory of a particular country, or a region or a locality in that country, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin"<sup>7</sup>. According to Article 22(1) of the TRIPS Agreement GI means: "Indication which identifies goods as originating in the territory of a member of WTO, or a region or locality in that territory where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."

There are various International Conventions on GI and they are as follows:

- Paris Convention for the Protection of Industrial Property 1883
- Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods 1891
- Lisbon Agreement for the Protection of Appellations of Origin and their International Registration 1958
- Madrid Protocol 1989
- Madrid Agreement Concerning the International Registration of Marks
- The TRIPS Agreement (articles 22 to 24) addresses the international protection of GIs

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7. WTO, [https://www.wto.org/english/tratop\\_e/trips\\_e/gi\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/gi_e.htm). (last visited 8 August 2024 7:00 PM.)

GI are covered as an element of IPR under Articles 1(2) and Article 10 of the Paris Convention for Industrial Property. India is obligated to protect GIs by virtue of its membership in the WTO, where the Agreement on TRIPS prescribes minimum conditions for protection.

A GI tag provides a guarantee of excellence and originality. GIs help the genuine producers to avail optimum cost for their premium goods even in the competitive market. It prevents false practices of generating and selling low-quality products. It ensures the customers regarding the best quality of products.

The Paris Convention acknowledges “indications of source or appellations of origin, and the repression of unfair competition” as forms of intellectual property<sup>8</sup> and makes provision for the seizure upon importation or within the country of goods “in cases of direct or indirect use of a false indication of the source of the good.”<sup>9</sup> While this protection is not identical to the protection of GIs, its enforcement would be coextensive with the protection of GIs in many instances.

In addition, the Paris Convention provides for protection against unfair competition, specifically prohibiting “indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods,”<sup>10</sup> factors that would also affect protection for GIs in many instances. Similar protection is also provided by the Madrid Agreement which aims to suppress the use of false or misleading source indications on goods. The Agreement provides for the seizure or prohibition of importation, or other sanctions, of “[all] goods bearing a false or deceptive indication” of the country of origin<sup>11</sup>. As with the protections afforded by the Paris Convention, this protection is not specifically directed toward the protection of GIs, but in many cases will have the effect of excluding their importation or sale.

As of July 2022, over 39 states are parties to the Lisbon Agreement and the registered appellations of origin have crossed 1000. The Geneva Act has around 37 contracting parties, but India is yet to be a member of Lisbon System<sup>12</sup>.

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8. Paris Convention for the Protection of Industrial Property, Article 1(2)

9. Paris Convention, Article 10.

10. Paris Convention, Article 10bis (3).

11. Madrid Agreement (Origin), Article 1.

12. ORGANIZATION FOR AN INTERNATIONAL GI NETWORK, <https://www.wipo.int/treaties/en/registration/lisbon> (last visited 8 August 2024 4:00 PM.)

## GEOGRAPHICAL INDICATION IN INDIA: LEGISLATIONS AND MEASURES

The Constitution of India assures IPR under the Right to practice any profession or to carry on any occupation, trade or business to all the citizens<sup>13</sup>. Entry 49 of the List I of the Seventh schedule does not specifically recognize GI and traditional knowledge, but as per the liberal interpretations GI is also included with reference to Art 248 & 253 which confers parliament exclusive powers to make laws.

The Geographical Indications of Goods (Registration and Protection) Act, 1999 has been enacted by the Government of India and which came into force in September 2003. The purpose of this Act is to improve the protection and registration of Geographic Indications (GIs) related to goods in India.

The Geographical Indications of Goods (Registration and Protection) Rules, 2002<sup>14</sup>, focuses on the registration procedure and the producer's application to be used as an authorized user of a registered geographic area. The aforementioned law came into force in 2003, and GI registration started in 2004–05. West Bengal's Darjeeling tea was the first item in India to be given the GI label and the GI tag was applied on the merchandise as well as the logo.

The number of GIs applications filed has also increased significantly, from 116 in 2021–2022 to 211 in 2022–2023 (81.89%). Compared to the previous five years, there has been a growing tendency in the filing of applications for patents, designs, trademarks, copyright, and geographical indications this year.

Below is a trend of IP application filing over the previous five years.

| Application                                    | 2018-19       | 2019-20       | 2020-21       | 2021-22       | 2022-23       |
|------------------------------------------------|---------------|---------------|---------------|---------------|---------------|
| Patent                                         | 50659         | 56267         | 58503         | 66440         | <b>82811</b>  |
| Design                                         | 12585         | 14290         | 14241         | 22699         | <b>22698</b>  |
| Trade mark                                     | 323738        | 334805        | 431213        | 447805        | <b>466580</b> |
| Geographical Indications                       | 32            | 42            | 58            | 116           | <b>211</b>    |
| Copyrights                                     | 18250         | 21905         | 24451         | 30988         | <b>29466</b>  |
| Semiconductor Integrated layout Designs (SCLD) | NIL           | NIL           | 05            | 01            | <b>23</b>     |
| <b>Total</b>                                   | <b>405324</b> | <b>427309</b> | <b>528471</b> | <b>568049</b> | <b>601789</b> |

*Source: The Controller General of Patents, Designs, Trademarks, and Geographic Indications, Ministry of Commerce and Industry, Government of India, Yearly Report 2022-2023*<sup>15</sup>

13. Indian Constitution, Art 19(1)(g)

14. Framed by the Ministry of Commerce & industry (Department of Industrial Policy and Promotion), In the exercise of the powers conferred by sub sec 87 of GI of Goods (Registration & Protection) Act 1999

15. INTELLECTUAL PROPERTY INDIA  
[https://ipindia.gov.in/writereaddata/Portal/IPOAnnualReport/1\\_114\\_1\\_ANNUAL\\_REPORT\\_202223\\_English.pdf](https://ipindia.gov.in/writereaddata/Portal/IPOAnnualReport/1_114_1_ANNUAL_REPORT_202223_English.pdf)

Since September 15, 2003, 475 GIs have been registered. There are now 15,304 GI Authorized User certificates in circulation.

Fees associated with GI petitions and other procedures under the Geographical Indications of the Goods (Registration and Protection) Act 1999<sup>16</sup> and the Rules derived from it, brought in a total revenue of Rs. 13,68,000/- (Rupees Thirteen Lakhs Sixty Eight Thousand only) for the Geographical Indications Registry in Chennai during the year.

The increasing numbers of GI registration as on July 2024 is evident to the rich cultural heritage and rich knowledge of traditional values in agricultural products and handicrafts.

GI tags play a crucial role in preserving and promoting India's rich cultural heritage. They act as a living testament to the unique skills, knowledge, and traditions embedded in each product.

The list of top 5 states in India and the number if GI Tags granted

| S No | State         | Number | Important GI tag items                                                                                                                          |
|------|---------------|--------|-------------------------------------------------------------------------------------------------------------------------------------------------|
| 1    | Uttar Pradesh | 94     | Banaras Brocades and Sarees, Agra durrie, Kannoj perfumes, Sharanpur wood craft, Agra petha, Basmati, Gorakpur terracotta, Varanasi glass beads |
| 2    | Tamil Nadu    | 59     | Salem Fabric, Kancheepuram Silk, Malabar Pepper, Dindigul locks, Tanjavur Pith works                                                            |
| 3    | Maharashtra   | 49     | Solapuri chaddar, Nagpur orange, Nashik valley Wine, Nashik grapes, Wasli Paintings, Sangli Raisins,                                            |
| 4    | Karnataka     | 44     | Mysore Agarbattis, MPak, Bangalore rose onion, Udapi sarees, Coorg green cardamom                                                               |
| 5    | Kerala        | 34     | Brass coconut shell craft embroidered, central Travancore Jaggery, Pokkali Rice, kaipad Rice, Tirur betel leaf                                  |
| 6    | Assam         | 32     | Muga Silk, Tezpur Litchi                                                                                                                        |
| 7    | Gujarat       | 27     | Gir kesar mango, Patan patola, Kutch embroidery, Rajkot patola                                                                                  |
| 8    | Odisha        | 26     | Gopalpur Tussar Fabric, Gaujam kewada, Hanaspuri sarees, Odisha rasagolla                                                                       |
| 9    | Uttarakhand   | 26     | Basmati, Malta fruit, Kala Bhat                                                                                                                 |
| 10   | West Bengal   | 26     | Malda Fazli mango, Mihidana, Bengal Pattachitra, Sitabhog                                                                                       |

*Source: Details of GI Applications registered in India, Intellectual Property India<sup>17</sup>*

16. The Geographical Indication Of Goods (Registration And Protection) Act, 1999 (last visited 8 August 2024 9:00 PM.)

17. INTELLECTUAL PROPERTY INDIA  
[https://ipindia.gov.in/writereaddata/Portal/Images/pdf/State\\_wise\\_Registered\\_GI\\_of\\_India\\_26\\_07\\_2024.pdf](https://ipindia.gov.in/writereaddata/Portal/Images/pdf/State_wise_Registered_GI_of_India_26_07_2024.pdf) (last visited 8 August 2024 9:00 PM.)



Any use of a geographical sign that suggests that products are originated in a particular geographic location in the identification or portrayal of such items is prohibited by a registered geographic sign. Indian G.I. products include Basmati rice and Darjeeling tea, for instance. The place and the products have formed a bond and connection so strong, that the mention of the area instantly brings up memories of the specific products made there, and vice versa. The following are a few examples of Indian geographical indicators that are officially recognized in India:

- Darjeeling tea
- Basmati rice
- Banaras Brocades and Sarees
- Coorg orange
- Phulkari
- Kolhapuri chappals
- Kanchivaram sarees
- Agra Petha

GI protection is given to a collection of producers who are associated with the specific area where the product was first produced. Numerous factors influence geographic indications (GI products), including origin, geography, climate, and human activity in a certain area. To be classified as a GI, a product must include a symbol indicating that it originates from a particular place. Moreover, the characteristics, qualities, or status of the product should be predominantly connected to the country in which it was made. Because the characteristics vary on the region of production, there is an obvious connection between the product and its original manufacturing site.

The legal remedies for GI violation are comparable to those for trademark infringement. Similarly, being dishonest about a GI is prohibited by the Geographical Indications of the Goods (Registration and Protection) Act 1999. There are two general categories into which remedies for GI conservation may be divided:

**(i) Civil Remedies**

- d. Injunction
- e. Damages
- f. Delivery of the infringing labels and indications containing products

**(ii) Criminal law remedies**

The penal provisions addressing violations are outlined as follows:

- Incorrectly and falsifying applying geographical indications to the goods.
- Offering products that are sold under deceptive geographic indications.
- Forging a geographic indicator on a registration form
- Inappropriately describes a place of geographically associated business indication Registry.
- Fabrication of records in the register.

Chapter VIII of the Act deals with offences and punishment for such crimes. For violating the law, one might be sentenced to six months to three years in jail and fined at least fifty thousand rupees, with the possibility of up to two lakh rupees. Nonetheless, the court may impose a lighter sentence in writing if it finds sufficient and distinctive grounds.

**IMPACT OF GI IN SOCIAL TRANSFORMATION**

Social change is always favored and welcoming because it is something that every society and its people look forward to. A large group of people living in an organized manner, sharing the necessary tasks and making choices about how to accomplish things, is referred to as a society. When an indigenous community collaborate, to produce goods in a particular area under the influence of natural elements, the shared dedication in production leads to the creation of distinctive products that are exclusive to that area. Any difference in social processes, social patterns, social interactions, or social organizations is referred to as social change. It is a shift in the social structure's norms and institutions.

Factors that influence social change are technology, culture, education, economics, etc. out of which economic factor is of unique importance with regard to social change. It goes beyond arguing that an area with advanced industries and jobs would prosper over time. Almost every area of a society's existence is revolutionized by its economic component.

According to Max Weber "Social change is achieved through charismatic leadership and collective effervescence". According to Gainsberg "Social change is a change in social structure, i.e. the size of the society, the composition or balance or its parts or the type of its organization." According to Jenson called "social change as modification in ways of doing and thinking of the people". That could be conferred as collective effort of people would contribute for the positive change in the society. The people together work for a common cause, which could lead to economic development which helps in the higher levels of education, greater employment

opportunities, and higher income levels. Social transformation and economic development are indivisible. Development is an ideal weapon for social change, laws which protects rights of individuals or group, help development and economic growth which lead the social change.

In the landmark case, **Tea Board of India Vs. ITC Ltd (2011)**<sup>18</sup> (known as the Darjeeling Tea Case), The defendant fraudulently named one of its premises using the word “Darjeeling,” leading consumers to assume it was the location of origin when in fact it was not. The Court held that “using this name could pose a great threat to the tea business of that place and hence the plaintiff moved an interlocutory application for granting temporary injunction for using the name”. By which it is interpreted that the GI act is a social welfare legislation which aims at protection of welfare of the people

Geographical indicators of origin have significant implications for manufacturers in developing nations. One of their most important characteristics is the link between these traditional products and activities and community engagement. Millions of individuals living in developing countries depend on these sorts of customary practices for their food security and general health. Traditional medicine can be the only affordable, easily available option for people in need.

Considering that GIs often depend on items like agriculture, fishing, handicrafts, and artisanal goods, any trade gain resulting from the classification of GIs is basically in favor of the working group. This is in disparity to other forms of intellectual property, such patents and trademarks, where beneficiaries are mostly affluent people. Geographical signals can therefore significantly contribute to human development and reduce the susceptibility of poverty.

## **BENEFITS OF GI OVER SOCIAL TRANSFORMATION**

The following features are connected to the importance of GI in rural development that can offer a strong instrument for rural progress:

### **Social Benefits**

The relationship between the goods, the producing location, as well as their steady comparative favored position, can operate as a catalyst for promoting economic development in underprivileged or distant areas. Due to GI, these protected goods may provide an increase to the local economy by creating job possibilities that improve individuals’ personal financial situations and deter rural-to-urban migration. Local producers may compete with large corporations by using GI to improve the reputation of their product and provide specialized services. GI’s reputation can also help differentiate a particular region or location. GIs are therefore seen as a component of rural financial progress and of strengthening.

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18. Tea Board of India Vs. ITC Ltd, (2011) 48 PTC 169 (Cal)

## **Economic Benefits**

GI producers of authorized items can charge a premium price if they maintain a certain minimum standard of quality and advise consumers so. If the quality falls short of expectations, consumers might retaliate by not making as many purchases in the future. Producers rely on consumers' perceptions of the GI-designated items in relation to the distinct GI-denominated area in order to get the respect associated with the products wearing their GI designation. Legal assurance protection against phrases that are confusingly used in the same or comparable context as GIs is necessary for GI manufacturers. They argue that in order to preserve the unique qualities of the GIs, they must be protected against exploiters who could exploit them outside of their specific regional context.

Some of the social and economic benefits are

1. Advantages of Local Community
2. A source of both psychological and economic power
3. Increase employment to population
4. Reverse Urban Migration
5. Preservation of Cultural Heritage
6. Economic Development
7. Quality Assurance
8. Environmental Sustainability
9. Global Trade Opportunities
10. Community Identity and Pride

India's historic crafts, culture, and cuisine may be preserved and urban migration can be reversed attributable to the hyper-localized character of GI. By linking rural and urban areas, the demographic phenomenon known as migration, either initiates or speeds up the development of cities.

Urbanization that follows is associated with a range of policy problems, including economic, environmental, and demographic ones. Local communities connected to the production of these distinctive commodities benefit from GI protection by feeling more proud of themselves and their identity. Producers frequently take great satisfaction in protecting traditional knowledge and advancing the unique cultural legacy of their area.

## ROLE OF GI IN RURAL DEVELOPMENT

Geographic indicators act as a powerful instrument for rural improvement. The potential for rural development might be a very strong foundation for developing nations to accept and promote items with an origin label inside their borders. The preservation of GI goods makes it possible for rural areas to accept commercial activities. GIs are often handmade goods created by rural areas. The social issues related to empowerment, health, education, etc. would be the basic requirements of the group of people of that geographical limits which needs attention.

The GIs have direct connection with the lifestyle of people engaged in the manufacturing, production, and marketing of the products that are globally recognized. Rural development includes both substantial social transformation and the economic growth of people. Better enforcement of land reforms, decentralization of planning, enhanced public participation in rural development programs, and quicker access to financing are all vital to give people in rural areas greater possibilities for economic development<sup>19</sup>.

GIs can have a positive impact on rural development in terms of environmental preservation, economic growth, and social well-being. These effects include bolstering locally produced and sustainably supplied food (with the exception of non-agricultural GIs like handicrafts), enhancing the circular economy throughout the value chain, guarding against violations like free-riding from illegitimate producers, strengthening economic resilience in the form of higher and stable prices, giving raw material producers more negotiating power for better distribution so they can command an increased retail price, and organizing the supply chain around a common product reputation linked to origin.

Research efforts showed that GIs creates more benefits for the rural development in a study conducted by Economist Thomas (2013) on economic competitiveness through Geographic Indications. The results of the study show that, marketing, distribution, branding and promotion are essential tools of the Indian Geographical Indication products to recognize profitable prospective in the international market. This will help to increase the socio-economic development of the community by Geographical Indication registration<sup>20</sup>.

In the case **GI Registry v. Karnataka Co-operative Milk Producers Federation** (2012)<sup>21</sup> for protection of the 'Nandini' milk brand under geographical indications. The court

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19. NATIONAL PORTAL OF INDIA <https://www.india.gov.in/topics/rural> (last visited 8 August 2024 8:00 PM.)

20. Divya N. D And Dr. Anoop K. K, *Rural Development Through Geographical Indication*, Volume 119 No. 16 2018, 1385-1391, (IJPAM), 1385, 2018

21. *GI Registry v. Karnataka Co-operative Milk Producers Federation*, ILR 2012 KAR 1234

emphasized the need to uphold the GI rights of products linked to their geographical origin and the importance of proper registration and protection mechanisms.

GI is anticipated to produce high-quality rural jobs and economic growth. This would support the preservation of the distinctive social, cultural, and intellectual property associated with indigenous knowledge, customs, artisanal abilities, and the highly esteemed modalities of expression exclusive to a certain area.

In the case **Kesar Bhai v. Union of India (2009)**<sup>22</sup> the court held GI status of a specific variety of saffron and highlighted the importance of protecting traditional products linked to their geographical origin. It clarified how such products should be legally protected under the GI system.

### **CASE STUDY: IMPACT OF GI TAG TO KANCHEEPURAM SILK AND SOCIAL TRANSFORMATION WITH THE BENEFITS OF GI**

Analyzing the reverse urbanization, employment and social transformation with the statistical report of the demography, economic growth of Kancheepuram district has exponentially after the GI tag associated with Kancheepuram silk in 2005. Kanchipuram has long been a hub for the handloom and silk industries, creating the popular Kanchipuram sarees. Despite the fact that the industry is worth of Rupees 100 Crores (US\$18.18 million), the weaving community faces challenges due to ineffective marketing strategies and redundant market participants.

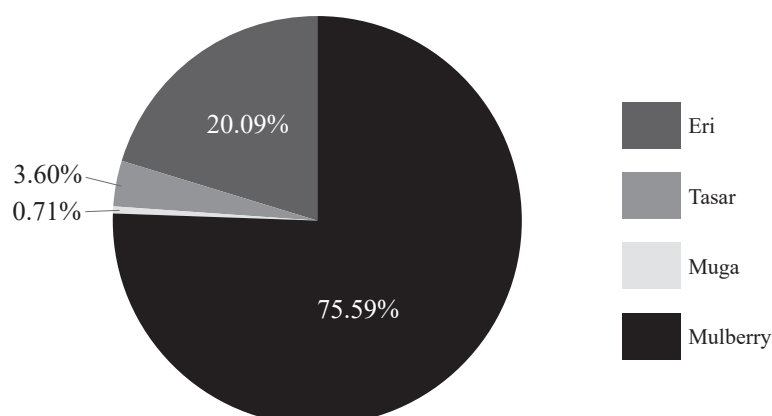
The GI designation was originally applied to “Kanchipuram Silk Sarees” in 2005, making it the first product in India to do so.

India ranks as the world’s second-largest producer of silk. About 9.2 million individuals in rural and semi-urban parts of the nation are employed in the sericulture sector (as per 2022-23). This sector is among the top earners of foreign exchange in the nation. 52,360 villages in India are home to sericulture operations. Four varieties of natural silks are produced in India: Muga, Eri, Tasar, and Mulberry.

Using the raw material, the nation creates silk clothing, accessories, made-ups, carpets, shawls, scarves, cushion coverings, and yarns. Tamil Nadu, Andhra Pradesh, Karnataka, West Bengal, and Jammu & Kashmir, are the states which contribute to the production of mulberry silk

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22. Kesar Bhai v. Union of India, (2009) 8 SCC 65

**Share of silk type in India's total silk production (2022-23)**

*Source: Central Silk Board of India, Ministry of Textiles*

Karnataka is the home of mulberry silk, whereas Surat is the source of gold zari. Despite becoming a global hub for the silk industry, Kanchipuram does not produce silk or any other raw material needed to make a silk saree. The production of Mulberry silk in India has shown expected increase in comparison to the demand expected after GI tag to Kanchipuram Silk. The statistics of mulberry production have dropped down from the production in 2000 till 2010, later there has been an increase from 2010 which is 181000 ha to 263000 ha drastically in 2024<sup>23</sup>.

Analyzing the factors for social change, the Kanchipuram district in the last 5 years has not shown satisfactory results, which has been predicted by economists after GI tag. Reverse urbanization theory has failed, due to the families who are engaged in the production of Kanchipuram Silks. When people migrate from urban to rural areas due to a demographic and socioeconomic trend it is known as “reverse urbanization,” also called “counter-urbanization” or “deurbanization”. The population migrates to urban areas in pursuit of economic development and education, with employment opportunities being one of the primary drivers of this migration. When there are opportunities for carrying out profession in rural areas, the economic growth would lead to social growth.

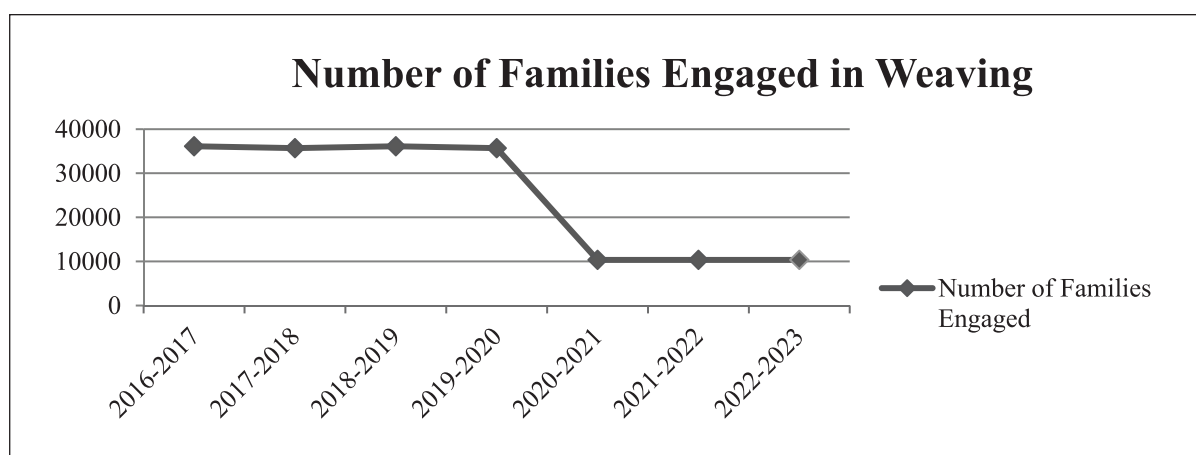
| Year      | No of families engaged in weaving | No of focal centers | No of handloom co-operative societies | Production Value in Mtr(Lakhs) – Silk |
|-----------|-----------------------------------|---------------------|---------------------------------------|---------------------------------------|
| 2016-2017 | 36121                             | 11                  | 74                                    | 2.85                                  |
| 2017-2018 | 35695                             | 8                   | 74                                    | 2.86                                  |

23. REPORT BY CENTRAL SILK BOARD, BANGALORE [https://texmin.nic.in/sites/default/files/Mulberry%20Raw%20Silk%20Production%20in%20India\\_2.pdf](https://texmin.nic.in/sites/default/files/Mulberry%20Raw%20Silk%20Production%20in%20India_2.pdf) (last visited 8 August 2024 8:00 PM.)



|           |       |   |     |      |
|-----------|-------|---|-----|------|
| 2018-2019 | 36121 | 8 | 74  | 2.63 |
| 2019-2020 | 35695 | 8 | 74  | 2.15 |
| 2020-2021 | 10350 | 4 | 74  | 1.8  |
| 2021-2022 | 10350 | 4 | 74  | 2.05 |
| 2022-2023 | 10350 | 4 | 156 | 2.34 |

*Source: District Statistical Handbook year wise<sup>24</sup>*



A drop in number of families engaged in the production of Kancheepuram silk was observed from 2016 to 2023. Based on the survey done by Digital Empowerment Foundation, youth adopt to work in different industries because of poor income, lack of working capital, time and cost, lack of government support or information about schemes and entitlements and low involvement of women in weaving work<sup>25</sup>

## **SUGGESTIONS FOR ENHANCING VIRTUES OF GI AND BETTER SOCIAL TRANSFORMATION IN KANCHEEPURAM DISTRICT**

GI generates employment in rural areas and also brings income through exports. However, there is still a need for legal frame work to focus more on quality control standards to build a brand in the international markets. GI is not as popular in India and there is need is to spread awareness among people about the benefits of it.

GI systems should be maintained throughout time by means of policy and regulatory frameworks. A long-term sustainable development and social responsibility could benefit from

24. KANCHEEPURAM DISTRICT REPORT <https://kancheepuram.nic.in/document-category/statistical-report> (last visited 8 August 2024 8:00 PM.)

25. BASELINE SURVEY REPORT, [https://www.defindia.org/wp-content/uploads/2018/04/Kancheepuram\\_DCDP-Baseline.pdf](https://www.defindia.org/wp-content/uploads/2018/04/Kancheepuram_DCDP-Baseline.pdf)

this continuity. In particular, regional policies and GI specification performance are essential to GIs' contribution to sustainability, it is critical to support local GI communities in their long-term sustainability mechanisms. Procedures for GI registration should guarantee that GI systems are suitably designed and updated as necessary to address regional sustainability concerns.

Following measures would increase the involvement of the local community and increase economic growth and which would pave way for a healthy social structure:

1. Training and Skill Development Centre for the local community
2. Production Centre setup jacquard and dobby looms to design borders
3. Design Lab assistance to weavers
4. Photo studio for promotion of product
5. Digital commerce facilities for electronic marketing
6. Product showrooms and exhibits organized

## **CHALLENGES OVER EFFECTIVE IMPLEMENTATION OF GI LAWS**

Future hurdles in India include effective implementation of GI and providing awareness to people. A robust legal structure is essential to prevent rivals both domestically and internationally from replicating India's GI badges. GI tags, such as those on Banarasi sarees and Darjeeling tea, are frequently imitated by both local and international businesses.

**Quality issues:** Less focus on quality monitoring and the difficulties are unaddressed by the GI Act. The sole regulations under the GI Act for monitoring the quality of goods such as food items and handicrafts are Rules 32(6)g and Form GI-1. Creating strict legislative guidelines to guarantee the quality of goods with GI tags is a formidable task. As an example, let's examine the Muga Silk case, which is a distinct type of Assamese natural silk fabric with a golden hue. In July 2006, GI tag was approved despite not adhering to quality control norms. However, the state government has since initiated an inspection process that deals with matters of geographical origin and other connected matters.

**Imitation of the products:** Semi pashmina/Silk-pashmina is the close substitutes of original pashmina/Kashmiri shawls.

**Enforcement of GIs:** Enforcing the GI Act effectively is a difficult task in and of itself. The availability of several venues for the selling of these goods is the cause. In both the local and international markets, monitoring and screening these kinds of outlets is a difficult process.

**Image-Creation across the globe:** Another difficulty with commercialization is creating an image and brand in customers' thoughts. Promotional marketing techniques that concentrate on the psychology of both domestic and foreign consumers are required for this.

**Protection of collective consciousness of a society**

**Protection over modern social structure, safeguarding the heritage**

**Promoting crime free society, by eradicating poverty, by way of increase in employment.**

**Creating interest in cultural profession**

GI is an effective source of rural development in India. This can be seen in the case of handloom weaving, which has been the source of livelihood. Handlooms represent a rich heritage of traditional and ancestral skills, but they have faced significant decline with the rise of power looms. In India, handloom sector enjoys its own distinctiveness across various states/regions across the country. Now GI tags can revive their existence and make handloom sector an engine of rural employment and development.

TTD is another intriguing example. In September 2009, Tirumala Tirupati Devasthanam's (TTD) received GI tag for Tirupati Laddu to stop the local hawkers from making them and selling them in the local marketplaces. Because it violated GI Act section 9(d), there was a tremendous deal of debate around it. Furthermore, GI tags are intended to reflect the economic success of a certain geographic area. Critics contended that TTD is a singular organization that does not speak for the whole area and that the GI legislation has been broken by the sanctioning body. There are instances where GI tags or brand names are misused. Allegations surfaced that organizations based in France, Japan, and Russia were misappropriating the Darjeeling brand, logo, and GI tag.

## CONCLUSION AND SUGGESTION

GIs aid in establishing a connection between a particular product and the region that it originates or belongs to. This enhances economic activity in rural regions, which in turn improves GI output and can be achieved through well-developed promotion and marketing strategies. The rural areas encompass most of the geographical areas that leads to more opportunities for rural development. The benefits of GI include maintaining and raising people's level of life through their economic activity. The majority of GI product users are people living in urban regions, which increase revenue and job possibilities of rural India. The ability of GI to directly communicate the origin to final consumers is one of its main benefits.

Under GI, the site of origin or production of any product is given the weightage it deserves because it is a uniquely differentiated area due to its unique climate, topography, etc. All of the

requirements for a GI's eligibility should be considered before registering. From a business perspective, all entrepreneurs want to offer things that customers need and all customers want authentic products of a standard quality; yet, some sellers deceitfully sell counterfeit goods in order to make a profit.

Every nation has a unique range of products that are an excellent fusion of its rich culture and environmental circumstances, and India being a diversified nation, has several states that are rich in their own unique cultures. As GIs have direct connection with the life of people, the laws should be made stringent to protect the interest of the local community and measures need to be taken for enforcing such laws for the benefit and future generation, with sustainable development and healthier transformation of society.

## INTELLECTUAL PROPERTY RIGHTS (IPR) IN DIGITAL AGE

M.V. Geethika Reddy<sup>1</sup>

Edupulapati Akshay<sup>2</sup>

### INTRODUCTION

The legal concept of creation of the brain or innovativeness of a person's own intellect refers to the intellectual property, this type of property includes all the inventions, symbols, artistic works, designs, literary and names used in commerce. The intellectual property rights [IPR] are the legal rights which are issued to the individuals or the organizations for their effort which were kept in their own innovation and creative outcomes. These are designed to protect Intangible property and give complete authority over it; the distribution and utilization of their creations will be in the hands of the creator itself which prevents unapproved usage of their work. There is a rapid increase in the use of the internet and evolution of new technologies has transformed the way the intellectual property rights holders.

The intellectual property rights have modified excessively in this current era, particularly answering to the complexities in the rise in the digital era. Intellectual property rights became more challenging in defending already active rights, which causes difficulties in innovation and issuance, due to the rapid growth in the use of computer network and technologies. The copyright infringement is the biggest challenge faced in IP in this digitized era. It is so much easier to the citizens to duplicate and also to distribute the copyrighted works without the consent of the intellectual property owner. The enforcement of intellectual property rights was difficult, as there are significant losses for creators and distributors of intellectual property.

To overcome these difficulties, there can be use of various legal and technological solutions. For instance, the enforcement efforts can be improved by the government through strengthening the intellectual property laws.<sup>3</sup> The organizations can even utilize their management of digital rights and technologies to ensure that their intellectual property is protected. So, in this digital age the intellectual property deals with multiple challenges that need a keen consideration and innovative solutions. All are required to work together to overcome these challenges and assure

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  3. Dr.ramesh, Bhagyamma.G, *Protection of intellectual property rights: An examination of international frameworks*, 2 ILE INTELLECTUAL PROPERTY AND CORPORATE LAW REVIEW, 37-45 (2023)

that the property which is in intellectual state is protected in such a manner that both the owners of the IP and users benefit.

The enforcement of intellectual property in this digital era poses drastic difficulties because of the convenience of copying and distribution of digital content. With the minimal efforts the distribution of digital content globally is possible with the help of the internet, this creates difficulty for the creators to control the usage of their intellectual property.

Copyright is a legal right that belongs to the owner of the intellectual property. This grants the owner exclusive authority of the original work. The original work needs to be in tangible form then only it can be protected under this law.

The copyrighted works enter the public domain when the copyright expires. The concept of copyright protects the owner from unauthorized duplication or use. Generally, the work of the owner is protected until 50 to 100 years after his death, which varies from one country to another, under the Copyright law.

For instance, the novels, Art, Dramatic, Musical, Literary, Film, Poetry, Original architectural designs, Graphic designs, Website content, Computer software are protected under the copyright law. The original owner can voluntarily register the copyright to his work to have the dominance of their own work in the legal system when there is a need. Even if the original owner of the work did not register with the government the copyright belongs to him only. But when it comes to the legal action relating to the copyright infringement the owner will need a registered copyright<sup>4</sup>. All types of work cannot be protected under the copyright law. In this digital age the reproduction and distribution of copyrighted materials has become easier without the consent of the original owner.

## SCOPE AND LIMITATIONS

The research paper on “Intellectual Property Rights in the Digital Era” aims to investigate the transformation of IP protection mechanisms in response to digital advancements. The scope includes the historical evolution of IP laws, the impact of digital technologies such as the internet and artificial intelligence on IP creation and enforcement, and an evaluation of current legal frameworks at international, regional, and national levels. It also encompasses case studies of digital IP infringement and policy recommendations for enhancing IP protection.

In spite of that, the analysis is narrowed by dominion variability in intellectual property statutes, the rapid Growth of technology, possible information statistics availability issues, and

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4. Van Gompel. S, *Copyright Formalities in the Internet Age: Filters of Protection or Facilitators of Licensing*, 28 BERKELEY TECH. L.J. 1425, 1425-1458 (2013)

a primarily focusing on copyrighted content and patent related issues, which may fail to notice various systems of IP.

## OBJECTIVES

To inquire how the present age has a say on the protection of the copyright, outlining the challenges related to internet piracy, infringement of patent, exploitation of trademark in the world where the role of communication is increasing rapidly. It will look at current legal frameworks and case studies to understand how intellectual property rights (IPR) are upheld and the role that cutting-edge technologies like blockchain and artificial intelligence (AI) play in this framework. In addition, the conversation seeks to offer strategies for protecting intellectual property, emphasizing the value of international cooperation and finding a balance between IPR protection and innovation. In conclusion, it examines how intellectual property rights (IPR) will evolve in the digital age and how evolving business models and technological advancements can assist in overcoming these challenges while promoting creativity and global collaboration.

## DIVERSE DIGITAL AGE CHALLENGES

Copyright is a form of intellectual property right that safeguards authentic works of authors, such as artistic works, dramatic works, digital works and etc. In the digitized age, the rapid increase of the net and current technological aspects has formed new difficulties for copyright owner, for instance, copyright infringement including piracy of digital content, continues to pose a significant challenge. With the growth of modem-to-modem data transferring and network streaming platforms in the digital era, it has become an easier process to control and distribute copyrighted works without the permission of copyright holder or the author of the work<sup>5</sup>. The digital age, often referred to as the information age in this digital age, represents a transformational era marked by the broad adoption of digital technology and the internet.

It signifies a period outlined by the rapid digitization of information, digitization of communication, information, and numerous other aspects of everyday existence.

The digital era is defining the 21<sup>st</sup> century because it has brought about profound changes in the ways that people work, communicate, access information, and conduct business.

The key challenge posed by the digital age is the ease of copyright infringement. The digital environment has built it easy for the individuals in copying and issuance copyrighted content in absence of the consent or any authorization. There has to be a balance of copyright protection with the principles of fair use and open access. Countries worldwide have to harmonize their

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5. Menell, P. S, *Governance of Intellectual Resources and Disintegration of Intellectual Property in the Digital Age*, 26 BERKELEY TECH. L.J. 1523 (2011).



intellectual property rights in this present digital age and to prevent issues like cross-border piracy and counterfeiting. Sensible use of intellectual property rights that provides protection and limited use of copyrighted work in absence of any authorization. Digital piracy directly affects the authors revenue streams, and it will lead to substantial financial losses.

Online copyright infringement is a significant challenge; it might be numerous kinds, and which mainly involves the unauthorized copying of copyrighted materials. It involves repurposing the existing copyrighted content by the creators which violates the copyright laws. Also safeguarding patents has been a difficulty with the increase of physical components of a computer programmes internet. Detecting and protecting patent infringement in the digital era is complicated. A thorough understanding of the relevant technology and the capacity to demonstrate infringement are necessary for the successful enforcement of software patents. A organization's or individual digital identification often dependence upon the host identifiers due to these disputation leads to the result of domain-squatting. It's an exercise of certifying names of a popular organization which are similar to present arena with the intent of making profit from a well-known trademark. This kind of exercise led to violation on trademark rights.

Another drastic challenge in this quick and active current era is evolving hi-techs like artificial intelligence (AI) and blockchain technology influence intellectual property protection in fair and unfair manner.

The work produced by AI raise doubts and questions related to the original owner and author of a copyrighted content. AI, specifically used for the purpose of learning mechanisms and vast neural circuits will create innovations automatically. Blockchain technology is a autonomous, open and unreachable network that makes it appropriate in recording or describing and authenticating transfers of IP ownerships and makes sure that each file has a unique fingerprint. Blockchain provides secure methods to track digital asset ownership. Small-scale and creative individuals, especially bear the danger of ruining their employment as a consequence of breaches in copyright.

Enforcing copyright laws in this era notices several types of difficulties. Finding and bringing suit against the copyright infringers for the action of theft and piracy is a complex scenario because of the obscurity given by the networks and VPNs (Virtual Private Networks) and various forms of techs to record their recognition it's a complex scenario to law abiding officers to detect them. There are additional jurisdictional obstacles derives when online piracy activities occur global wide, requires collaboration and teamwork between the various legal states.

Depending on the current data in the year of 2020, there are more than 500 billion individuals who have copyrighted portals based on the web, which was reported by world intellectual property

organization. Besides, legitimate businesses get affected because of the piracy, which resulted reduction of transactions and formed an unjust market condition. To overcome this address the related demands, admiration and operational institutions have chosen different measures, like anti-piracy legislation to foster intellectual property rights throughout the state. Over all the challenges the government should involve protecting the copyrighted works. Navigating a balance between the interests of creators, authors, artists need to be protected and safeguards intellectual property without hindering innovation. To fight digital infringement, network based appropriate solutions and illegal act measures need to be increased. Through keeping abreast of legal modifications and comprehending these obstacles, people and enterprises can adeptly makeover through the complex digital landscape and safeguard their priceless intellectual property rights.

## LEGAL FRAMEWORKS AND DEVELOPMENTS

There are multiple kinds of intellectual property rights are accessible for preserving different kinds of developments and inventions. Without the holder of an intellectual property rights knowledge, content is known browsed exchange and utilized in a completely new direction for the reason to the widespread of web browsing and quick technological advancements. Aset of legal rights which are imposed on ideas resulted from created efforts is known as intellectual property rights.

Copyrights safeguards original works of authors, artists, including book, artistic work, computer program works and different kinds of ideal works.

The holder of the copyright holds authority to issue, propagate, represent, to project his creative works based on their original ideas.

The Copyright Act, 1957<sup>6</sup>, is the main law governing in India, this law provides deliver safety mechanisms for the artistic works, literary works, tuneful works, works, it also extends protection to computer software and cinematography films<sup>7</sup>. The Copyright Act, 1957, is the first copyright law passed by the Indian parliament after the independence of India, on June 4, 1957 and it came into effect on 21st January 1958. The latest revolutionary amendment to the Copyright Act, 2012, which was passed by the parliament on May 22, 2012, was given approval by the president of India on June 7, 2012, and on June 8, 2012, it received notice. This Copyright Act, 2012 came into existence from the month of June 21<sup>st</sup>, 2012. It distinguishes laws and regulations such as copyright registration, copyright infringement and remedies to the contravention.

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6. The Copyright Act, 1957 Acts of Parliament (India)

7. Harnowo. T, *Law as Technological Control of The Infringement of Intellectual Property Rights In The Digital Era*, 2 CORP. & TRADE L. REV. 65, 65-70 (2022).

It enlarged the scope of protected works in literary, artistic works, music, films and the sound recordings. The Copyright act established the Copyright Board to control various copyrighted disputes. In following years, India accepted international copyright conventions like the Berne Convention, adopted in 1886 and the Universal Copyright Convention, aligning its legal framework with global norms. The regulations of the Copyright Act, 1957, are completely lined up with all international copyright conventions and treaties of which India is a member. The Berne convention for Literary and Artistic works (1886) (updated at Paris in 1971), the Universal Copyright Convention, 1952 of UNESCO, the Geneva Phonogram Convention, 1971, The Trade Related Intellectual Property Rights (TRIPS) Agreement, 1995 of WTO<sup>8</sup>, the WIPO Copyright Treaty (WCT), 1996, the WIPO Performances and Phonograms Treaty (WPPT), 1996.

In India patents predominantly regulated by the Patents Act, of 1970<sup>9</sup> delivers Reliability to the innovations and Originations in India. This act controls the enrolment process, grant of patents and revocation of patents. Matters for the patent infringement will be handled by the high court under the respective jurisdiction. With the ratification of the Indian Patents and Designs act, 1911, the annals of patent law in India have instituted. The present Patents act came into power in 1972.

The Patents Act, of 1970 again amended by the Patents Act, 2005, where the patent field extended to all kinds of technological aspects like drugs, food, drugs, chemicals, and micro-organisms.

Trade secrets consist of confidential and proprietary information which are sensitive in nature including formulae, customers information lists, production procedures and marketing plans. Trade secrets containing sensitive data are perpetually protected as long as they remain undiscovered and offer a competitive advantage. The Trademarks Act, 1999 is the main legislation governing trademarks in India and it came into force on December 30,1999.

This act safeguards against trademark infringement. Cases involving trademark infringement are under the district court or high court's jurisdiction. The Trademarks Act, 1940 was the first legislative law related to trademarks in India. These principles were based on the common law principles of passing off and equity and these are similar to England's pre 1875 system.

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8. The Trade Related Intellectual Property Rights (TRIPS) Agreement, 1995 Of WTO

9. The Patent Act, 1970, Acts of Parliament (India)

## **FUTURE DIRECTIONS AND CONSIDERATIONS**

To safeguard the intellectual property from being infringed, the organizations or the individuals can follow various types of strategies which includes both legal and the innovative approaches.

### **Registration of the IP Rights**

To make sure that intellectual property like patents, copyrights and trademarks are registered properly. This makes it convenient to recover the damages if there are any instances where the IP of an individual gets infringed.

### **Perform Operational Freedom Searches**

Look for potential IP barriers with thorough searches conducted prior to the introduction of new products. This makes it possible to make preventive modifications to product marketing or design tactics while also preventing unintentional infringements.

### **Fair Utilization of Contracts**

To enter into a formal contract between employees and the contractors where the ownership of the intellectual property is clearly defined. Especially in startups this has a crucial role as the independent contractors can make a huge contribution to the development of the new product.

### **Limited Exposure**

In order to discourage suspected infringers, it's important to make the sensitive information visible less. This can involve limiting access to confidential data and utilizing Digital Rights Management (DRM) tools.

### **Continuous Innovation**

To stay ahead of competitors, maintain a cycle of innovation. Individuals or organizations can establish a moving target, by developing ideas and new products continuously, in such a way that the competitors find it hard to copy

### **Share And Collaboration of Knowledge**

Establish or develop partnerships with other companies. This provides protection collectively against infringement and promotes an innovative culture

### **Implementation of Security Controls**

It's a technological solution, the cybersecurity measures were used to protect the trade secrets and also the sensitive information from getting breached, like regular audits of data access, encryption etc.

### **Usage of IP Management Tools**

To make effective use of technology to monitor and maintain IP. Prior to any breaches getting worse, they can be spotted with the use of tools that track how the sensitive documents are used.

### **Publishing Innovations**

Take into consideration extensively disseminating original concepts or innovations with due credit. By doing this, ownership is made publicly known and it also discourages others from adopting the same discoveries.

### **Seek Declaratory Judgments**

To clarify rights and reduce the likelihood of litigation, proactively seek a declaratory judgment in possible IP issues. By being proactive, you may ensure a strong legal position before issues emerge.

### **Train and Educate Staff**

Encourage an IP-aware culture inside the company. Employees who receive regular training on the value of intellectual property protection and the dangers of infringement may be better equipped to defend the company's intellectual property.

## **CASE STUDY AND REAL: WORLD APPLICATION**

The significance of intellectual property rights (IPR) has grown in the digital era because of the fast expansion of technology and the internet. In this case **Super Cassettes Industries Ltd. V. Myspace inc. & Ors (2011)**<sup>10</sup> this is a case of digital piracy and copyright violations in India. This suit involved and interlocutory appeal filed by the defendant, against an interim injunction granted in favour of the plaintiff, Super Cassettes is also known as T-series, filed a lawsuit against an Indian music company, sued Myspace for copyright infringement, claiming that the website enabled users to upload and distribute protected content without the authorization which is a copyright breach. The single judge' impugned judgment spanned 132 pages, addressing arguments, case law, and reasoning. The court's judgment was in the favour of Super Cassettes' favour and it highlighted the duty of the online communities to prevent violation of copyright. By establishing an instance for digital networks responsibility in India, this case had made implications those made companies more extra cautious of user-generated content and assured that copyright laws are followed.

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10. My Space Inc. vs Super Cassettes Industries Ltd., (2017) 236 DLT 478 (DB).

In **Tata sons Ltd. v. Greenpeace international (2011)**<sup>11</sup> infringement of Trademarks in the digital sphere (India). “Turtle vs. Tata”, Green Space created the computer game “Tata” as a part of an environmental protest against the Tata Group. Tata claimed that the use of their trademark in the game was not authorized and launched a lawsuit for trademark misuse. The Delhi High Court concluded the case in the Favor of Greenpeace, holding that the tata trademark was not violated because it was used for the public awareness purposes rather than for profit. In the digital era, this case emphasizes the need to strike a compromise between trademark protection and freedom of speech.

**Samsung Electronics co. Ltd. v. Apple Inc.,137 S. Ct 429 (2017)**<sup>12</sup> this particular case discusses the technology patent infringement (United States) in brief Apple co. filed a suit against Samsung co. for patent infringement, claiming that the Samsung company has copied the Apple co. design, appearance, features of the iPhone which was the product of Apple. The argument before the court is 35 U.S.C. & 289, which is a damages provision which specifies design patents. This suit sparked a worldwide legal dispute spanning several countries. The Northern District of California of U.S District Court has the authority of this case and the judgment came in the Favor of Apple co. and gave them hefty damages. This case highlights the intrinsic worth of the patent in the present technology sector as well as the potential extensive litigation to safeguard intellectual property.

The **Yahoo Inc. v. Akash Arora (1999)**<sup>13</sup> spotlights Indian Domain Name Disputes. Akash Arora registered the internet domain which is “yahooindia.com” which was deceptively close to the Yahoo’s trademark, Yahoo initiated a lawsuit against Akash Arora. The jurisdiction of this case comes under the High Court of Delhi, and it was found in the advantage of Yahoo’s, holding that domain name that are illogically close to or identical to trademarks might cause inconsistencies among consumers and so be considered trademark abuse. This particular instance provided legal safeguards for trademark holders in the realm of internet and was among the first in India to address the problem of cybersquatting.

**Justice K.S. Puttaswamy (Retd.) v. Union of India (2017) 10 SCC 1**<sup>14</sup>. In this law suit the supreme court of justice held that the privacy rights are secured as a fundamental right under the Articles 14, 19, and 21 of the Indian Constitution. They argued that privacy was not explicitly

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11. Tata Sons Limited vs Greenpeace International & ANR, I.A. No.9089/2010 in CS (OS) 1407/2010.
  12. Analyses of Samsung Elecs. co. v. Apple Inc, 11-CV-01846-LHK (N.D. Cal. Oct. 22, 2017)137 S. ct. 429. |
  13. Yahoo!, inc. vs Akash Arora & Anr., 1999 IIAD Delhi 229, 78 (1999) DLT 285.
  14. Justice K.S.Puttaswamy(Retd) vs Union of India, (2017) 10 SCC 1.

mentioned in the Constitution and that it could be restricted in the interest of national security, public order, and morality. The specified arguments spotlights around the identification of the privacy rights as a constitutional right. The appellant pacifies that privacy is intrinsic in the decorum and integrity of an individual.

They challenged that the governmental organization gathering the personal information data without consulting or providing any form of intimation will violates the fundamental right of individuals. The Court of appeals at last upheld the privacy rights and significance in protecting individual rights.

## **CONCLUSION AND SUGGESTIONS**

As we direct the globalised world, it is important to point the balance in protecting innovativeness and safeguarding the people's interest. lawmakers, content producers and technology platforms required to work together to notice answers that protects intellectual property rights (IPR) while continuing publicly available to consciousness and traditions. On of the difficulties faced due to the rapid growth of online copyright infringement and piracy work, the difficulty of implementing IPR across the globe, and the new evolution of technologies that pressurize the ideas and people's interest may get affected. Proper use and the ambiguous differentiation between originally generated works and copyright infringement complicate the process of IPR enforcement.

Aside from all these difficulties there are advantages in the digital era. In Accordance to their global reach, artists have the ability to present their creative work to a larger set of audience without any restriction constrained by physical distribution. Creative innovation and crowd funding has raised into effective tools to bring resources together and ideas, producing groundbreaking outcomes in various types of industries. In addition, clean business strategies that provide income sources outside the traditional copyright enforcement framework. Blockchain technology offers clear and unchangeable records of ownership and transactions which holds guarantee in enhancing the protection of intellectual property rights.

International cooperation is very essential for efficiently implementing intellectual property rights (IPR) across the globe, consider how widespread the internet and digital economy are. Globalization of intellectual property right laws and the interchange of appropriate exercise can out-turn in a more dependable and well-built groundwork for intellectual property protection. In the current era, intellectual property protection has got larger importance both economically and ethically. It promises that creator is remunerate for their achievements, increases cultural differences, and empowers them to keep increasing the boundaries of creativeness.



In order to inventive business models, furthermore economic sources outline the scope of traditional copyright enforcement. Blockchain technology offers unchangeable ownership and transaction records that are clear and transparent, which has the power to enhance the protection of intellectual property.

In light of the worldwide nature of the internet and digital economy, cross-border intellectual property rights enforcement requires effective international collaboration. It may be possible to create a more reliable and stronger framework for intellectual property protection by sharing best practices and harmonizing IPR laws across nations.

It is important to safeguard the interest of the intellectual property owners. The legal frameworks have to be strengthened in such a way that the misuse of the intellectual property should not takes place furthermore. There should be a fair usage of the intellectual property. They also have to create and increase the awareness to relating to the importance of respecting IP rights and their moral usage. Encouragement of collaborative work between government and the innovative creators or the technological platforms in order to detect the IP infringement as well as the enlargements of computerised systems to point out and detach piracy content.

## **THE PRINCIPLE OF PURPOSE LIMITATION AND THE NEED FOR ITS ROBUST ADOPTION INTO THE INDIAN DATA PROTECTION REGIME**

Sumanth Kumar<sup>1</sup>

### **INTRODUCTION**

Personal data is the data pertaining to a particular individual. People provide their personal data to conduct a variety of transactions through digital media, with such transactions becoming ubiquitous with a modern lifestyle. The State as well as certain commercial enterprises have begun to collect, store, and process substantial quantities of data over the past three decades by utilising digital means. In this regard, the phrase “Big Data” entered the popular imagination in the late 1990s and has become a mainstay ever since. Several countries have introduced legislation attempting to safeguard the interests of private users of digital platforms and to ensure that personal data, which may be of a sensitive nature, is collected, stored, and processed only for those purposes which are explicitly specified to them at the time of providing their data. In India, legal provisions relating to the protection of an individual user’s data over digital platforms were previously scattered across multiple pieces of legislation necessitating a novel and innovative piece of legislation which is comprehensive enough to address this issue.

The Digital Personal Data Protection (DPDP) Act, 2023 ostensibly seeks to protect the interests of individuals by ensuring that their personal data is not processed for purposes otherwise than those stated, however, it juxtaposes this with the powers granted to the Central Government to process personal data for other lawful purposes. Here, the question as to which interest will be given greater importance arises. Whether the pendulum will swing in favour of an individual’s privacy or the power of the State to collect, store, or process any individual’s data for purposes that it deems fit is yet to be seen as the Act itself has not been notified by the Union Government.

The current text of the Act that received presidential assent on the 9<sup>th</sup> of August 2023, was received with some apprehension regarding the wording of certain provisions. This study examines the key provisions concerning Purpose Limitation as laid out in the new Digital Personal Data Protection Act, 2023. Part II of this study examines relevant segments of the Report submitted by the Committee of Experts on a Data Protection Framework for India, chaired by Justice B.N. Sri Krishna, and the implementation of the Recommendations in that

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regard. Part III will examine the Principle of Purpose Limitation as it is incorporated in the GDPR and draws some parallels between the implementation of and restrictions placed on Purpose Limitation in the European Union and India under the new Act. Part IV will highlight the criticisms facing the new Act and will provide appropriate solutions that may be incorporated to ensure a robust framework that is in the best interests of individual data principals as well as the State.

### **PURPOSE LIMITATION AS STATED BY THE JUSTICE SRIKRISHNA COMMITTEE AND THE IMPLEMENTATION OF ITS RECOMMENDATIONS INTO THE DPDP ACT, 2023**

The Committee of Experts on a Data Protection Framework for India, under the Chairmanship of Justice B. N. Sri Krishna, was constituted in August 2017. This Committee aimed to provide clarification on several issues regarding data privacy and security: especially the need for a robust regulatory framework to protect digital data from unlawful or illicit collection, storage, and processing. The Committee submitted its Report<sup>2</sup> along with a draft Bill to the Ministry of Electronics and Information Technology on July 27, 2018.

Chapter 4 of the Report is titled “Obligations of Data Fiduciaries under which Part II submits recommendations on “Purpose Limitation and Data Minimisation” and Part III submits recommendations on “Big Data Challenges to Data Minimisation and Purpose Limitation”. The Report defines the relationship between a data principal and a data fiduciary in the following manner:

“The basic relationship is between two persons — the data principal and the data fiduciary. In this relationship, the data principal entrusts the fiduciary with personal data to achieve a particular purpose. This may involve, for instance, entrusting financial information to complete a transaction. The fiduciary undertakes to fulfil the purpose, whether itself or with the assistance of third parties.”<sup>3</sup>

The Report further states that the nature of the connection between the data principal and the data fiduciary consists of several elements which are characteristic of a classic fiduciary relationship and recognises that data fiduciaries must be legally required to notify the data principals of the exact purposes for which their data is being collected at the time of such collection. Additionally, the Report advocates for data minimalization, i.e., preventing the

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2. *A Free and Fair Digital Economy Protecting Privacy, Empowering Indians* (2018), PRS INDIA, [https://prsindia.org/policy/report-summaries/free-and-fair-digital-economy#:~:text=Srikrishna\)%20submitted%20its%20report%20and,draft%20a%20data%20protection%20Bill.,](https://prsindia.org/policy/report-summaries/free-and-fair-digital-economy#:~:text=Srikrishna)%20submitted%20its%20report%20and,draft%20a%20data%20protection%20Bill.,) (Last visited, 23 March 2024 10:00 PM)

3. *Id.*, at 53.

widespread collection of personal data for multifarious purposes, as a goal for any prudent data protection regime.<sup>4</sup>

The Report highlights the two sub-principles contained under Purpose Limitation as follows:

- i. The purpose for which the personal data is processed must be clearly specified to the data principle. This is called “Purpose Specification”.
- ii. The processing must be limited to such purposes or other compatible purposes. This is called “Use Limitation”.<sup>5</sup>

Regarding the above sub-principles, the Report provides the following assumptions:

“Implicit in each of these sub-principles are two assumptions: first, that specification of purpose must meet a certain standard of specificity — simply specifying purposes in a vague manner will not be sufficient. Second, any unspecified use will be determined from the point of view of whether the processing is fair and reasonable in light of the purpose that was specified<sup>6</sup>.”

The Report identifies that the above assumptions cannot be incorporated easily. It would be impossible for a data fiduciary to detail every purpose for which data may be collected, stored, and processed, as it would involve copious amounts of paperwork which would be counter-productive to the protection of data principals. However, it is necessary to maintain that all purposes for which data is processed are valid, legitimate, and legal. The DPDP Act, 2023 contains several provisions that seek to protect a data principal’s personal information by expressly maintaining that Purpose Limitation is an important principle that is pervasive throughout the Act. In this regard, Section 4 of the Digital Personal Data Protection (DPDP) Act, 2023, states the following:

1. “A person may process the personal data of a Data Principal only in accordance with the provisions of this Act and for a lawful purpose,
2. for which the Data Principal has given her consent; or
3. for certain legitimate uses.
4. For the purposes of this section, the expression “lawful purpose” means any purpose which is not expressly forbidden by law.”<sup>7</sup>

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4. *Ibid.*

5. *Ibid.*

6. *Ibid.*

7. The Digital Personal Data Protection Act, 2023, §4, No. 22, Acts of Parliament, 2023 (India).

The Report also recommends that certain broad uses that personal data may be put to in the future could be detailed to the data principals to provide some degree of flexibility to fiduciaries and processors. If such broad future uses were made available to data principals prior to data collection, it would allow them to make reasoned decisions regarding the use of their personal data<sup>8</sup>. In this regard, Section 5(1)(i) of the DPDP Act states the following:

“Every request made to a Data Principal under section 6 for consent shall be accompanied or preceded by a notice given by the Data Fiduciary to the Data Principal, informing her,

- i. the personal data and the purpose for which the same is proposed to be processed.”<sup>9</sup>

Additionally, Section 6(1) of the DPDP Act states the following:

“The consent given by the Data Principal shall be free, specific, informed, unconditional, and unambiguous with a clear affirmative action, and shall signify an agreement to the processing of her personal data for the specified purpose and be limited to such personal data as is necessary for such specified purpose<sup>10</sup>.”

Thus, it is evident that Purpose Limitation is an important and recognised principle in India. It is essential to safeguard an individual’s privacy as people must know and understand the exact reasons for which personal data is being collected, stored, and processed to make an informed decision when any personal data is requested by a fiduciary or a processor.

Part III of Chapter 4 of the Report is titled “Big Data Challenges to Minimisation and Purpose Limitation”. Here, the Report recognises that data minimalization is not possible to implement in a world where the antithesis is true, *i.e.*, data maximisation. With so-called Big Data processing, which is ubiquitous in the 21<sup>st</sup> Century, massive amounts of personal data can be processed at scale to create accurate profiles regarding behaviour, monetary spending, or market trends, to precisely target specific audiences<sup>11</sup>. The process of big data is very essential to the functioning of the modern world, especially concerning real-time weather updates, natural disasters, seismic activity, and space exploration to name a few areas of study; however, do the benefits of such processing truly outweigh the harm? The Report states the following regarding the use of Big Data analytics:

“In order to ensure that any such use of big data analytics is narrowly tailored and geared towards maximising individual benefits and minimising harm in the digital economy, it is

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8. *Supra* note 1 at 54.

9. *Supra* note 6 at §5(1)(i).

10. *Id.*, §6(1).

11. *Supra* note 1 at 54.

necessary to constrain its uses in ways that optimally respect individual autonomy in a free and fair digital economy<sup>12</sup>.”

In furtherance of this goal, the Report recommends three possible ways to implement Big Data analytics in a manner that respects individual autonomy. Firstly, it speaks of data anonymisation which would not allow the re-identification of an individual once their consent for data processing is withdrawn. Secondly, it exempts data processed for reasonable purpose from any unnecessary regulation. Lastly, when an individual cannot be informed about the future purposes for which their personal data may be processed when it is collected, the data should not be processed in a manner that may significantly harm the data principal or act directly against a specific individual without their consent<sup>13</sup>.

Data principals are entitled to request the correction or erasure of their personal data under the DPD Act, 2023. Section 8(7) of the Act provides for the obligation to erase personal data if the purpose for which the data has been collected has been fulfilled or if the principal withdraws consent as follows:

“A Data Fiduciary shall, unless retention is necessary for compliance with any law for the time being in force, -

- a. erase personal data, upon the Data Principal withdrawing her consent or as soon as it is reasonable to assume that the specified purpose is no longer being served, whichever is earlier; and
- b. cause its Data Processor to erase any personal data that was made available by the Data Fiduciary for processing to such Data Processor<sup>14</sup>.”

Additionally, Section 12(1) and Section 12(2) of the Act provide for the right to correction and erasure of personal data in the following manner:

1. “A Data Principal shall have the right to correction, completion, updating and erasure of her personal data for the processing of which she has previously given consent, including consent as referred to in clause (a) of section 7, in accordance with any requirement or procedure under any law for the time being in force.
2. A Data Fiduciary shall, upon receiving a request for correction, completion or updating from a Data Principal, -

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12. *Supra* note 1 at 56.

13. *Ibid.*

14. *Supra* note 6 at §8(7).

3. correct the inaccurate or misleading personal data.
4. complete the incomplete personal data; and
5. update the personal data<sup>15</sup>.”

The above provisions have been worded in such a manner that it becomes evident that the principle of Purpose Limitation has been incorporated into the Act; however, the above provisions may not be exactly in line with the recommendations of the Justice Srikrishna Committee as data anonymisation has not been wholly implemented, and obtaining future consent of data principals for further processing of data collected at an earlier date is also not mandated.

Though several parts of the Justice Srikrishna Committee have emphasised the need for robust implementation of the Purpose Limitation principle, the DPDP Act, 2023, does not adequately implement the principle. To understand the true implications that the non-implementation of this principle may have, it is important to understand the exemptions that are laid out in the Act itself. Part III of this study examines the exemptions that have been granted under the DPDP Act, 2023, and compares them with the Restrictions placed on extending Purpose Limitation under the GDPR.

### **COMPARISON BETWEEN THE RESTRICTIONS PLACED ON PURPOSE LIMITATION UNDER THE GDPR AND EXEMPTIONS GRANTED UNDER THE DPDP ACT, 2023**

The General Data Protection Regulation (GDPR) which was made applicable within the European Union on the 25th of May 2018, has been a landmark legislation that is hailed internationally as it protects the rights of individuals from unscrupulous elements in digital media. The GDPR itself is based on seven core Principles which are laid out in Article 5 of the legislation. Of these seven principles, ‘Purpose Limitation’ is of importance for this study.

Article 5(1)(b) of the GDPR states that personal data shall be:

“...collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes; further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes (‘purpose limitation’).”<sup>16</sup>

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15. *Supra* note 6 at §12.

16. General Data Protection Rules, Article 5, Regulation (EU) 2016/679 (*European Union*).



This provision ensures that any data collected, stored, or processed for specified governmental or commercial purposes cannot be utilised for any other purpose than what has already been informed to the data principal. ‘Purpose Limitation’ essentially dictates that any personal data that is collected must be utilised solely for legitimate purposes that are explicitly mentioned to the data principal. If data processors wish to utilise personal data for any purpose other than those notified, they must obtain the consent of the data principal or have some lawful justification or excuse. This Principle is the cornerstone of any privacy protection legislation as it safeguards the interests of individual data principals while promoting transparency among data processors and agencies that handle, carry, or store personal data.

### **RESTRICTIONS ON EXTENDING PURPOSE LIMITATION UNDER THE GDPR**

The GDPR envisions a polity where individual privacy is protected against the commercial interests of businesses or the necessities of the State. Article 15(1)(a) of the GDPR states the following:

“The data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and the following information:

- a. the purposes of the processing<sup>17</sup>.”

This provision, along with several others, seeks ensure the privacy of data subjects by limiting the purposes for which any data collection, storage, and processing is allowed. Data controllers are mandated to notify the data subjects of every purpose which the data will be utilised for, and if any additional purpose is identified after a subject has shared their data with a controller, such purpose must be made notified to the data subject for their approval. The data subjects are entitled to apply for such confirmation from data controllers directly.

The GDPR does not provide absolute and unencumbered rights to data subjects. Member States of the European Union may limit or restrict the application of any of the principles, rights, or obligations through legislative action for their respective States. Article 23 of the GDPR lays down certain restrictions to which a Union or Member State of the European Union may subject data controllers or processors. These restrictions may be made applicable by any Member State with regard to matters such as national security<sup>18</sup>, defence<sup>19</sup>, public security<sup>20</sup>, and several other

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17. *Id.*, at Article 15(1)(a).

18. *Id.*, at Article 23(1)(a).

19. *Id.*, at Article 23(1)(b).

20. *Id.*, at Article 23(1)(c).

processes which may be necessary for the effective functioning of some instrumentalities of the State.

Article 23(2) states the following:

“In particular, any legislative measure referred to in paragraph 1 shall contain specific provisions at least, where relevant, as to:

- a. the purposes of the processing or categories of processing.
- b. the categories of personal data.
- c. the scope of the restrictions introduced.
- d. the safeguards to prevent abuse or unlawful access or transfer.
- e. the specification of the controller or categories of controllers.
- f. the storage periods and the applicable safeguards taking into account the nature, scope and purposes of the processing or categories of processing.
- g. the risks to the rights and freedoms of data subjects; and
- h. the right of data subjects to be informed about the restriction, unless that may be prejudicial to the purpose of the restriction.”<sup>21</sup>

The GDPR has incorporated restrictions on the rights of data subjects but has simultaneously provided for a systematic manner in which such restrictions may be imposed by the Member States. Article 23(2) of the GDPR essentially prevents any Member State of the European Union from taking arbitrary actions concerning an individual’s right to privacy. Article 23(2)(a) states that while imposing any restrictions, the respective government must expressly mention the reasons and the purposes for such processing in contravention of the established principles or rights as enumerated under Article 5 of the GDPR. Thus, Purpose Limitation is followed even if a Member State is required to restrict its applicability to data subjects.

Here, the burden to adhere to the standards of compliance rests on the data controller and the respective Member State that passes some legislation to restrict any of the principles as stated under Article 5 of the GDPR. Similarly to the GDPR, even the DPDP Act, 2023, contains certain exemptions, which the Central Government may grant to various classes of organisations, from adhering to the rights of data principals and the obligations of data fiduciaries and processors.

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21. *Id.*, at Article 23(2).

## EXEMPTIONS TO PURPOSE LIMITATION UNDER THE DPDP ACT, 2023 COMPARED WITH THE GDPR

Section 17 of the DPDP Act, 2023, provides for exemptions from the provisions of the Act. Section 17(1) of the Act exempts the rights provided to data principals under Chapter II, except Section 8(1) and Section 8(5), and Chapter III of the Act if the processing is required for purposes such as enforcing some legal right or claim<sup>22</sup>, performance of functions by courts or tribunals<sup>23</sup>, prevention, detection, investigation, or prosecution of an offence<sup>24</sup>, processing of personal data of data principles not located in India by persons based in India<sup>25</sup>, merger, amalgamation, reconstruction, or division of two or more companies<sup>26</sup>, or ascertaining the assets and liabilities of a person who has defaulted on loan payments.<sup>27</sup>

Section 17(1) provides for exemptions under six distinct circumstances while Article 23 of the GDPR provides for exemptions under 10 distinct circumstances. Certain exemptions, such as those related to processing for the purposes of judicial proceedings and the prevention, investigation, detection, or prosecution of criminal offences are common to both pieces of legislation.

Under the GDPR, these exemptions, coupled with exemptions related to national security<sup>28</sup>, defence<sup>29</sup>, and public security<sup>30</sup>, are subject to the same restrictions as mentioned under Article 23(2). In contrast, Section 17(2)(a) of the DPDP Act, 2023, provides the following:

“The provisions of this Act shall not apply in respect of the processing of personal data –

- a. by such instrumentality of the State as the Central Government may notify, in the interests of sovereignty and integrity of India, security of the State, friendly relations with foreign States, maintenance of public order or preventing incitement to any cognizable offence relating to any of these, and the processing by the Central Government of any personal data that such instrumentality may furnish to it.”<sup>31</sup>

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22. *Supra* note 6 at §17(1)(a).

23. *Id.*, at §17(1)(b).

24. *Id.*, at §17(1)(c).

25. *Id.*, at §17(1)(d).

26. *Id.*, at §17(1)(e).

27. *Id.*, at §17(1)(f).

28. *Supra* note 15 at Article 23(1)(a).

29. *Id.*, at Article 23(1)(b).

30. *Id.*, at Article 23(1)(c).

31. *Supra* note 6 at §17(2).

Here, the DPDP Act, 2023, completely exempts any notified instrumentality of the State from all the provisions and protections mentioned under the Act, effectively nullifying the protection of individual privacy. Additionally, the wording of Section 17(2)(a) is extremely vague as there are no judicially prescribed tests or standards for what may be “in the interests of the sovereignty and integrity of India”, or indeed what may constitute “maintenance of public order”. Such ambiguous wording may lead to arbitrariness on the part of the Central Government, as only it has the power to notify such instrumentalities.

Section 17(2)(b) exempts data collected for other purposes of the State as well. It is worded as follows:

“The provisions of this Act shall not apply in respect of the processing of personal data –

- a. necessary for research, archiving or statistical purposes if the personal data is not to be used to take any decision specific to a Data Principal and such processing is carried on in accordance with such standards as may be prescribed.”<sup>32</sup>

This provision enables the State to permanently store all data collected by governmental agencies while conducting any form of research or statistical activity without specifying the nature of such activities. Several agencies carry out research and collect data on varied subjects such as health and nutrition, socio-economic status, household consumption expenditure patterns, and permeation of government schemes, to name a few. As the data collected through such activities may be sensitive in nature, it should have been imperative for the Act to address the security measures to be adopted to prevent the misuse of such data; however, the Act merely states that “such processing is carried on in accordance with such standards as may be prescribed” which does not adequately address the concern over the purposes for which future processing of such data will occur.

Article 23(2)(d) and Article 23(2)(f) of the GDPR provide for “the safeguards to prevent abuse or unlawful access or transfer”<sup>33</sup> and “the storage periods and the applicable safeguards taking into account the nature, scope and purposes of the processing or categories of processing”<sup>34</sup> respectively. Conversely, the onus for providing such safeguards has been placed on the corresponding Data Protection Rules which are yet to be introduced in Parliament. It is submitted that providing adequate digital and physical security measures to protect the sensitive data that may be collected during research activities should have been made an obligation for

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32. *Id.*, at §17(2)(b).

33. *Supra* note 15 at Article 23(2)(d).

34. *Id.*, at Article 23(2)(f).

the Central Government under the Act itself rather than a prescribed format to be notified at a later date.

Section 17(4) provides the following with regard to a data principal's right to request correction or erasure of their data:

“In respect of processing by the State or any instrumentality of the State, the provisions of sub-section (7) of section 8 and sub-section (3) of section 12 and, where such processing is for a purpose that does not include making of a decision that affects the Data Principal, sub-section (2) of section 12 shall not apply.”<sup>35</sup>

The right to correction and erasure of personal data is widely gaining popularity and recognition internationally as the “Right to be Forgotten”. Under the DPDP Act, 2023, the Central Government is effectively empowered to retain any individual's personal data for an unspecified period of time and process it for any purpose without making information of such storage and processing available to the data principal. This provision completely derogates from the Principle of Purpose Limitation as an individual's data may be processed for any purpose. Unlike the GDPR which provides for restrictions upon the exemptions stated under Article 23, in India, the Central Government is given a blanket exemption to collect, store, and process any data, whether sensitive personal data or merely personal data, through its notified instrumentalities without providing any justification or reasoning. The Act does not mention if the Central Government is required to inform the specific data principal if and when their data is being processed for the circumstances laid down under Section 17(2)(a). Thus, individuals may be completely oblivious to the fact that their personal data or sensitive personal data is being collected, stored, and processed by some State instrumentality, essentially defeating the very object of the privacy legislation.

It is submitted that the exemptions listed under Section 17(4) may be for the benefit of the Central Government in evading personal responsibility toward individual data principals. However, Section 17(5) is even more bizarre as it provides for the following:

“The Central Government may, before expiry of five years from the date of commencement of this Act, by notification, declare that any provision of this Act shall not apply to such Data Fiduciary or classes of Data Fiduciaries for such period as may be specified in the notification.”<sup>36</sup>

This provision is highly contentious as it not only provides an exemption from the rights of data principals to the instrumentalities of the State but extends this exemption to any organisation or class of organisations for any period of time that may be notified by the Central Government.

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35. *Supra* note 6 at §17(4).

36. *Supra* note 6 at §17(5).

This creates an extremely adverse situation for every individual data principal in the country. Not only can information be collected, stored, and processed in contravention of the rights provided to data principals, but there need be no intimation given to the data principals if their personal data is being shared across data fiduciaries or processors. In fact, the Act does not provide for any safeguards or security measures in this regard. As the Rules relating to the Act are yet to be introduced in Parliament by the Central Government, the manner in which such data transfer which is exempt from adhering to the rights of data principals is as yet unclear. Thus, even though Purpose Limitation has been included, ostensibly, as a cornerstone of the Act, it can easily be circumvented wholly through the actions of the Central Government.

The Act does not provide for the permanent deletion of personal data from the databases of notified government agencies, and notified data fiduciaries or class of data fiduciaries, increasing the scope for misuse. It is submitted that the Central Government will have unfettered access to personal data and may process it in such a manner so as to create profiles on private citizens and individuals if the Act is notified with such vague and ambiguous wording. Individuals whose data is being collected, stored, and processed by the State may never be aware that the State is acting to subvert their right to privacy in this manner. In the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, and maintenance of public order, the Central Government is essentially empowering itself to transform the country into a surveillance State. However, this is dependent on the corresponding Rules which are yet to be introduced in Parliament, as well as the composition of the proposed Data Protection Board of India, which is the body empowered to make crucial decisions under the Act.

## CONCLUSION

It is seen that there has been inclusions of “sensitive personal data” as a category of data in The Personal Data Protection Bill, 2019 draft which had been presented in Parliament. This Bill mandated stricter standards of compliance on the part of data fiduciaries and processors while handling sensitive personal data. According to Section 2(36) of the Bill, sensitive personal data included data related to finances<sup>37</sup>, health<sup>38</sup>, sexual orientation<sup>39</sup>, and religious or political belief or affiliation<sup>40</sup>, to name a few. The Bill essentially restricted the purposes for which sensitive personal data could be collected, stored, or processed.

Unfortunately, the DPDP Act, 2023, completely drops these considerations and, as a result, vulnerable groups whose sensitive personal data may be misused will not receive any additional

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37. The Personal Data Protection Bill, 2019, Cl. 2(36)(i), No. 373 of 2019 (India)

38. *Id.*, at Cl. 2(36)(ii).

39. *Id.*, at Cl. 2(36)(v).

40. *Id.*, at Cl. 2(36)(xi).

protection. It is submitted that the re-inclusion of sensitive personal data as a category of data will be beneficial to every data principal, whether they belong to vulnerable socio-economic groups or not. The Article also highlights the fact that sensitive personal data can be utilised by commercial enterprises to create user profiles to enable targeted marketing of products or services; however, such profiling may be utilised to produce adverse effects as well<sup>41</sup>. The new Act, once again, does not address the issue of targeted marketing adequately, as there is no differentiation between categories of data.

Another article titled “New data protection law draws criticism”<sup>42</sup> highlights criticisms against the new Act from noted privacy rights experts. One such criticism comes from Pranesh Prakash, a law and policy consultant who has worked with the Centre for Internet and Society, regarding the changes in the Right to Information Act, 2005, who states the following:

“The new law exempts ‘personal information’ from being disclosed. Often the information one seeks under this Act involves some personal details. Now appeals can be rejected easily.”<sup>43</sup>

The new DPDP Act, 2023, ostensibly seeks to protect the privacy rights of individuals; however, the wording of the Act is such that it exempts instrumentalities of the State wholly from their obligations if notified by the Central Government. Thus, the protections envisaged by the Act may only be utilised effectively against contraventions by private enterprises. It is submitted that the State may wholly exempt its instrumentalities from providing their own personal data for public scrutiny, making this a legislation that may be utilised to protect the interests of the State against those of society. Additionally, public interest technologist, Anivar Aravind, states the following about the purpose of the Act:

“...to make it easier for government organisations to use our data as it gives blanket exceptions for the State. Also, it does not address the right to privacy, which is a fundamental right.”<sup>44</sup>

The wording of certain provisions of the Act discussed in previous Parts of this study highlights the manner in which the Central Government may use the privacy of individuals as an excuse to consolidate its grip on every individual’s personal data, thereby defeating the purposes of privacy legislation altogether. However, no value judgement can be made in this

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41. *Supra* note 36.

42. Rashmi Rajagopal, *New data protection law draws criticism*, DECCAN HERALD (Aug. 16, 2023), <https://www.deccanherald.com/india/karnataka/bengaluru/new-data-protection-law-draws-criticism-2648820> (last accessed on 9 Aug 2024).

43. *Ibid.*

44. *Ibid.*



regard until the relevant Rules are introduced in Parliament, as they will govern the actual applicability of the Act.

The DPDPA, 2023, has been introduced after much consultation with various stakeholders, but it does not inspire confidence among privacy rights experts due to its ambiguous wording. It is submitted that the category of “sensitive personal data” be re-included within the ambit of the new Act, and additional protections be made available to data principals in that regard. It is further submitted that the wording of vague provisions including Section 17(2), Section 17(4), and Section 17(5) be amended to ensure that the Central Government does not possess unbridled powers to exempt instrumentalities of the State or private organisations from their obligations under the Act. It is understood that certain exigencies require exemptions to be placed; however, such exigencies should be utilised as an excuse to empower the Central Government from completely exempting itself from its obligations to protect the privacy of all individuals within India.

## **A THEORETICAL ANALYSIS OF THE CHALLENGES AND EFFICACY OF NEW CRIMINAL LAWS IN ADDRESSING CORPORATE FRAUDS IN INDIA**

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### **INTRODUCTION**

Corporate fraud seriously jeopardizes Indian investor confidence and the country's economic stability. Though there is a solid legal structure in place, there is continuous debate on how well criminal laws handle, stop and prevent corporate fraud. With an eye toward their efficacy in tackling corporate fraud, this paper offers a theoretical study of recent changes and newly enacted criminal laws in India. The research explores the legislative aim underlying these newly enacted laws, how they are purported to be carried out, and how they may affect diminishing instances of corporate misconduct and fraud.

Beginning with a chronology of corporate fraud in India, the paper clarifies the evolution of corporate law and stresses important cases of fraud that have shaped the current legal system. It then examines important legislative changes including changes to the Companies Act of 2013<sup>3</sup>, the application of the Insolvency and Bankruptcy Code of 2016 (IBC)<sup>4</sup>, and the strengthening of regulatory bodies including the Securities and Exchange Board of India (SEBI) and the Serious Fraud Investigation Office (SFIO). The paper assesses how well these strategies find, prevent, and litigate corporate fraud.

One significant challenge that has been seen is the complex legal procedures' nature and the consequent court process delays. Sometimes cases of corporate fraud stay unsolved for long periods of time despite the establishment of specialized courts and accelerated processes, therefore reducing the efficacy of criminal prosecution as a deterrent. Emphasizing issues such as inadequate resources, lack of technological expertise, and challenges in cooperating with other

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1. Assistant Professor, Alliance School of Law, Alliance University, Bengaluru.
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  3. The Companies Act, Ministry of Corporate Affairs, Act 18 (2013), (Aug 8, 2024, 3:30 PM), <https://www.mca.gov.in/content/dam/mca/pdf/CompaniesAct2013.pdf>
  4. The Insolvency and Bankruptcy Code, Ministry of Law and Justice, Act 31 (2016), (Aug 8, 2024, 3:30 PM), <https://www.mca.gov.in/Ministry/pdf/TheInsolvencyandBankruptcyofIndia.pdf>

regulatory and enforcement authorities, the report also examines the purpose of investigative agencies.

An interesting mix of economic liberalization, regulatory growth, and well-known cases exposing the flaws in the financial system of India has shaped the corporate fraud scene in our country. Examining the historical evolution of corporate governance and dishonest behavior helps one to appreciate the current state of corporate fraud in India and the legislative actions taken to solve it.

The roots of corporate law in India can be traced back to the Companies Act of 1866, introduced during the British colonial era. This statute acts as the foundation for corporate governance, but it was enacted to facilitate the interests of organizations under the crown functioning in India<sup>5</sup>. After India got independence, the Companies Act of 1956 came into existence, which acted as the cornerstone of corporate world in India for about five decades.<sup>6</sup>

The economic liberalization that happened in the year 1991 was a significant turning point in India's corporate journey. As the Indian economy opened its doors to foreign investors and involvement of private entities expanded, so did the probability of corporate crimes. The era beginning from 1990s and extending up till early 2000s witnessed numerous financial crimes that were committed by corporate giants that highlighted the inadequacies of the existing legal regulatory framework.<sup>7</sup>

One of the most discussed cases from that time would be the scam of 1992 revolving around Harshad Mehta, which happened through manipulation of financial statements in the stock market and banking sector.<sup>8</sup> The case got renewed attention and was somewhat glorified when it was adapted into a web-series for an OTT platform and even prompted a movie. The case highlighted the shortcoming of the Indian securities market and resulted in significant reforms in the securities market, for instance, the establishment of the Securities and Exchange Board of India (SEBI) as a regulatory body under law in 1992. The Ketan Parekh scam which happened in 2001, was another stock market manipulation scandal, it further necessitated the need for stringent legal framework and governance. These scams shooed away investors from the Indian stock market and reduced the public trust in the newly globalized economy.

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5. BIDYUT CHAKRABARTY, *GANDHI'S DOCTRINE OF TRUSTEESHIP: SPIRITUALIZING INTERPERSONAL RELATIONSHIP* (2017)
  6. Doug Kimball, *The Case for Data Transparency: Four Key Areas Where Deeper Visibility Is Critical*, 25 BUSINESS INTELLIGENCE JOURNAL 16–25 (2020).
  7. Archana, *Trusteeship Model: Redefining Business in the 21st Century*, 9 INTERNATIONAL JOURNAL OF RESEARCH IN SOCIAL SCIENCES 1962–1969 (2019).
  8. David Sanz-bas et al., *Cryptocurrencies and Fraudulent Transactions: Risks, Practices, and Legislation for Their Prevention in Europe and Spain*, 10 LAWS 1–21 (2021).

The turn of the millennium brought new hardships, and a notorious corporate fraud came into light that shook investor's trust even further. The Satyam Computer Services scandal of 2009, is often referred to as 'India's own Enron scam', as it involved accounting fraud at a mass level and it marked the need for stringent corporate governance framework. This case was instrumental in prompting a comprehensive review of corporate laws in India.<sup>9</sup> The fact that the entire world went through a global recession in 2008 further exacerbated the trials and tribulations faced by the Indian investors.

Hoping to overcome these difficulties, the Companies Act of 2013 superseded the 1956 Act. Several clauses in this new law were meant to improve corporate governance, boost openness, and toughen the fines for dishonesty. The Serious Fraud Investigation Office (SFIO) was thus established as a statutory body to look into and punish major corporate fraud and offenses.

As businesses and the nature of trade and commerce changed, corporate fraud kept changing and becoming more complex. Involving billionaire Nirav Modi, the Punjab National Bank heist of 2018 revealed flaws in the banking industry's monitoring systems and underlined the worldwide character of contemporary corporate crime.

Despite strengthened legislation, the persistence of corporate fraud cases has led to further legal reforms.<sup>10</sup> The Insolvency and Bankruptcy law of 2016, was introduced to address corporate debt and restructuring issues, indirectly aiming to prevent fraud related to wilful defaults and asset stripping. More recently, the introduction of the Bharatiya Nyaya Sanhita, 2023<sup>11</sup>, Bharatiya Nagarik Suraksha Sanhita, 2023<sup>12</sup>, and Bharatiya Sakshya Adhiniyam, 2023<sup>13</sup>

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9. José Carlos Marques, *Industry Business Associations: Self-Interested or Socially Conscious?*, 143 JOURNAL OF BUSINESS ETHICS 733–751 (2017).

10. Vatroslav Zovko, *Management in the Year 2050*, 16 INTERDISCIPLINARY DESCRIPTION OF COMPLEX SYSTEMS 417–426 (2018) institutions and corporations invest substantially in the research of the future. One of the possible and expected future scenarios is the rise of artificial intelligence. It is expected that between the years 2030 and 2045 artificial intelligence will significantly surpass human intelligence. The Robocup Federation, an international organization that promotes research and development in robotics, believes that around the year 2050 autonomous robots will win a soccer game against the current soccer World Cup winners. In that manner, autonomous robots will have the opportunity to take over most, if not all, repetitive jobs and routine human activities. In addition to that, humans will be aided by artificial intelligence, creating consumers with instant, perfect information about all the products and services offered on the market. On the other hand, the labour market will be threatened by the emergence of (close to.

11. The Bharatiya Nyaya Sanhita, Ministry of Law and Justice, Act 45 (2023), (Aug 8, 2024, 3:30 PM), [https://www.mha.gov.in/sites/default/files/250883\\_english\\_01042024.pdf](https://www.mha.gov.in/sites/default/files/250883_english_01042024.pdf)

12. The Bharatiya Nagarik Suraksha Sanhita, Ministry of Law and Justice, Act 46 (2023), (Aug 8, 2024, 3:30 PM), [https://www.mha.gov.in/sites/default/files/250884\\_2\\_english\\_01042024.pdf](https://www.mha.gov.in/sites/default/files/250884_2_english_01042024.pdf)

13. The Bharatiya Sakshya Adhiniyam, Ministry of Law and Justice, Act 47 (2023), (Aug 8, 2024, 3:30 PM), [https://www.mha.gov.in/sites/default/files/250882\\_english\\_01042024.pdf](https://www.mha.gov.in/sites/default/files/250882_english_01042024.pdf)

represents a significant overhaul of the criminal justice system, with potential implications for corporate fraud prosecution.<sup>14</sup>

This historical overview demonstrates that corporate fraud in India has been a persistent challenge, evolving in complexity and scale alongside the country's economic growth.<sup>15</sup> The legal and regulatory landscape has been reactive, often changing in response to significant scandals.<sup>16</sup> Delving deeper into the efficacy of new criminal laws in addressing corporate fraud, it is crucial to consider this historical context and the lessons learned from past failures and successes in combating corporate malfeasance.

## **THE COMPANIES ACT, 2013: A CORNERSTONE IN CORPORATE FRAUD PREVENTION**

Replacing the Companies Act, 1956, the Companies Act, 2013 marked a major overhaul of corporate law in India, addressing the changing corporate governance challenges and building a stronger framework for preventing and penalizing corporate fraud. Several important provisions of the Act directly have direct implications for corporate fraud prevention.

### **Definition and Punishment of Fraud**

The law provides a holistic definition of fraud under provision 447, which states that any act, omission, concealment of actual facts and figures, or abuse of office with the intent to misrepresent or avail undue advantage.<sup>17</sup> It also provides severe penalties for committing fraud, it provides imprisonment for a minimum duration of six months to a maximum period ten years and a fine which triple of the sum involved in the fraud.

### **Class Action Suits**

Section 245 enshrines the concept of class action suits, it provides the opportunity to multiple shareholders or depositors to file a suit under one title together if they have reasons for believing that the company's functioning or conduct of affairs is injurious to their position.<sup>18</sup>

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14. Bruce L. Benson, *Let's focus on victim justice, not criminal justice*, 19 INDEPENDENT REVIEW 209–238 (2014).
  15. *Rethinking Corporate Social Responsibility: Thoughts on the Future of Business Ethics*, in 2023 AMA SUMMER ACADEMIC CONFERENCE 1098–1100.
  16. Lisa Jones Christensen et al., *Taking responsibility for corporate social responsibility: The role of leaders in creating, implementing, sustaining, or avoiding socially responsible firm behaviors*, 28 ACADEMY OF MANAGEMENT PERSPECTIVES 164–178 (2014).
  17. Noga Blickstein Shchory et al., *Market Power Parasites: Abusing the Power of Digital Intermediaries To Harm Competition*, 35 HARVARD JOURNAL OF LAW & TECHNOLOGY (2021), [https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final\\_report\\_1\\_](https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_)
  18. Anil Kumar et al., *Analysis of critical success factors for implementing Industry 4.0 integrated circular supply chain—moving towards sustainable operations*, 34 PRODUCTION PLANNING AND

This section strengthens the position stakeholders by providing them with the option to take legal measures against financial malpractices, potentially creating an element of fear.

### **Establishment of Serious Fraud Investigation Office (SFIO)**

The Serious Fraud Investigation Office (SFIO) was established in 2003 as a specialized multidisciplinary organization under the Ministry of Corporate Affairs in response to the Naresh Chandra Committee on Corporate Audit and Governance's recommendations. However, the Companies Act of 2013 granted the SFIO statutory recognition, significantly expanding its powers and scope. Section 211 of the Act formally established the SFIO, and Section 212 defined its investigative authority. The Act gave the SFIO authority to conduct searches, seize documents, and make arrests in cases of suspected serious fraud. It also designated SFIO reports as admissible evidence in court proceedings. Furthermore, the Act required other investigating agencies to transfer relevant documents to the SFIO when they took on a case, thereby centralizing complex corporate fraud investigations. This statutory backing, combined with expanded powers, elevated the SFIO from an ad hoc body to a key player in India's corporate governance framework, better able to combat sophisticated financial crimes.

### **Enhanced Disclosure Requirements**

The Act mandates more comprehensive and frequent disclosures by companies. This includes disclosing related party transactions, loans and investments, and remuneration of key managerial personnel. These requirements aim to increase transparency and make it more challenging to conceal fraudulent activities.<sup>19</sup>

### **Auditor Accountability**

The Act enhances the authority and responsibility of auditors. Auditors are obligated to notify the Central Government of any suspected fraud exceeding a predetermined level. The purpose of this regulation is to guarantee the timely identification and notification of such fraudulent activities.

### **Independent Directors**

The Act requires the selection of autonomous directors for specific categories of organizations. The directors are anticipated to offer impartial supervision and safeguard the concerns of minority shareholders, so potentially mitigating the likelihood of fraudulent conduct.

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CONTROL 984–998 (2023).

19. Omar Vásquez Duque, *No Alarms and Many Surprises: Salience as a Basis For Excessive Pricing Intervention in an Antitrust Context*, 16 JOURNAL OF COMPETITION LAW & ECONOMICS 552–571 (2020), <https://academic.oup.com/jcle/article/16/4/552/5862149>.

### **Corporate Social Responsibility (CSR)**

While not directly related to fraud prevention, the mandatory CSR spending requirement under Section 135 aims to promote ethical business practices and corporate accountability.<sup>20</sup>

### **Prohibition of Insider Trading**

The Act explicitly prohibits insider trading, complementing SEBI regulations on this matter. This provision aims to prevent the misuse of sensitive information for personal gain.<sup>21</sup>

### **Whistle-blower Protection**

The Act protects whistle-blowers, encouraging employees and others to report suspected fraudulent activities without fear of retaliation.<sup>22</sup>

### **Internal Financial Controls**

Section 134(5) mandates directors to implement and maintain adequate internal financial controls<sup>23</sup>, which are crucial for preventing and detecting fraudulent activities within the organization.

### **Effectiveness and Challenges**

While the Companies Act, 2013, has significantly strengthened the legal framework for corporate governance and fraud prevention, its effectiveness has been mixed:

- **Increased Deterrence:** The severe penalties prescribed for fraud have created a more substantial deterrent effect.<sup>24</sup>

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20. Anupam Ghosh et al., *Gearing Up of Corporate Social Responsibility With Artificial Intelligence: An Indian Forecast.*, 4 ANWESH: INTERNATIONAL JOURNAL OF MANAGEMENT & INFORMATION TECHNOLOGY 56–59 (2019), <http://search.ebscohost.com/login.aspx?direct=true&db=buh&AN=140951677&site=ehost-live>.
  21. Alex Murray et al., *Contracting in the Smart Era: The Implications of Blockchain and Decentralized Autonomous Organizations for Contracting and Corporate Governance*, 35 ACADEMY OF MANAGEMENT PERSPECTIVES 622–641 (2021).
  22. Jonathan Wright, *BLOW THE WHISTLE! HOW BRINGING WHISTLEBLOWER REWARDS TO ANTITRUST WOULD HELP CARTEL ENFORCEMENT*, 69 ADMINISTRATIVE LAW REVIEW 695–724 (2017).
  23. Fengqin ZhuanSun et al., *The Mechanism of Evolution and Balance for e-Commerce Ecosystem under Blockchain*, 2021 SCIENTIFIC PROGRAMMING 1–9 (2021), <https://www.hindawi.com/journals/sp/2021/5984306/>
  24. Luigi Wewege et al., *Disruptions and Digital Banking Trends*, 10 JOURNAL OF APPLIED FINANCE & BANKING 15–56 (2020).



- Improved Transparency: Enhanced disclosure requirements<sup>25</sup> have made it more challenging to conceal fraudulent activities.
- Challenges in Implementation: Issues of true independence and expertise have hampered the effectiveness of provisions like independent directors.
- Resource Constraints: Agencies like the SFIO face resource constraints when effectively investigating the volume of potential fraud cases.
- Judicial Delays: Despite the Act's provisions, prosecuting complex fraud cases still faces delays in the judicial system.

The Companies Act 2013 represents a significant step forward in India's fight against corporate fraud. It has created a more comprehensive, stringent corporate governance and fraud prevention legal framework.<sup>26</sup> However, the Act's full potential in combating corporate fraud is yet to be realized due to implementation challenges and systemic issues in the broader legal and regulatory ecosystem. Ongoing amendments and refinements to the Act and strengthening enforcement mechanisms will be crucial in enhancing its effectiveness in preventing and penalizing corporate fraud.

### **THE SERIOUS FRAUD INVESTIGATION OFFICE (SFIO): INDIA'S SPECIALIZED CORPORATE FRAUD INVESTIGATIVE AGENCY**

The Serious Fraud Investigation Office (SFIO) was established in 2003 as a multi-disciplinary organization under the Ministry of Corporate Affairs. It gained statutory status with the enactment of the Companies Act, 2013, which formalized its role and powers in investigating serious corporate frauds.

#### **Legal Framework and Powers**

The SFIO's statutory recognition under Section 211 of the Companies Act, 2013, significantly enhanced its authority and scope:

- Investigative Powers: The SFIO has been granted extensive investigative powers, including the authority to conduct searches, seize documents, and arrest individuals involved in serious fraud.

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25. Avi Goldfarb & Catherine Tucker, *Digital Economics*, 57 JOURNAL OF ECONOMIC LITERATURE 3–43 (2019), <https://www.aeaweb.org/articles?id=10.1257/jel.20171452> (last visited Jan 13, 2022).

26. Svetlana B. Avdasheva & Dina V. Korneeva, *Does Competition Enforcement Prevent Competitive Strategies of Digital Platforms: Evidence from BRICS*, 17 RUSSIAN MANAGEMENT JOURNAL 547–568 (2019).

- **Multi-disciplinary Approach:** The SFIO comprises experts from various fields, including accounting, forensic auditing, law, information technology, investigation, and taxation. This multi-disciplinary composition allows for comprehensive and specialized investigations into complex corporate frauds.
- **Reporting Mechanism:** Under Section 212 of the Companies Act, 2013, the SFIO must submit an investigation report to the Central Government. This report can be used as evidence in court proceedings.<sup>27</sup>
- **Precedence in Investigation:** When the SFIO takes up a case, other investigating agencies must transfer relevant documents and information to the SFIO, giving it precedence in corporate fraud investigations.

### **Key Functions and Responsibilities**

The SFIO's primary functions include-

- Detecting and investigating serious corporate fraud
- Prosecuting perpetrators of corporate fraud
- Advising the government on measures to prevent corporate fraud
- Recommending changes to existing laws to address emerging forms of corporate fraud

### **Effectiveness and Impact**

The SFIO has played a crucial role in investigating several high-profile corporate fraud cases in India-

- **Satyam Computer Services Scandal (2009):** The SFIO's investigation was instrumental in uncovering the fraud's extent and in the perpetrators' successful prosecution.
- **Kingfisher Airlines Case:** The SFIO's investigation revealed several irregularities and potential fraud in the company's operations.
- **IL&FS Crisis (2018):** The SFIO's ongoing investigation into this case has led to several arrests and revelations about systemic issues in the shadow banking sector.

These investigations have helped prosecute specific cases, leading to broader regulatory reforms and increased awareness about corporate fraud.

### **Challenges and Limitations**

Despite its significant powers and successes, the SFIO faces several challenges-

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27. Sonali Gupta, *Behind every Superman there is a Clark Kent: discovering the silent strengths in the entrepreneurial journey*, 39 PROMETHEUS: CRITICAL STUDIES IN INNOVATION 101–112 (2023).

- **Resource Constraints:** The SFIO often struggles with inadequate staffing and resources compared to the volume and complexity of cases it handles.
- **Coordination Issues:** While the SFIO has precedence in investigations, coordination with other agencies like the CBI, ED, and local police can sometimes be challenging.
- **Lengthy Investigation Process:** Due to the complexity of corporate fraud cases and resource limitations, SFIO investigations can be time-consuming, sometimes taking years to complete.
- **Prosecution Delays:** Even after the SFIO submits its reports, the prosecution of cases in courts often faces significant delays due to the overburdened judicial system.
- **Evolving Nature of Fraud:** The SFIO must constantly adapt to new forms of corporate fraud, particularly those involving advanced technologies and cross-border transactions.

### **Recent Developments and Future Outlook**

In recent years, there have been efforts to strengthen the SFIO-

- **Enhanced Use of Technology:** The SFIO increasingly employs data analytics and forensic tools to improve its investigative capabilities.<sup>28</sup>
- **Capacity Building:** There have been initiatives to enhance the skills and knowledge of SFIO officers through specialized training programs.
- **International Cooperation:** The SFIO is working on strengthening its ties with international agencies to handle cross-border fraud cases better.

The SFIO has emerged as a critical agency in India's fight against corporate fraud. Its statutory powers, multi-disciplinary approach, and focus on serious frauds have made it an essential part of the corporate governance ecosystem. However, to fully realize its potential, the SFIO needs continued support regarding resources, technological upgradation<sup>29</sup>, and streamlined coordination with other agencies. As corporate frauds become more sophisticated, the role of the SFIO in safeguarding India's corporate integrity is likely to become even more crucial.

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28. Fabiana Di Porto et al., *"I See Something You Don't See": A Computational Analysis of the Digital Services Act and the Digital Markets Act*, 1 STANFORD COMPUTATIONAL ANTITRUST 84–116 (2021), <https://data.europa.eu/doi/10.2763/407537> (last visited Dec 18, 2021).

29. AURELIEN PORTUESE, PRECAUTIONARY ANTITRUST: THE CHANGING NATURE OF COMPETITION LAW IN THE DIGITAL ERA (2022), <https://itif.org/publications/2022/09/19/precautionary-anti-trust-the-changing-nature-of-competition-law/>.

## THE INSOLVENCY AND BANKRUPTCY CODE (IBC): A PARADIGM SHIFT IN CORPORATE DEBT RESOLUTION AND FRAUD PREVENTION

The Insolvency and Bankruptcy Code, 2016 (IBC) represents a significant reform in India's corporate insolvency resolution process. While primarily designed to address the issue of non-performing assets (NPAs) and streamline the insolvency resolution process<sup>30</sup>, the IBC has also emerged as an indirect but consequential tool in combating corporate fraud.

### Key Features and Mechanisms

- **Time-Bound Resolution:** The IBC mandates a 180-day timeline (extendable to 270 days) for completing the insolvency resolution process. This time-bound approach helps quickly identify potentially fraudulent activities.
- **Creditor-in-Control Model:** By shifting control from debtors to creditors during the resolution process, the IBC reduces the opportunity for fraudulent promoters to manipulate the process.
- **Information Utility:** The establishment of information utilities under the IBC aids in the collection, collation, and dissemination of financial information, enhancing transparency and making it harder to conceal fraudulent transactions.
- **Committee of Creditors (CoC):** The CoC, comprising financial creditors, plays a crucial role in decision-making during the resolution process, reducing the chances of collusion and fraud.
- **Resolution Professional:** The appointment of an independent resolution professional to manage the company during the insolvency process adds a layer of scrutiny.

### Impact on Corporate Fraud Prevention

- **Deterrence to Willful Defaulters:** Section 29A of the IBC bars willful defaulters and those with non-performing assets from participating in the resolution process. This provision is a strong deterrent against deliberate defaults often associated with fraudulent intentions.
- **Lifting the Corporate Veil:** The IBC allows for 'lifting the corporate veil' in cases where fraud is suspected, enabling the investigation of the personal assets of promoters and directors.<sup>31</sup>

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30. D. Daniel Sokol, *Debt, Control, and Collusion*, 71 EMORY LAW JOURNAL 695–738 (2022), <https://scholarlycommons.law.emory.edu/elj/vol71/iss4/1>

31. JINGYUAN MA & M E L MARQUIS, *Business Culture in East Asia and Implications for Competition Law*, 51 TEXAS INTERNATIONAL LAW JOURNAL 1–43 (2016), <http://search.ebsco-host.com/login.aspx?direct=true&db=a9h&AN=116895093&site=ehost-live&scope=site>

- **Avoidance Transactions:** The Code empowers resolution professionals to investigate and reverse transactions deemed preferential, undervalued, or fraudulent, occurring up to two years before the insolvency commencement date.
- **Cross-Border Insolvency:** Recent amendments incorporating cross-border insolvency provisions aim to tackle frauds involving international transactions and asset concealment abroad.<sup>32</sup>
- **Personal Guarantees:** The extension of the IBC to personal guarantors of corporate debtors has closed a significant loophole often exploited in corporate frauds.

### **Effectiveness and Challenges**

The IBC has shown considerable effectiveness in addressing corporate fraud in the following manner:

- **Recovery Rates:** Improved recovery rates under the IBC have indirectly discouraged fraudulent activities aimed at siphoning off funds.
- **Behavioral Change:** The threat of losing control over the company has led to a positive behavioral change among corporate debtors, encouraging timely repayment and discouraging fraudulent practices.<sup>33</sup>
- **Uncovering Hidden Frauds:** The resolution process has, in several cases, led to the discovery of previously hidden fraudulent transactions.

However, the IBC also faces challenges in its role as a fraud prevention tool:

- **Delays in Resolution:** Despite the time-bound mandate, many cases exceed the prescribed timeline, potentially allowing space for manipulation.
- **Capacity Issues:** The limited number of National Company Law Tribunal (NCLT) benches and insolvency professionals sometimes hampers efficient resolution and thorough fraud investigation.

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32. David R. Johnson & David Post, *Law and Borders: The Rise of Law in Cyberspace*, 48 STANFORD LAW REVIEW 1367 (1996), <https://www.jstor.org/stable/1229390>

33. Michael C. I. Nwogugu, *International Capital Flows, Complexity and the Illegality of the “Sharing Economy” and Digital Currencies*, SSRN ELECTRONIC JOURNAL 1–55 (2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3015529](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3015529) inequality, low savings rates, internet penetration and the perceived inefficiencies of regulation. During 2005-2017, the “Sharing Economy” (which includes Airbnb; Apple; Alibaba, Uber; WeWork; LiquidSpace, Lyft; Ebay; Didi Chuxing; HomeAway, etc..

- **Pre-packaged Insolvency Resolution:** While beneficial for MSMEs, this recent addition to the IBC framework needs careful monitoring to prevent its misuse for concealing fraud.
- **Evolving Jurisprudence:** As the IBC is relatively new, the evolving jurisprudence sometimes leads to uncertainties in interpretation and application.

### **Future Outlook**

With constant revisions and court interpretations improving its efficacy, the IBC keeps changing. Recent suggestions to incorporate clauses for group bankruptcy and specific frameworks for real estate and financial service providers are likely to enhance further the Code's capacity to handle sector-specific crimes.

Though not mostly intended as an anti-fraud law, the IBC has become a major disincentive to corporate fraud in India. Its focus on time-bound settlement, creditor control, and openness has produced a setting less fit for dishonest behavior. The IBC's ability to prevent and expose corporate fraud will probably become even more important as it develops and adjusts to new difficulties, therefore helping to maintain the general integrity of India's business ecosystem.

### **SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI): GUARDIAN OF INDIA'S SECURITIES MARKET**

It came into existence in 1992, the Securities and Exchange Board of India (SEBI) received its authority under law through the SEBI Act, 1992. SEBI plays an instrumental role in the context of publicly listed companies. Its existence is a *sine qua non* for attracting foreign institutional investors to invest in the Indian economy and contribute to its growth. It also acts as a regulator for monitoring crimes related to the stock market.

### **Key Functions and Powers**

Combatting corporate fraud in India mostly depends on the Securities and Exchange Board of India (SEBI). SEBI boasts great powers and several purposes. India's securities market is mostly under control by it. Regulating publicly traded companies, market middlemen, and investors, SEBI develops and implements rules SEBI also boasts some investigative power. This enables SEBI to investigate suspected fraudulent activity holistically, with authority to call people, access records, and execute search and seizure activities. By means of adjudicatory powers, SEBI enables itself to conduct investigations, impose fines, and issue orders against companies transacting against securities laws. Working under a mandate to safeguard investor interests, SEBI is these drives its alert market surveillance. Using cutting-edge technologies, SEBI has begun to find abnormalities and possible fraud. Additionally, very powerful in influencing corporate governance rules, enforcing strict disclosure rules, and controlling

insider trading is SEBI. Additionally, under SEBI's authority are rules for the "Prohibition of Fraudulent and Unfair Trade Practices." By periodically publishing such rules, SEBI tackles several kinds of market manipulation. SEBI also bears the obligation of instructing investors. As a preventive step against bogus schemes, SEBI runs investor awareness campaigns and related projects. Although SEBI has great authority, their efficacy is sometimes tested in the complex and changing terrain of corporate finance. This calls for constant adaptation of its policies and capacities, thus the implementation of the new criminal laws is important.

### **Major Initiatives in Fraud Prevention**

The Securities and Exchange Board of India (SEBI) has enforced a comprehensive framework of regulations to counter corporate fraud and enhance market integrity. SEBI has implemented more stringent disclosure requirements and imposed harsher penalties for individuals who breach the regulations pertaining to insider trading. The act of insider-trading continues to pose a persistent danger, and imposing criminal liability on those responsible would have a stronger deterrent impact. The new criminal acts will undoubtedly assist SEBI in accomplishing that goal. SEBI also issues regulations referred to as the 'Listing Obligations and Disclosure Requirements (LODR)'. SEBI requires listed entities to make disclosures that are both comprehensive and timely. This fosters transparency and minimizes the potential for fraudulent activities. The implementation of rigorous corporate governance norms has led to the further strengthening of the regulatory framework. These norms include the composition of the board, transactions involving related parties, and mechanisms for reporting wrongdoing. Various forms of market manipulation and fraud exist. The Securities and Exchange Board of India (SEBI) periodically issues the 'Prohibition of Fraudulent and Unfair Trade Practices (PFUTP) Regulations' to combat these unethical activities and establish a strong and proactive framework. Furthermore, the Securities and Exchange Board of India's (SEBI) consent orders and settlement mechanisms, despite their primary purpose of accelerating the resolution of cases, also serve as deterrents against corporate misconduct. The efficacy of these measures is still being evaluated in light of the ever-changing dynamics of the market and the ever-increasing sophistication of financial crimes, still these measures collectively demonstrate the multifaceted approach that SEBI takes to prevent and punish corporate fraud.

### **Effectiveness in Combating Corporate Fraud**

SEBI has been instrumental in addressing various instances of corporate fraud. Some practical scenarios in which it has been highly useful may be summarized as follows:

- **High-Profile Cases:** Investigations and actions by SEBI in cases including the Satyam scandal, NSE co-location case, and several insider trading events have demonstrated their effectiveness.



- **Market Manipulation:** Various cases of price manipulation, pump-and-dump schemes, and circular trading have been effectively detected by SEBI and appropriate legal actions have been taken. Market manipulations have been diminished even by unscrupulous retail and institutional investors.
- **Disclosure Violations:** SEBI aggressively penalizes companies and their promoters for false or insufficient disclosures. This arguably has made a deterrent effect. The officers of a company are also made liable under section 102(4) and 102(5) of the Companies Act, 2013.
- **Investor Awareness:** SEBI proactively takes several measures in investor education, which has helped increase awareness among investors. It has also resulted in the early detection and reporting of fraudulent schemes. SEBI regularly partakes in state and national fairs and raises investor awareness through their kiosks and helpdesks.

### **Challenges and Limitations faced by the SEBI**

SEBI has made significant headway in its fight against corporate fraud. Even still, its regulatory initiatives continue to face a number of challenges and limitations. One of the most significant challenges is keeping up with the rapid pace of technological advancements. Technological advancements are enabling increasingly complex forms of market manipulation and fraud. SEBI needs to have a dedicated team of experts who monitor and eliminate such threats. SEBI also struggles with resource limitations. The sheer volume and complexity of India's growing securities market necessitates that SEBI be provided with vastly more resources than it currently has at its disposal. The presence of offshore companies and transactions that take place across international borders presents jurisdictional challenges that make investigations and enforcement actions more difficult. To add insult to injury, the orders issued by SEBI frequently result in drawn-out legal battles in the courts and appellate tribunals, which delays their implementation and may consequently reduce the effectiveness of their deterrent effect. In addition to addressing such issues pertaining to regulatory overlap, the regulatory body is required to maintain close coordination with other agencies, such as the Reserve Bank of India and the Ministry of Corporate Affairs. Furthermore, the Securities and Exchange Board of India (SEBI) is typically required to walk a regulatory tightrope because of the difficulty of balancing the protection of investors with the requirement to promote market expansion. As a result of these numerous challenges, it is clear that the Securities and Exchange Board of India (SEBI) needs to continue to develop its policies and capabilities in order to effectively manage the constantly shifting landscape of corporate fraud in India's financial markets.

## Contemporary Developments and the Way Forward

SEBI continues to evolve its approach to combat corporate fraud. Some key areas through which it ensures effectiveness and proactively combats the ever-present threats are as follows:

- **Technology Integration:** SEBI is leveraging the use of artificial intelligence and machine learning for market surveillance and fraud detection.
- **Strengthening Whistle-blower Mechanisms:** SEBI is working on enhancing protections and incentives for whistle-blowers to encourage reporting of fraudulent activities.
- **Tightening Disclosure Norms:** SEBI keeps increasing its vigilance and adopts a continuous refinement of disclosure requirements to address emerging forms of corporate malpractices.
- **International Cooperation:** SEBI is working in concert with other global market regulators to address cross-border frauds better.
- **Regulatory Sandbox:** SEBI along with the RBI are exploring innovative regulatory approaches for new market products and technologies.

Across the globe, particularly in the securities market, SEBI has become known as an efficient regulator in India's battle against corporate fraud. Its aggressive approach to developing rules, investigating issues, and imposing fines has greatly improved investor confidence and market integrity.<sup>34</sup> But from an objective point of view, obstacles still exist; SEBI's ongoing development and adaptation to reality in emerging markets places it as a vital barrier against corporate misbehavior in India's financial systems. The more complex corporate frauds and ways to execute them get, the more important SEBI's contribution to maintaining market integrity is expected to become. This calls for continuous improvement in its operational capacity and legislative framework. Law and policymakers should keep empowering SEBI through amendments and ordinances to keep it relevant.

## ANALYZING THE EFFICACY OF NEW CRIMINAL LAWS IN COMBATING CORPORATE FRAUD

The recent introduction of the Bharatiya Nyaya Sanhita (BNS), 2023, Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023, and Bharatiya Sakshya Adhinyam (BSA), 2023, represents a significant overhaul of India's criminal justice system. While these laws are not specifically tailored to address corporate fraud, they contain provisions that could potentially impact the

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34. Klender Cortez et al., *Exchange Market Liquidity Prediction with the K-Nearest Neighbor Approach: Crypto vs. Fiat Currencies*, 9 MATHEMATICS 1–15 (2021).

investigation, prosecution, and adjudication of corporate offenses.<sup>35</sup> This analysis examines the potential efficacy of these new criminal laws in combating corporate fraud.

### **Bharatiya Nyaya Sanhita (BNS), 2023**

The BNS, which replaces the Indian Penal Code, 1860, introduces several provisions relevant to corporate fraud.

a) Enhanced Penalties: The BNS provides for increased penalties for economic offenses, which could serve as a stronger deterrent against corporate fraud. However, the effectiveness of enhanced penalties in white-collar crimes remains debatable, as decision-makers in corporate fraud often calculate risks against potential gains.

b) New Offenses: The introduction of offenses like ‘organized crime’ could potentially be applied to large-scale, systematic corporate frauds. This broadens the scope for prosecution of complex corporate criminal activities.

c) Community Service: The provision for community service as a form of punishment could be applied to corporate offenders. While this may enhance corporate social responsibility, its deterrent effect on serious corporate fraud is questionable.

### **Bharatiya Nagarik Suraksha Sanhita (BNSS), 2023**

The BNSS, replacing the Code of Criminal Procedure, 1973, introduces procedural changes that could impact corporate fraud investigations:

a) Electronic Filing: Provisions for electronic filing of FIRs and complaints could expedite the reporting and initial processing of corporate fraud cases.

b) Technological Integration: Enhanced use of technology in investigations could improve the efficiency and effectiveness of corporate fraud probes, especially in dealing with digital evidence.

c) Time-bound Investigations: Stricter timelines for completing investigations could address the long-standing issue of delayed prosecutions in corporate fraud cases. However, this might also pressure investigators to rush complex cases, potentially compromising thoroughness.

### **Bharatiya Sakshya Adhiniyam (BSA), 2023**

The BSA, replacing the Indian Evidence Act, 1872, introduces changes in evidence law that could significantly impact corporate fraud cases:

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35. Chaz Arnett, *From Decarceration To E-Carceration*, 41 CARDOZO LAW REVIEW 641–720 (2019), <https://search.ebscohost.com/login.aspx?direct=true&db=a9h&AN=141705860&site=e-host-live>.

a) **Electronic Evidence:** Enhanced admissibility and guidelines for electronic evidence are crucial for prosecuting modern corporate frauds, which often involve complex digital transactions and communications.

b) **Expert Testimony:** Provisions for expert testimony could be particularly beneficial in corporate fraud cases, which often require specialized financial and forensic expertise.

c) **Video Conferencing:** Allowing videoconferencing in court proceedings could expedite trials, especially in cases involving international dimensions.

### **Efficacy Analysis**

The newly enacted criminal laws bring about a number of potential enhancements to the way in which corporate fraud is dealt with; however, they also bring about certain limitations. The implementation of these new laws presents the possibility of accelerating investigations and trials by incorporating technological advancements and improving the existing procedures. These laws, along with the holistic approach of the other concerned regulators and offices, have the potential to reduce the significant amount of time that elapses between the commission of corporate offenses and the resolution of those offenses through the legal system. Within the context of corporate fraud cases, the provisions of the Bharatiya Sakshya Adhiniyam for electronic evidence and expert testimony have the potential to improve the quality of evidence admitted and accepted by the courts. This is an essential factor given the frequently complicated nature of these types of crimes and the fact that the entire world is riding the wave of digitalization. The new laws have expanded the scope of prosecution due to the introduction of new offenses and the potential application of ‘organized crime’ status to corporate fraud. Increased penalties and streamlined procedures have a better deterrent effect. Still, the effectiveness of these measures will ultimately be determined by the consistency of enforcement and the number of successful convictions. There also exist certain difficulties in putting these laws into effect. Primarily, these difficulties circle around increasing the capabilities of law enforcement, judicial officers, and prosecutors to deal with complex cases of corporate fraud within the new framework. Furthermore, the expansive nature of these laws, despite the fact that they offer a general framework, may not adequately address the particular complexities of corporate fraud. This has the potential of limiting the effectiveness of these laws in combating sophisticated financial crimes in the corporate sector. The need of the hour is a more nuanced approach towards fighting these corporate crimes.

### **CONCLUSION**

The nature of corporate frauds in India has undergone drastic changes in recent decades, much like the rest of the world. This necessitates ongoing modifications to the legal and regulatory

system. This research paper examined the history of corporate fraud in India, traced the evolution of corporate governance, and the effectiveness of recent initiatives and the introduction of new criminal legislation in addressing these persistent issues.

The Companies Act, 2013 has achieved significant success in improving corporate governance. The provisions contained therein have had an arguably deterrent effect on malfeasant corporations. It may also be safely argued that the implementation of stricter penalties, more stringent disclosure regulations, and the creation of the Serious Fraud Investigation Office (SFIO) have enhanced the existing legal tools to effectively address corporate misconduct. However, the success of these endeavors has been somewhat tainted due to the challenges in implementation of these laws and a lack of sufficient resources.

The SFIO has been quite helpful in handling challenging corporate fraud cases since it is a competent multi-disciplinary investigative team composed of experts from various departments having intensive experience. It is necessary that there should be more authority and legislative recognition. Such measures will enable the discovery and examination of major corporate violations. These obstacles must be overcome. The SFIO still has difficulties financing and working with other agencies if it is to completely utilize its powers and achieve its goals.

Originally meant to solve bankruptcy issues, the Insolvency and Bankruptcy Code (IBC), 2016 has also proved to be a useful instrument in combating corporate fraud. Laws against intentional defaulters, creditor-in-control paradigm, and time-bound approach have created a business environment more open and responsible. Still, grounds of concern remain the National Company Law Tribunals' capacity issues and the ongoing delays in the settlement process.

Leading the initiatives to find and address securities market fraud is the Securities and Exchange Board of India (SEBI). Market integrity has been much enhanced by the legislative actions, investigative authority, and investor protection focus. While maintaining technical advancements in fraud is a constant issue, SEBI's capacity to adjust to growing market challenges has been commendable.

The adoption of the new criminal laws—the Bharatiya Nyaya Sanhita, Bharatiya Nagarik Suraksha Sanhita, and Bharatiya Sakshya Adhinyam in 2023 marks a significant overhaul of the criminal justice system that could have repercussions for cases involving corporate fraud. These rules improve several areas, including the management of evidence, use of technology, and procedural efficacy; their lack of comprehensive guidelines on handling corporate fraud could thus limit their capacity to properly fight intricate corporate crimes.

Although India has improved its legal and regulatory system significantly to combat corporate fraud, problems persist. Usually, implementation difficulties, limited resources,

and the always shifting nature of corporate fraud compromise the efficacy of these processes. Moving forward, a multi-pronged approach is necessary, which may be elaborated as follows:

- Continuous refinement of laws and regulations to address emerging forms of corporate fraud.
- Enhanced coordination between various regulatory and investigative agencies.
- Investment in capacity building and technological upgradation of enforcement agencies.
- Focus on speedy trial and resolution of corporate fraud cases.
- Strengthening of corporate governance norms and promoting a culture of ethical business practices.

The legal and regulatory environment has to change along with the complexity of financial products and corporate structures. The success of the recent reforms and new criminal laws in reducing corporate fraud will depend on their efficient execution, interpretation by the court, and the capacity of the whole system to change to fit the changing character of such fraud. Only by using a dynamic and flexible strategy can India properly solve the problem of corporate fraud and support a transparent, responsible, and trustworthy business climate.

**CHAPTER - 2**  
**GENDER JUSTICE AND HUMAN RIGHTS**





## TACKLING GENDER PAY GAP: A CHALLENGE IN THE REALM OF LABOUR RIGHTS IN INDIA

Irfan Rashid<sup>1</sup>

Amritesh P<sup>2</sup>

### INTRODUCTION

The gender pay gap can be simply defined as the difference in average earnings between men and women who are employed in the workforce. Usually, this gap manifests as women earning less than their male counterparts for the same or similar roles. You must have come across statements like “Women are not as serious in their jobs as men are”, “It’s cheaper to hire men since maternity leave is a loss to organizations”, and the all-time classic, “Women are too emotional to handle difficult jobs”. These are the archaic beliefs that perpetuate the gender pay gap in India, and discourse and reforms are needed to question them<sup>3</sup>.

Gender pays gap is not just a problem of disparity in pay between men and women for work done but it is also a problem of systemic discrimination that restricts women from getting good paid jobs<sup>4</sup>. This disparity has deep historical roots. Women have historically been paid less than men, and this practice is reinforced by traditional roles and discriminatory perceptions. It is influenced by socio-cultural norms, occupational preferences, and educational disparities. Factors such as occupational segregation, cultural barriers, and workplace discrimination contribute to this ongoing issue. In 2022, American women typically earned 82 cents for every dollar earned by men. That was about the same as in 2002, when they earned 80 cents to the dollar<sup>5</sup>. This indicates a mere 2% improvement over the previous two decades.

In India, despite having specific legislations like Equal Remuneration Act, 1976 (hereinafter referred to as “ERA”) and international frameworks like the Universal Declaration of Human

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1. Student, School of Law, CHRIST (Deemed to be University), Bangalore.
  2. Student, School of Law, CHRIST (Deemed to be University), Bangalore.
  3. Kelp, *Decoding the Gender Pay Gap in India*, KELP BLOG (Aug. 1, 2024, 7:35 PM), <https://www.kelphr.com/blogs/gender-pay-gap-in-india/>.
  4. Khushi Mehta, Iftikhar Ahmad, *Decent Work Check 2023*, wage indicator (Aug 9, 2024, 7:45 PM), <https://wageindicator.org/documents/decentworkcheck/asia/india-english.pdf>.
  5. PEW RESEARCH CENTER, <https://www.pewresearch.org/social-trends/2023/03/01/the-enduring-grip-of-the-gender-pay-gap/> (last visited Aug. 8, 2024).

Rights, significant pay disparities persist<sup>6</sup>. Addressing this issue is not only a matter of justice but also a crucial step towards achieving sustainable development. Through this research, the paper aims to highlight the urgent need for more robust interventions and strategies to tackle the gender pay gap<sup>7</sup>.

## **SIGNIFICANCE**

The authors, through this paper, seek to delve into the issue of gender pay gap in India. The main objective of the paper is to critically analyze existing laws related to equal pay for equal work in India, identify the loopholes, and understand why gender pay disparity persists despite the presence of constitutional provisions and specific legislations to tackle the same.

The paper examines the historical context, contemporary challenges, and international perspectives related to gender pay disparity, while focusing mainly on India. By closely examining the provisions of the Equal Remuneration Act, 1976, and the Code on Wages, 2019, the study seeks to uncover the shortcomings of these existing legislations. This analysis is significant as the author lays down actionable recommendations for policymakers to address gaps and enhance gender pay equity. The research's findings support advocacy efforts, influence legislative reforms, and help create a fairer and more inclusive labour market in India. This research will serve as a robust basis for shaping potential legal advancements and anticipating changes in public sentiment.

## **UNDERSTANDING GENDER PAY GAP AND LABOUR RIGHTS**

### **Historical Context**

In the course of Industrial Revolution, and as wage placing became more orderly, women were systematically given less pay than men for similar works. Such gender-based pay differences were often explained either directly with reference to gender or with other reasons. The campaign for equal remunerations for males and females doing the same work was pioneered during first wave feminism starting with the Trade Unionism in industrialized nations of the world during the 19th Century. Secondly, notable is that in the 1830s female trade unions went on strikes which are considered among the first attempts to fight gendered wage discrimination<sup>8</sup>. Employment of women was however markedly high during the World War I, especially after the year 1916 which saw introduction of conscription. They frequently

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6. Cristofori R, Ferrari S, *Religion in the Public Space*, Routledge, Volume III (1st ed.), (2013).

7. Cotter, A.-M.M, *Gender Injustice: An International Comparative Analysis of Equality in Employment*, (1st ed.). Routledge, (2004).

8. TUC LIBRARY COLLECTIONS, LONDON METROPOLITAN UNIVERSITY, <http://www.unionhistory.info/equalpay/roaddisplay.php?irn=820> (last visited Aug. 8, 2024).

substituted men in occupied positions and received much less pay – a process called ‘dilution’. Women became more active in trade unions – their membership increased by 160 percent, but their demands, such as the fight for equal wages, remained largely ignored. In the context of USA, the share of women engaged in economic activities increased substantially from the 1930s through mid-1970s, particularly married women. In 1970, half of unmarried women and 40 per cent married women were part of the workforce. Despite creating significant advantages for the economy, barriers to women’s advancement still exist. The highest ever participation rate for prime-aged working women was witnessed in the late 1990s at about 76 percent which has since dropped to around 76 percent today<sup>9</sup>.

The gender pay gap in India has had various socio-cultural influences, including stereotyping, discrimination, and there being disproportionate distributions of family responsibilities between the genders. Cultural and traditional practices have provided expectations from women that they become homemakers and should not work exploiting family and domestic duties restrain women from advancing in their careers. Also, industries and occupations, particularly the female dominated ones, like teaching, nursing among others, pay their workers relatively lesser as compared to industries with many male employees. Women were viewed as persons who cannot concentrate on their work properly as they have responsibilities at home and children to attend to. Also, they were often considered to be less informed and less capable than men in technical arenas, even though there was no scientific reason for such a perception<sup>10</sup>. After the Indian independence it shifted then policies to focus on gender equity and women’s rights. Nonetheless, while the liberalization policies of the 1990s opened up the economy to some extent, the results were midway<sup>11</sup>. This production process saw more women joining the work force though the formal sector remained highly gendered regarding wages earned. Women were also informed and settled in informal employment that provided insecurity of employment and no benefits hence widening the income gap. Employment generation through Education and skill development programmes of the Government also positively impacted the women employment, but barriers of social norms and bias did continue to offset them from the higher paid jobs. Some legislative measures have been enacted to provide for measures against discrimination for the women, such as The Equal Remuneration Act, 1976. There still exist shortcomings and

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9. Janet L. Yellen, The history of women’s work and wages and how it has created success for us all, BROOKINGS (Aug. 5, 2024, 3:17 PM), <https://www.brookings.edu/articles/the-history-of-womens-work-and-wages-and-how-it-has-created-success-for-us-all/#:~:text=The%20occupational%20choices%20of%20those,Educated%20women%20were%20scarce>.

10. Omkar Apugol, *Analysis of the Equal Remuneration Act and the Need for Equal Wages for Women*, 17 SUPREMO AMICUS 315, 317 (2020).

11. GOVINDA R, M. P, 1 INDIA’S SOCIAL SECTOR AND SDGS: PROBLEMS AND PROSPECTS, Routledge India. (2019).

the enforcement have been weak as well, and the Gender Pay Gap is a continuous reality in Indian labour market.

### International Perspective

Equal pay for men and women for the same work is a principle rooted in the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on December 10, 1948<sup>12</sup>. In the context of USA, The Equal Pay Act of 1963<sup>13</sup> further solidified this principle by mandating equal pay for equal work to eliminate gender-based disparities. However, it also recognizes that wage disparities may arise from factors such as experience in service, efficiency, quality of the produced goods or the volume of goods produced, and other factors other than gender.

In UK, the Equal Pay Act of 1970<sup>14</sup> was inspired by the Equal Pay Act (US), and it mandates equal treatment in pay and employment conditions for men and women<sup>15</sup>. A claimant must prove that he or she has performed the work of a comparator to have a case. Employers must then rebut any pay difference by demonstrating that it is not on the grounds of gender. Further, in October 2010, The Equality Act 2010 came into force in the UK, and it brought together over 116 separate pieces of legislation into one single Act. This Act offers a legislative framework to safeguard people's rights and promote equality of opportunity<sup>16</sup>. Many countries, just like the US and UK, have specific legislations to address equal pay for equal work, but still the issue of pay disparity persists. The fact that women workers continuously earn less than their male counterparts, especially in unorganized sectors, is a cause for worry and thus reforms are needed.

India is a signatory to the UN special charters, and the Equal Remuneration Act complies with the guidelines set up by the Universal Declaration of Human Rights (UNDHR), the International Labour Organization (ILO) and the Convention on Elimination of all form of Discrimination Against Women, 1979 (CEDAW)<sup>17</sup>. The UNDHR enshrines the concept of equal pay for equal

12. UNITED NATIONS, <https://www.un.org/en/about-us/universal-declaration-of-human-rights#:~:text=Article%2023&text=Everyone%2C%20without%20any%20discrimination%2C%20has,other%20means%20of%20social%20protection>. (last visited Aug. 7, 2024).

13. Equal Pay Act, 1963 (US).

14. Equal Pay Act, 1970, c. 41 (UK).

15. Stevenson, George, Stuart, Michael, *The Women's Liberation Movement and the Intractable Problem of Class, c. 1968 c. 1979*, Durham theses, Durham University. (2016).

16. EQUALITY AND HUMAN RIGHTS COMMISSION (BRITAIN), <https://www.equalityhumanrights.com/equality/equality-act-2010/what-equality-act#:~:text=A%20new%20Equality%20Act%20came,equality%20of%20opportunity%20for%20all>. (last visited Aug. 8, 2024).

17. Harshith Sai Boddu, *EQUAL PAY FOR EQUAL WORK: A STUDY ON GENDER WAGE GAP AND EQUAL REMUNERATION ACT, 1976*, MANUPATRA ARTICLES (Jul. 5, 2024), <https://www.manupatra.com/articles/equal-pay-for-equal-work-a-study-on-gender-wage-gap-and-equal-remuneration-act-1976>.

work, and it was adopted unanimously by the United Nations General Assembly in 1948. Article 23 states that everyone has the right to equal pay for equal work, free from discrimination, and every worker has the right to fair compensation that guarantees him and his family a life worthy of human dignity and is supplemented, if needed, by additional social safety nets<sup>18</sup>. Moreover, Article 2 of the ILO's 1951 Convention on Equal Remuneration, its 100th convention lays down that members (countries) promote and ensure equal pay for men and women for work of equal value. This can be achieved through national laws, wage determination machinery, collective agreements, or a combination of these methods<sup>19</sup>. The CEDAW, 1979 entered into force as an international treaty in 1981 and its Article 11 mentions that the States Parties (countries) shall take all appropriate measures to eliminate discrimination against women in the field of employment<sup>20</sup>. This article enshrines “*the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work*”<sup>21</sup>.

In 2015, members of the UN adopted a universal call to action to end poverty, protect the planet and ensure that all people enjoy peace and prosperity by 2030 and collectively come up with Sustainable Development Goals. These goals include equal pay for equal work of equal value as one of them. The Goal 8.5 mentions: “*By 2030, achieve full and productive employment and decent work for all women and men, including for young people and persons with disabilities, and equal pay for work of equal value*”<sup>22</sup>.

### **The Contemporary Era and The Reasons for Disparity**

India was ranked 135 out of 146 countries in the World Economic Forum's Global Gender Gap Index for 2022<sup>23</sup> and it highlights significant gender inequality that exists. Moreover, the World Inequality Report 2022 shows men earning 82% of labour income, while women earn

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articles.manupatra.com/article-details/EQUAL-PAY-FOR-EQUAL-WORK-A-STUDY-ON-GENDER-WAGE-GAP-AND-EQUAL-REMUNERATION-ACT-1976.

18. UNITED NATIONS, *supra* note 12.

19. INTERNATIONAL LABOUR ORGANIZATION, [https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100\\_INSTRUMENT\\_ID:312245:NO#:~-:text=1.,for%20work%20of%20equal%20value](https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312245:NO#:~-:text=1.,for%20work%20of%20equal%20value). (last visited Aug. 7, 2024).

20. UNITED NATIONS, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women> (last visited Aug. 7, 2024).

21. *Id.*

22. UNITED NATIONS (SDG 2030 AGENDA), <https://sdgs.un.org/2030agenda> (last visited Aug. 8, 2024).

23. WORLD ECONOMIC FORUM, [https://www3.weforum.org/docs/WEF\\_GGGR\\_2022.pdf](https://www3.weforum.org/docs/WEF_GGGR_2022.pdf) (last visited Aug. 5, 2024).

just 18%<sup>24</sup>. This is suggestive of fundamental problems such as discrimination at the workplace, lack of equality for females in terms of education and employment opportunities, as well as traditional practices that limit women's freedom. These challenges require that policy changes and societal transformation should be carried out so as to ensure that equal opportunities are accorded to all in respect to their gender. As per the Monster Salary Index Report conducted in 2019, a gender pay gap of 19% is estimated reflecting that women in India are paid 19% less than men in India<sup>25</sup>. The report also highlighted that 60% of working women in the country report facing workplace discrimination. In 2018, the median gross hourly wage for men was Rs 242.49, which is Rs 46.19 higher than the Rs 196.3 earned by women<sup>26</sup>. The gravity of this issue can be understood by the fact that, very recently, in the Global Gender Gap Report 2024 by World Economic Forum, India closed 64.1% of its gender gap in 2024, ranking 129th globally, a marginal decline from 127th last year<sup>27</sup>.

The following are some of the primary causes of the current gender pay disparity in India:

**Occupational Preferences:** It is also important to note that overall employment of women in the Indian paid workforce is comparatively still low, more so women in rural environments where the key business is agriculture. While wife and daughters are mostly associated with duties like drying and storing of grains, men plow the field and harvest the crops not because they dominate women but because of personal preferences. Also, there are more women in the personal services, care giving occupations and informal employment particularly the agricultural activities.

**Cultural Barriers:** In India therefore, cultural factors of employment marginalize women and even more so higher caste women by making it hard for them to seek paid work let alone for sustenance. Several recorded interviews with widows from rural North India show that the search for employment results in losing their rights to the properties and their expulsion from villages. This is due to the times that childcare duties compel women to take up part time employment or take gap years in their career hence earn less than their male counterparts. The analysis shows that full-time working women make a 34% less than men, and the working women who were

24. WORLD INEQUALITY REPORT 2022, [https://wir2022.wid.world/www-site/uploads/2023/03/D\\_FINAL\\_WIL\\_RIM\\_RAPPORT\\_2303.pdf](https://wir2022.wid.world/www-site/uploads/2023/03/D_FINAL_WIL_RIM_RAPPORT_2303.pdf) (last visited Aug. 5, 2024).

25. THE HINDU BUSINESSLINE, <https://www.thehindubusinessline.com/economy/indian-women-earn-19-less-than-men-monster-report/article26454996.ece> (last visited Aug. 5, 2024).

26. THE NEW INDIAN EXPRESS, <https://www.newindianexpress.com/business/2019/Mar/07/gender-pay-gap-still-high-women-in-india-earn-19-per-cent-less-than-men-report-1948043.html> (last visited Aug. 5, 2024).

27. THE HINDU, <https://www.thehindu.com/business/Economy/india-ranks-129-on-global-gender-gap-index-iceland-on-top-wef/article68280347.ece> (last visited Aug. 8, 2024).



part-time are paid almost 42% less than men. However, non-mothered females are also paid less because of reproductive possibilities in the future.<sup>28</sup>

**Education & Training:** In India, women's literacy rates lag significantly behind those of men, with many girls dropping out before completing their education. Historically, educational investment has favored men, who are expected to become the primary earners, while women are often seen as future homemakers, deeming their education less critical. However, this gender gap in education has been narrowing over the years. The literacy rate difference between men and women decreased from 21.59% in 2001 to 16.68% in 2011, indicating that women are gaining more educational opportunities as the country progresses<sup>29</sup>.

**Corporate policies & Workplace discrimination:** Corporate policies like extended maternity leave aim to support women but can unintentionally reinforce traditional gender roles by assuming women are primary caregivers. This can hinder women's career advancement due to biased perceptions that they may underperform in higher positions. Conversely, inadequate paternity leave perpetuates the notion that men are not responsible for family duties. Additionally, gender discrimination in hiring, promotions, and salary negotiations maintains the gender pay gap. These biases, rooted in traditional views of gender roles, lead to unequal treatment and undervaluation of women's work<sup>30</sup>.

## LEGAL FRAMEWORK IN INDIA

### Constitutional Provisions and Judicial Pronouncements

It is said that citizens are more likely to be able to use their freedom in areas that are worthwhile of exploration if their social rights are more equitable<sup>31</sup>. The Indian Constitution contains a number of clauses that seek to achieve gender equality, including the prohibition of paying women less for doing equivalent labour.

**Article 14:** Equality before law - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India<sup>32</sup>. This implies that there should be no legal discrimination between men and women regarding their wages. Both genders must receive equal pay for equal work as a fundamental right.

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28. Martha C. Nussbaum (Ed.), Jonathan Glover (Ed.), *WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES* 55 (Oxford University Press 1996).

29. JAGRAN JOSH, <https://www.jagranjosh.com/general-knowledge/census-2011-literacy-rate-and-sex-ratio-in-india-since-1901-to-2011-1476359944-1> (last visited Aug. 5, 2024).

30. Kelp, *supra* note 1.

31. Hamzah Hussaini, *Equal Pay for Equal Work: Labour, Sports and Constitutional Perspective*, Alliance University, 4 (2020).

32. INDIA CONST. art. 14.

The Supreme Court, in the case of **Sita Devi v. State of Haryana**<sup>33</sup>, said that “*the doctrine of ‘equal work for equal pay’ is recognized by this Court as a facet of the equality clause contained in Article 14 of the Constitution.*” Similarly, in the case of **People’s Union for Democratic Rights v. Union of India**<sup>34</sup>, the Apex Court held that not giving equal wages to both men and women for their equal amounts to violation of right to equality under Article 14, and also directed the Government to ensure that the provisions of the Equal Remuneration Act were not violated by the contractors<sup>35</sup>.

**Article 15:** Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth<sup>36</sup>. This article explicitly prohibits discrimination based on sex. This means that employers cannot pay women less than men for the same work solely based on gender. Any differential treatment in wages due to gender is unconstitutional.

**Article 16:** Equality of opportunity in matters of public employment -

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State<sup>37</sup>.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State<sup>38</sup>.

This article basically ensures that men and women have equal opportunities in public employment. This includes equal pay for equal work, as denying equal pay would be a form of employment discrimination prohibited by this article.

**Article 19 (1) (g):** All citizens shall have the right to practice any profession, or to carry on any occupation, trade or business<sup>39</sup>. This clause supports the right to engage in any profession or business, which implicitly includes the right to be compensated fairly. Equal pay is a component of the fair practice of any profession or trade.

**Article 39:** The State shall, in particular, direct its policy towards securing -

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33. Sita Devi v. State of Haryana, (1996) 10 SCC 1.

34. People’s Union for Democratic Rights v. Union of India, (1982) 3 SCC 235.

35. Omkar Apugol, *Analysis of the Equal Remuneration Act and the Need for Equal Wages for Women*, 17 SUPREMO AMICUS 315, 323 (2020).

36. INDIA CONST. art. 15.

37. INDIA CONST. art. 16, cl. 1.

38. INDIA CONST. art. 16, cl. 2.

39. INDIA CONST. art. 19, cl. 1.

(a) that the citizens, men and women equally, have the right to an adequate means of livelihood<sup>40</sup>.

(d): that there is equal pay for equal work for both men and women<sup>41</sup>.

These clauses explicitly state the State's responsibility to ensure equal pay for equal work for both men and women, and also emphasizes the need for economic equality and fair wages as a matter of policy. The Apex Court in the case of **Randhir Singh v. Union of India**<sup>42</sup> observed that the principle 'Equal pay for Equal work' is deducible from the interpretations of Article 14 and 16 in the light of in the light of the Preamble and Article 39(d). And this can be appropriately applied to situations where there are disparate pay scales due to arbitrary or irrational classifications, even when the individuals drawing the different pay scales are employed by the same company. Further, in **D.S. Nakara v. Union of India**<sup>43</sup>, a Constitutional Bench reaffirmed and upheld the decision taken in the case of *Randhir Singh v. UOI*.

**Article 51 (A) (e):** It shall be the duty of every citizen of India to renounce practices derogatory to the dignity of women<sup>44</sup>. Paying women less than men for the same work undermines their dignity and is contrary to this fundamental duty. In the case of **Dharwad District PWD Literate Daily Wages Employees' Assn. v. State of Karnataka**<sup>45</sup>, the Supreme Court unanimously recognized equal pay for equal work and ensuring security for service by regularizing casual employment within a reasonable period of time as constitutional goals for our socialistic polity.

### Specific Legislations to Address the Issue

#### **Equal Remuneration Act, 1976**

Section 4(1) of the ERA mentions that it is the duty of employer to pay equal remuneration to men and women workers for same work or work of a similar nature<sup>46</sup>. Moreover, Sub-section (2) addresses a potential loophole. It prevents employers from circumventing the law by lowering the wages of male employees to match the lower wages of female employees. Instead, it ensures that employers raise the wages of female employees to match those of their male counterparts. Thus, it ensures true equality in remuneration without reducing anyone's pay.

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40. INDIA CONST. art. 39, cl. (a).

41. INDIA CONST. art. 39, cl. (d).

42. *Randhir Singh v. Union of India*, (1982) 1 SCC 618.

43. *D.S. Nakara v. Union of India*, (1983) 1 SCC 305.

44. INDIA CONST. art. 51, cl. (A).

45. *Dharwad District PWD Literate Daily Wages Employees' Assn. v. State of Karnataka*, (1990) 2 SCC 396.

46. Equal Remuneration Act, 1976, § 4, No. 25, Acts of Parliament, 1976 (India).

In the case of **Mackinnon Mackenzie & Co. Ltd. v. Audrey D'Costa**<sup>47</sup>, the Supreme Court found that the petitioner company had violated Section 4 of the Equal Remuneration Act. The discrepancies in pay between male and female stenographers were unjustified, and the company was required to pay the difference in remuneration.

Section 5 states that there shall be no discrimination while recruiting men and women workers<sup>48</sup>. This provision also includes subsequent service conditions like promotions, training, or transfers. Moreover, the formation of Advisory Committees by the Government is required, as outlined in Section 6, to increase women employment. These committees having a minimum of ten members with at least half strength being women, make recommendations on the extent of female employment in the concerned establishments. They take into account aspects like the number of women in employment, demands, the suitability of women employment and need for extending employment including part-time. The goal here is to ensure a balanced and fair approach to women's employment in various sectors.

The Government, as per Section 7 of the Act, is empowered to appoint authorities, at least at the rank of a Labour Officer, to hear and decide complaints and claims regarding violations of the provisions of the Act. These authorities can address complaints of non-compliance and claims of unequal wage payments between men and women for similar work.

Furthermore, the Act has laid down, under Section 10, punitive measures in case of violation of its provisions. If an employer indulges in any unlawful recruitment procedures, or makes distinction in wages between male and female employees for the same or similar work, or discriminates between male and female employees, or fails to conform to directions given by the Government, he will be penalized<sup>49</sup>. The penalty consists of a fine not less than ten thousand rupees and not more than twenty thousand rupees, or imprisonment for a period of three months to one year, or both for the first offence. For subsequent offences, imprisonment can extend up to two years<sup>50</sup>.

### **Code on Wages, 2019**

In July 2019, the Code on Wages, 2019 was introduced in Lok Sabha, and it aims to control wage and bonus payments in all jobs related to any industry, trade, business, or manufacturing. Four laws are replaced by the Code: (i) the Equal Remuneration Act of 1976; (ii) the Minimum

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47. Mackinnon Mackenzie & Co. Ltd. v. Audrey D'Costa, (1987) 2 SCC 469.

48. Equal Remuneration Act, 1976, § 4, No. 25, Acts of Parliament, 1976 (India).

49. Equal Remuneration Act, 1976, § 10, No. 25, Acts of Parliament, 1976 (India).

50. *Id.*

Wages Act of 1948; (iii) the Payment of Bonus Act of 1965; and (iv) the Payment of Wages Act of 1936<sup>51</sup>.

The fundamental distinction between the ERA and the Code on Wages is that, whereas the ERA prohibited discrimination against women and between men and women workers, the Code on Wages forbids discrimination on the basis of gender. Therefore, by using the term “gender” instead of specifying “man” and “woman”, the Code on Wages, 2019 recognizes the diversity of gender identities and aims to provide equal remuneration and prevent discrimination for all employees, regardless of their gender identity<sup>52</sup>. This could be a great step towards the inclusion of LGBTQIA+ community within the ambit of Indian labour laws.

The code defines ‘same work or work of a similar nature’ as “*work in respect of which the skill, effort, experience and responsibility required are the same, when performed under similar working conditions by employees and the difference if any, between the skill, effort, experience and responsibility required for employees of any gender, are not of practical importance in relation to the terms and conditions of employment*”<sup>53</sup>. Moreover, Section 3 of the Wage Code of 2019 prohibits discrimination on the basis of gender. It states that no employer shall discriminate against any employee on the basis of gender in an establishment or any unit thereof with regard to wages for work that is performed by the same employee or work that is similar to it<sup>54</sup>.

However, this code is not yet implemented and awaits its implementation after the new Government is formed post 2024 Lok Sabha elections<sup>55</sup>.

## ANALYZING THE CURRENT CHALLENGES AND SHORTCOMINGS IN THE LEGISLATION

It can be fairly said that every law has a loophole, but every loophole does not have a law. While laws are crafted to address specific issues, there are often unintended gaps or ambiguities that can be exploited. Thus, it becomes crucial to amend laws and come up with better laws in order to maintain a robust legal system and walk towards the path of social transformation.

51. PRS LEGISLATIVE RESEARCH, <https://prsindia.org/billtrack/the-code-on-wages-2019> (last visited Aug. 5, 2024).

52. AP Mahajan, *Public Personnel Administration: Functionality and Challenges*, (1st ed.), Routledge India, (2023).

53. Code on Wages, 2019, § 1 (v), No. 184, Bills of Parliament, 2019 (India). [https://labour.gov.in/sites/default/files/the\\_code\\_on\\_wages\\_as\\_introduced.pdf](https://labour.gov.in/sites/default/files/the_code_on_wages_as_introduced.pdf).

54. T Naamat, D Porat, E Pesina, and G M Quer, (30 Dec. 2019). *Legislating for Equality*, Leiden, The Netherlands: Brill, Nijhoff. (Aug. 5, 2024, 9.30PM). <https://doi.org/10.1163/9789004227637>.

55. Pallavi Nahata, *Labour Codes May Be Implemented After The New Government Is Formed*, NDTV PROFIT (May 31, 2024, 9:22 AM), <https://www.ndtvprofit.com/law-and-policy/labour-codes-may-be-implemented-after-the-new-government-is-forme>.

Section 16 of the ERA empowers the Government to declare that any observed pay differences between men and women within an establishment or employment were due to factors other than sex, and thus legitimizing unequal pay without justification<sup>56</sup>. Basically, once the Government made such a declaration under Section 16, it effectively closed any debate on whether pay inequality was due to gender bias or not, and therefore it shielded discriminatory practices from further scrutiny. In the case of **Air India v. Nergesh Meerza**<sup>57</sup>, the Supreme Court held that a declaration under Section 16 “completely concludes the matter” and constitutes “presumptive proof” that there was no gender discrimination in violation of the ERA. The new Code on Wages 2019 has eliminated this particular section. Thus, hopefully soon, the problems pertaining to such a declaration would no longer exist.

Unfortunately, the Code retains a few flaws from the ERA, especially concerning wage equality. It requires employers to pay equal wages for “the same work or work of similar nature”. Courts have traditionally interpreted this phrase very narrowly. Successful claims under the ERA have typically involved women performing the exact same tasks as their male counterparts, such as stenography, sweeping, or packing goods<sup>58</sup>. Courts have generally avoided broader comparisons, such as contrasting care work done by women in a crèche (nursery) with machine operation by men in the same factory<sup>59</sup>. This is puzzling, considering that the ERA defines “same work or work of similar nature” as work requiring the same level of skill, effort, and responsibility. One could argue that both running machinery and caring for children involves a great deal of expertise, effort, and responsibility, and therefore both jobs should be compensated fairly<sup>60</sup>. However, the judiciary’s interpretation has been constrained by a narrow reading of “same work or work of similar nature”, which limits the scope of comparisons and potentially overlooks the true value of different types of work.

A more forward-thinking option would have been to use ‘equal pay for work of equal value’, a concept found within the Equality Act, 2010 in the UK. In environments where job segregation is prevalent, with women predominantly in lower-paid and undervalued roles, focusing solely on “same work or work of similar nature” does little to address the systemic issue. By demanding equal pay for work of equal value, we can challenge the patriarchal norms that devalue work typically performed by women. This strategy would encourage equitable pay practices across gender lines by acknowledging that jobs held by women should get equal

56. Rishika Sahgal, *Equal Pay for Equal Work? Flaws in the Indian Law*, OXHRH BLOG (Aug. 7, 2024, 4:07 PM), <https://ohrh.law.ox.ac.uk/equal-pay-for-equal-work-flaws-in-the-indian-law/>.

57. *Air India v. Nergesh Meerza*, (1981) 4 SCC 335.

58. Rishika Sahgal, *supra* note 56.

59. *Id.*

60. *Id.*



compensation if they are similar to those held by males in terms of ability, experience, effort, and responsibility<sup>61</sup>.

Another loophole could be observed in Section 7(3) of ERA, and the same is retained in the new Code as well. The section states that if there is any dispute as to whether a work is of same or similar nature the dispute shall be decided by an authority as may be notified by the Government<sup>62</sup>. This clearly shows the lack of clear and objective criteria for determining whether two or more works are of the same or similar nature. This decision is left to the authority appointed by the Government, and without proper guidelines, the determination can be highly subjective. This subjectivity introduces the risk of inconsistent and arbitrary decisions, which could potentially undermine the goal of ensuring equal remuneration for work of equal value. Clear, objective standards for this determination would help ensure a more consistent and fair application of the law.

## RECOMMENDATIONS FOR A MORE EQUITABLE AND SUSTAINABLE FUTURE

### Suggestions for Policymakers

**Comprehensive Legislation:** Strengthen existing laws and adopt the principle of “equal pay for work of equal value” so that we ensure fairness not only in identical job roles but across different occupations that require similar levels of effort, skill, and responsibility. Moreover, implement Pay Transparency that requires companies to disclose pay scales and compensation data, which can help identify discrepancies in pay between genders.

**Data Collection and Analysis:** Mandate regular pay equity audits to pinpoint and analyse gender pay disparities across various roles and demographics. Additionally, invest in detailed data collection on employment, pay, and promotions by gender.

**Support for Work-Life Balance:** Develop and promote leave policies that allow both men and women to take parental leave so that we reduce the stigma around taking some time off for family responsibilities. Additionally, expand access to affordable childcare through subsidies or tax incentives. This could potentially reduce career interruptions for women and also encourage equal sharing of family responsibilities. Both parents can advance in their careers and lead to a more balanced and equitable pay structure.

**Education and Training:** Provide educational programs and scholarships and encourage girls and women to pursue careers in science, technology, law and other professional paths. Also, address occupational segregation with the help of outreach programs and incentives for companies that diversify their workforce.

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61. *Id.*

62. Equal Remuneration Act, 1976, § 7 (3), No. 25, Acts of Parliament, 1976 (India).



**Cultural Change and Awareness:** Launch campaigns to raise awareness and educate the public and businesses about the importance of pay equity. This includes challenging gender stereotypes and biases, promoting diversity and inclusion, and addressing systemic discrimination and inequality. A change in the mindset is of utmost importance to ensure equitable opportunities.

### **Areas for Further Research**

**Labour Rights for Transgender Communities:** Research and analyze the legal framework that protects the labour rights of transgender people, including the socio-legal issues pertaining to their employment opportunities.

**Comparative Analysis:** Examine how the labour laws in India differ from those of other jurisdictions and analyze how countries with robust laws (for example, the UK's Equality Act 2010) have addressed gender pay disparities and whether similar approaches could be adopted for India.

**Economic Impact of Gender Pay Gap:** Study the broader economic impact of the gender pay gap on national economies, and then analyze how closing the pay gap could influence economic growth, productivity, and social welfare.

## **CONCLUSION**

According to a McKinsey Global Institute report, improving women's equality could increase the global GDP by \$12 trillion by 2025<sup>63</sup>. This shows how important gender equality is as a social objective and as a major force behind the development of the world economy as well.

The gender pay gap in India remains a challenge. Historical and socio-cultural factors, such as occupational preferences, cultural barriers, and disparities in education and training, continue to perpetuate this inequality. Specific legislations like the Equal Remuneration Act, 1976, and the Code on Wages, 2019, have been enacted to address pay disparities, but their effectiveness has been limited by certain loopholes and narrow interpretations by the judiciary. The persistence of gender pay disparity highlights the need for comprehensive reforms that go beyond merely equalizing pay for identical jobs and focus on the broader principle of "equal pay for work of equal value."

Policymakers are recommended to prioritize stronger enforcement of existing laws, implement transparent pay practices, and promote cultural and educational initiatives that challenge gender stereotypes and biases. By taking a holistic approach that includes legislative

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63. MCKINSEY & COMPANY, <https://www.mckinsey.com/featured-insights/employment-and-growth/how-advancing-womens-equality-can-add-12-trillion-to-global-growth> (last visited Aug. 8, 2024).

amendments, awareness campaigns, and support for women's education and professional growth, India can move closer to achieving true pay equity and ensuring that all citizens, regardless of gender, have the opportunity to participate fully and fairly in the workforce.

## BEYOND EQUALITY IN LAW: ADDRESSING GENDER JUSTICE AND SYSTEMIC PRACTICAL INEQUALITIES IN INDIA AND BEYOND

Kavitha Christo Nelson<sup>1</sup>

Mathivanan A<sup>2</sup>

*“Gender equality is not only a fundamental human right but a necessary foundation for a peaceful, prosperous, and sustainable world.”*

-António Guterres

### INTRODUCTION

Gender justice is not a just goal but a fundamental human right that underpins the achievement of Sustainable Development Goals 5 and 10 while creating a fair, just, inclusive society and a sustainable world. Gender equality is about achieving dignity, justice, and human flourishing, where everyone can thrive regardless of gender identity and expression.

Gender equality is about achieving dignity, justice, and a fulfilling life for all human beings, regardless of gender. Gender justice is not just about addressing disparities and discrimination or achieving equality; it is a transformative process that reshapes society.<sup>3</sup> The paper argues that gender equality is about equal opportunities, rights, and access to resources. Gender justice and human rights go beyond legal frameworks and are rooted in specific changes in social norms, attitudes, and political power dynamics. This underscores our role in ending inequalities between men and women in both the legal realm and practice, inspiring hope for a more just and equitable future.

The Universal Declaration of Human Rights (UDHR) and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) intervene to reconcile global gender justice but have limitations regarding inequality in the forms of race, ethnicity, disability, and poverty.<sup>4</sup> While it is true that all human beings are most certainly born equal in terms of their

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1. Research Scholar, Alliance School of Law, | Alliance University Bengaluru.
  2. Founder & CEO- Medbill Experts – U.S. and U.A.E.
  3. UNDP, *Gender Justice*, Rule of Law and Human Rights 2019 Annual Report, <https://rolhr.undp.org/content/ruleoflaw/en/2019/Focus/Gender-justice.html>. Last Visited: Jul.29, 2024.
  4. Human Rights Instruments, Convention on the Elimination of All Forms of Discrimination against Women, United Nations General Assembly, 18 December 1979. <https://www.ohchr>.

fundamental rights, the first Article of the UDHR sets the precedent of non-discrimination due to gender, and the second Article strictly prohibits discrimination based on gender as well. CEDAW prohibits discrimination against women in all aspects of life, addressing gender stereotypes, emphasising access to justice, promoting political participation and recognizing women's economic rights, including property ownership and employment opportunities. Although international instruments play a significant role in influencing national legislation globally, beyond legal instruments, implementing and monitoring mechanisms in individual nations do not rely solely on policies or court decisions challenging norms but on societal acceptance and awareness amongst people, highlighting the need for cultural change.<sup>5</sup>

The United Nations Development Programme takes a holistic approach to supporting national partners in promoting gender justice by implementing non-discriminatory laws and policies, enhancing women's access to justice, and increasing accountability for sexual and gender-based violence (SGBV). As individuals, we can challenge stereotypes, amplify gender voices, and advocate for equal opportunities. Our actions, no matter how small, can contribute to the larger movement for gender justice. However, it is disheartening to acknowledge that discriminatory laws, policies, and ingrained attitudes persist worldwide, hindering the progress towards equal rights and equal power.

Nevertheless, as of October 2023, there is reason for hope. Globally, 500 companies are led by women, an all-time high, and 34 women served as the Head of State or Government in 31 countries. This progress in women's leadership roles is a testament to the potential for change. However, it is disheartening that discriminatory laws, policies, and norms persist. The United Nations Foundation survey research highlights that 40 percent of countries limit women's property ownership rights, 28 countries did not enact legislation to address domestic violence, 30 percent restrict women's freedom of movement, and 16 countries do not consider women's testimony to carry the same evidentiary weight in court as men's. From a workplace perspective, 93 countries do not legally provide equal pay for equal work, and 19 countries mandate women to work outside the home only with their husband's permission. This survey depicts the urgent need for change, as it will take another 130 years for women to achieve real gender equality in the highest position of power if we continue at the current pace.<sup>6</sup>

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[org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women](https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women).

5. UDHR, *What are human rights?* OHCHR.ORG (Jul.29, 2024. 9.20 AM) <https://www.ohchr.org/en/what-are-human-rights>.
6. United Nations Foundation, *A Snapshot of Gender Inequality: 50 of the World's Most Sexist Laws, Policies, and Norms*, #equal everywhere, UNITED NATIONS FOUNDATION (Jul.29, 2024. 10.25 AM) <https://equaleverywhere.org/facts/>.

The paper aims to spotlight human rights issues faced by every gender and LGBTQ+ individuals in India and beyond.

The paper explores the complexities of gender justice and human rights through the lens of the urban-rural divide between LGBTQ+ rights movements and gender-sensitive movements, examining the struggle for the recognition and inclusion of LGBTQ+ individuals.

### **UNEQUAL TERRAIN: THE URBAN-RURAL DIVIDE**

India's vast landscape presents a complex picture of gender disparities. With the bustling economies and access to educational opportunities, urban areas offer a glimpse of progress where women in cities increasingly pursue higher education and enter the workforce. However, the traditional gender roles persist, limiting women to specific sectors or relegating them to secondary earners within families. Nevertheless, urban living comes with its own challenges, as there is an evident increase in sexual harassment in public spaces, family responsibilities and a lack of affordable and trusted childcare facilities, which sets barriers to women's equal participation in society. From the political participatory notion, urban women have opportunities for political engagement and support from NGOs and local governance.<sup>7,8,9</sup>

Rural India presents a starkly different reality. Women engage in formal and informal work to manage agriculture, animal husbandry, and cottage industries. However, their labour is often unrecognized compared to that of urban women. These deeply entrenched social norms in women's roles often confine them to domestic work, limiting their mobility and decision-making power. Although rural areas are much safer than urban areas, women still face risks when

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7. BBC News, *Why half of India's urban women stay at home*, March. 3, 2023. BBC NEWS (Jul.29, 2024. 11.45 AM) <https://www.bbc.com/news/world-asia-india-64810339>.
  8. Akash Raj and Nandani Bhanot, *Tracing Decline of Female Labour Force Participation Rate to Caste Inequalities in Urban and Rural India*, INTNL. JRNL. OF POLICY SCIENCES AND LAW (IJPSL) Volume 1, Issue 3. [https://ijpsl.in/wp-content/uploads/2021/03/Tracing-Delay-of-Female-Labour-Force-Participation-Rate-to-Caste-Inequalities-in-Urban-and-Rural-India\\_Akash-Raj-Nandani-Bhanot.pdf](https://ijpsl.in/wp-content/uploads/2021/03/Tracing-Delay-of-Female-Labour-Force-Participation-Rate-to-Caste-Inequalities-in-Urban-and-Rural-India_Akash-Raj-Nandani-Bhanot.pdf).
  9. Dr. R. Balasubramanian, *Gender Inequality in India: Tracing Its Origins, Examining Its Outcomes And Charting A Path Forward*, JRNL. OF EMERGING TECHNOLOGIES AND INNOVATIVE RESEARCH (JETIR) [www.jetir.org](http://www.jetir.org) Nov.2023, Vol. 10(11), <https://www.jetir.org/papers/JETIR2311514.pdf>.

isolated or on long walks to collect water and firewood. In rural areas, women lack political participation as their voices are muted in decision-making compared to urban women<sup>10,11</sup>.

### Gender Stereotypes and Women's Human Rights

Gender stereotypes are generalized views about attributes or roles that women and men possess, and in women, they limit their capacity to develop personal abilities, pursue professional careers, and make their life choices. However, harmful stereotypes perpetuate inequalities that harm certain groups of women, such as minority or Indigenous women, women with disabilities, lower caste women, and migrant women.<sup>12</sup> Two international human rights treaties, the CEDAW and the Convention on the Rights of Persons with Disabilities, aim to eliminate prejudices and customary practices based on stereotypical roles for men and women<sup>13</sup>.

Women experience high levels of pressure in male-dominant sectors, significant job-related pressure, and are more susceptible to mental health issues due to an interpersonally oriented leadership style. This states that gender-specific behaviour demotivates and demoralizes women in the workplace, reducing their aspiration for career advancement. Women are often perceived as lacking the male-type or leadership qualities required for promotion to senior-level positions. Privileges offered to women at work can cause stereotypes, and people tend to perceive that part-time jobs are designed for mothers, leading to less opportunity for women to succeed. Most women's main link to entrepreneurship is through the business occupations of their fathers and kinfolk, and their inclusion into the family enterprise is a matter of birth, not choice<sup>14</sup>.

10. Akash Raj and Nandani Bhanot, Tracing Decline of Female Labour Force Participation Rate to Caste Inequalities in Urban and Rural India, INTNL. JRNL. OF POLICY SCIENCES AND LAW (IJPSL), Volume 1, Issue 3. [https://ijpsl.in/wp-content/uploads/2021/03/Tracing-Degline-of-Female-Labour-Force-Participation-Rate-to-Caste-Inequalities-in-Urban-and-Rural-India\\_Akash-Raj-Nandani-Bhanot.pdf](https://ijpsl.in/wp-content/uploads/2021/03/Tracing-Degline-of-Female-Labour-Force-Participation-Rate-to-Caste-Inequalities-in-Urban-and-Rural-India_Akash-Raj-Nandani-Bhanot.pdf).
11. Dr. R. Balasubramanian, *Gender Inequality in India: Tracing Its Origins, Examining Its Outcomes and Charting A Path Forward*, JOURNAL OF EMERGING TECHNOLOGIES AND INNOVATIVE RESEARCH (JETIR) [www.jetir.org](http://www.jetir.org) November 2023, Volume 10, Issue 11 <https://www.jetir.org/papers/JETIR2311514.pdf>.
12. MARCO EVOLA, IVANA KRSTIĆ, FUENSANTA RABADÁN, GENDER-COMPETENT LEGAL EDUCATION, *5.Feminist Judgments*. SPRINGER INTERNATIONAL PUBLISHING. <https://www.springerprofessional.de/En/feminist-judgments/23882548>.
13. United Nations, *Gender stereotyping, OHCHR and women's human rights and gender equality*, h UNITED NATIONS <https://www.ohchr.org/en/women/gender-stereotyping>.
14. Naznin Tabassum et al., *Gender Stereotypes and Their Impact on Women's Career Progressions from a Managerial Perspective*, SAGE JRNLS. Volume 10, Issue 2. <https://doi.org/10.1177/2277975220975513>. <https://journals.sagepub.com/doi/full/10.1177/2277975220975513>.

Organizations play a key role in propagating discrimination, with stereotype threats occurring when individuals anticipate negative judgement or treatment based on their group's negative perception. In-group favouritism in the workplace leads to the formation of stereotypes, with more women hired when selection criteria include feminine characteristics. Disparate treatment can result from gender stereotypes regarding performance or competencies<sup>15</sup>.

Nevertheless, the right to free and full consent is a fundamental human right recognized globally, and coercive marriages violate this right as these are often due to cultural norms, family expectations, or societal pressure. Queer women, including lesbians, and bisexuals, face unique challenges due to their sexual orientation not aligning with societal expectations, and such coerced into marrying men would lead them to emotional distress and sometimes breakups. The global phenomenon of coerced marriages affects LBQ+ individuals worldwide, affecting both conservative and progressive societies<sup>16</sup>.

Harvard researchers believe gender stereotypes can significantly hinder women's self-confidence in the workplace and as well outside work. A study on women's reluctance to express ideas on Male Topics found women were less likely to self-promote their ideas when their gender was known. Stereotypes also play a role in how outside evaluators rate the contributions of each group member after reading transcripts of conversations. They highlight that to achieve professional success, and people must voice opinions and advocate for their ideas while working in decision-making teams.<sup>17</sup>

### **Gender Stereotypes in Childhood**

Gender stereotypes in children limit their potential and could cause harm in later life, especially when a debate questions nature vs nurture with the gender gap, and a recent neuroscience and developmental psychology research showed the differences in the male and female brain<sup>18</sup>. In childhood, stereotypes teach boys not to express emotions and girls to be nice and obedient, and they contribute to poor mental health in young people, higher male suicide

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15. Ibid. 14.

16. Stephanie Farrior, Human Rights Advocacy on Gender Issues: Challenges and Opportunities, JRNL. OF HUMAN RIGHTS PRACTICE, Volume 1, Issue 1, March 2009, Pages 83–100, 01 March 2009, <https://doi.org/10.1093/jhuman/hup002>. <https://academic.oup.com/jhrp/article/1/1/83/2188706>.

17. Harvard Business School, *How Gender Stereotypes Kill a Woman's Self-Confidence*, HARVARD-BUSINESS SCHOOL-WORKING KNOWLEDGE-BUSINESS RESEARCH FOR BUSINESS LEADERS, Feb. 25, 2019, <https://hbswk.hbs.edu/item/how-gender-stereotypes-less-than-br-greater-than-kill-a-woman-s-less-than-br-greater-than-self-confidence>.

18. Madeleine S C Wallien & Peggy T Cohen-Kettenis, Psychosexual outcome of gender-dysphoric children, JRNL. AM ACAD CHILD ADOLESC PSYCHIATRY. 2008 Dec;47(12):1413-23. PMID: 18981931. DOI: 10.1097/CHI.0b013e31818956b9. <https://pubmed.ncbi.nlm.nih.gov/18981931/>.



rates, low self-esteem in girls, and issues with body image<sup>19</sup>. Stereotyping and discrimination can exacerbate the struggle or challenges faced by individuals who don't conform to societal traditional roles. As the children's attitudes towards gender are fully formed by the age of seven, stereotypes reinforced throughout society challenge parents and caregivers. Stereotypes are prevalent everywhere in media, in clothing, toys, and books, and limited representation of gender. BBC's experiment highlighted the influence of parenting and how caregivers unconsciously teach gender stereotypes<sup>20</sup>.

### **Gender Stereotypes and Media Representations**

Gender is a social category that influences how people identify themselves and their peers. While exposure to such gender stereotypes and sexual representations is associated with the internalization of cultural ideas of appearance, endorsements of sexist attitudes, and tolerance of abuse and body shame are linked to detrimental effects on physical and psychological well-being, such as eating disorder symptomatology, increased body surveillance, and poorer body image quality of life. Although public interest in gender has surged in the last decade due to social and political movements in gender equality<sup>21</sup>.

### **Gender Stereotypes and Men's Self-Ratings**

Men and women continue to accept stereotypes about men's self-rating on sociability, which differ when they characterize themselves rather than when they characterize others. Studies have found that men are more self-aggrandizing when rating themselves than others, ascribing more of the 'wonderful' traits traditionally associated with women. Women have traditionally been in people-oriented, service occupations, while men have traditionally been in things-oriented and competitive roles<sup>22</sup>.

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19. Kelley D Drummond et al., *A Follow-Up Study of Girls with Gender Identity Disorder*. DEV PSYCHOL. 2008 Jan;44(1):34-45. PMID: 18194003 DOI: 10.1037/0012-1649.44.1.34. <https://pubmed.ncbi.nlm.nih.gov/18194003/>.
  20. Birmingham City University, *Gender stereotypes in childhood: what's the harm?* BIRMINGHAM CITY- SCHOOL OF EDUCATION AND SOCIAL WORK, <https://www.bcu.ac.uk/education-and-social-work/research/cspace-blog/gender-stereotypes-in-childhood-whats-the-harm>.
  21. Fabrizio Santoniccol et al., Gender and Media Representations: A Review of the Literature on Gender Stereotypes, Objectification and Sexualization, INT J ENVIRON RES PUBLIC HEALTH. (2023) 20(10): 5770. Doi: 10.3390/ijerph20105770. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10218532/>.
  22. Tanja Hentschel et al., The Multiple Dimensions of Gender Stereotypes: A Current Look at Men's and Women's Characterizations of Others and Themselves. FRONT. PSYCHOL. SEC. Personality and Social Psychology, Volume 10 - 2019, 30 (2019), <https://doi.org/10.3389/fpsyg.2019.00011>. <https://www.frontiersin.org/journals/psychology/articles/10.3389/fpsyg.2019.00011/full>.

An imbalanced gender distribution in social roles drives the persistence of traditional gender stereotypes. Although there is a shift in social roles, a pattern of role segregation persists, where women tend to concentrate on occupations requiring communal attributes and men in occupations that require assertive qualities.

### **Gender Stereotypes and Historical Background Of LGBTQ+ Movements in The World**

LGBTQ+ has a long-standing history, dating back to the 1920s upon the rise of blues music, the introduction of gay bars in the United States, and organizations supporting the LGBT community began to establish, but in 1566 on the United States' first case of same-sex activity, the U.S Military eliminated the LGBT population, discharging lesbians and gays and preventing them from serving. When hate towards LGBT reached its peak in the 1960s with physical harassment, psychiatric lockup, jail and job loss, The Civil Rights Movement and the Stonewall Riots gave hope to as part of minorities in the U.S. and stood against oppression in the LGBT.

Researchers depict lesbians as straightforward, being too honest and direct in stating their thoughts, but stereotypes that lesbians are good in sports, such as women's soccer and claiming them more masculine than heterosexual women. On the other hand, some research says gays are stereotyped as full of empathy, considering them more understanding and respecting than heterosexuals. In the US, gay individuals are often stereotyped as sensible, with research showing that gay marriages provide better physical and mental health for gays than heterosexual marriages due to the fairness of household chores<sup>23</sup>. However, the stereotypes vary with countries and their cultural and social backgrounds.

### **TRANSGENDER STEREOTYPES**

Trans is an umbrella term referring to people whose gender doesn't align with their assigned sex at birth<sup>24</sup>. Transgender people have existed for centuries, with texts suggesting priests of the Sumerian goddess Inanna were transgender. First, gender dysphoria was documented in the Middle Ages, claiming them to have poorer mental health than non-trans people due to stigmatization, oppression, and gender myths, with higher rates of depression, anxiety and

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23. Aprilya Indah R, *Different Types of Stereotypes Toward Lgbt As Minorityon*, AMERICAN ONLINE NEWS, RUBIKON Vol. 7(1). Feb.2020. <https://jurnal.ugm.ac.id/rubikon/article/view/62510/30175>

24. HRC Foundation, *Understanding the Transgender Community*, HRC FOUNDATION <https://www.hrc.org/resources/understanding-the-transgender-community>.

suicidality rates.<sup>25,26</sup> Cisgender refers to a person's gender identity aligning with their birth gender, and it is a privilege that allows them to move freely in daily interactions without interruptions that suggest their gender is not right.<sup>27</sup>

Transgender transition to gender and, due to societal pressures, workplace problems, family non-acceptance, and discrimination, return to their original gender identity and detransition themselves. Studies say that acceptance of transgender transition can reduce the rates of detransition<sup>28</sup>.

## GENDER JUSTICE IN INDIA: A CONSTITUTIONAL PERSPECTIVE

Historical roots of gender inequality in India originated from patriarchal norms, caste-based hierarchies and further stratified gender dynamics, with women from lower castes experiencing greater marginalization. Social reform movements in the 19<sup>th</sup> century advocated for women's empowerment and education and fought against oppressive practices like child marriage and sati systems in India. The 20<sup>th</sup> century had significant advancements, with a key highlight on the women in Indian independence movements, and the Constitution of India plays a major role in uplifting women and removing barriers and gender divides<sup>29</sup>.

The concept of gender justice from India's constitutional fabric would be *Article 14* – Equality before the law is a great equalizer nudging when the scales of justice tip bring them back to equilibrium, ultimately highlighting 'no bias and 'no discrimination' regardless of gender,

25. Patient, *Debunking transgender stereotypes and myths*, Peer reviewed by Dr Krishna Vakharria (Aug. 01, 2022), <https://patient.info/news-and-features/debunking-transgender-stereotypes-and-myths>.
26. LGBT Health & Wellbeing, Scottish Trans, Equality Network, LGBT Youth Scotland, Stonewall Scotland, *LGBTI Populations and Mental Health Inequality* (2018) <https://www.lgbthealth.org.uk/wp-content/uploads/2018/08/LGBTI-Populations-and-Mental-Health-Inequality-May-2018.pdf>.
27. PBS NEWS.ORG, *Here's what most people get wrong about the transgender community* Nation, PBS NEWS.ORG (Apr 23, 2015, 5:26 PM EDT). <https://www.pbs.org/newshour/nation/breaking-common-misconceptions-gender>.
28. William Byne et al., *Report of the American Psychiatric Association Task Force on Treatment of Gender Identity Disorder*, *American Psychiatric Association Task Force on Treatment of Gender Identity Disorder*. ARCH SEX BEHAV. 2012 Aug;41(4):759-96. PMID: 22736225 DOI: 10.1007/s10508-012-9975-x. <https://pubmed.ncbi.nlm.nih.gov/22736225/>.
29. Dr. R. Balasubramanian, *Gender Inequality in India: Tracing Its Origins, Examining Its Outcomes And Charting A Path Forward*, JRNL. OF EMERGING TECHNOLOGIES AND INNOVATIVE RESEARCH (JETIR) [www.jetir.org](http://www.jetir.org) (2023), Vol.10(11), <https://www.jetir.org/papers/JETIR2311514.pdf>.

caste or creed<sup>30</sup>. While *Article 15*<sup>31</sup> stresses inclusion and banishing discrimination based on gender, religion, race, and place of birth, fighting for equality, *Article 16*<sup>32</sup> and *Article 39(d)*<sup>33</sup> get ‘*equal pay for equal work*’, granting equality in employment opportunities irrespective of gender in India.

*Article 39(a)*<sup>34</sup> sighs ‘adequate means of livelihood’, and *Article 42*<sup>35</sup> wraps pregnant women in protective cloaks with ‘*just and humane work conditions*’ and guarantees maternity leave. *Article 46*<sup>36</sup> promotes the education and economic interests of weaker sections, and *Article 47*<sup>37</sup> ensures healthy nutrition for all.

Despite constitutional provisions, challenges persist in India, including patriarchal interpretations, gender-based violence against women, and implementation gaps. Some laws are perceived as weaknesses and perpetuate imbalances in India. Gender bias in various spheres, despite progress, there is still work to dismantle barriers and empower women fully in rural areas; women face barriers in accessing education, employment, property and political participation.

### **The Struggle for Inclusion: The LGBTQ+ Rights Movement**

Although the Constitution of India guarantees no discrimination in gender, caste or creed, the LGBTQ+ community in India faces a unique set of challenges. Societal stigma and a lack of legal recognition force many LGBTQ+ individuals to maintain and live in secrecy, fearing discrimination and violence against them. Nonetheless, the historic judgement decriminalizing homosexuality by Section 377 of the Indian Penal Code was struck down in 2018 as unconstitutional and marked a significant step forward;<sup>38</sup> the fight for full equality continues with persistent issues like access to healthcare, societal acceptance, and legal protections against discrimination, remaining pressing concerns for the LGBTQ+ community.<sup>39</sup>

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30. INDIA CONST. art. 14.

31. INDIA CONST. art. 15.

32. INDIA CONST. art. 16.

33. INDIA CONST. art. 39(d).

34. INDIA CONST. art. 39(a).

35. INDIA CONST. art. 42.

36. INDIA CONST. art. 46.

37. INDIA CONST. art. 47.

38. Navtej Singh Johar v UOI. WP (Crl.) 76/2016; WP (C) 572/2016

39. Times of India, *What is Section 377 of IPC?*. TIMES OF INDIA dated Dec.13, 2018. (Aug.4, 2024) <https://timesofindia.indiatimes.com/india/what-is-section-377/articleshow/66067994.cms>.

Forced marriages within the LGBTQ+ community are another complex issue that affects various demographics, including young individuals who are vulnerable due to their sexual orientation or gender identity. Despite global progress in LGBTQ+ rights, challenges persist, such as domestic violence, abuse, forced marriages, honour killings, and the use of rape to ‘undo’ a victim’s sexual orientation or gender identity.<sup>40,41</sup>

## GLOBAL BEST PRACTICES AGAINST GENDER STEREOTYPES AND HUMAN RIGHTS

The Khwaja Sira Community in Pakistan was legally recognized as the third gender in 2012 after a fight for their right by the Supreme Court of Pakistan, granting them fundamental human rights of citizenship<sup>42,43</sup>. The 2018 Transgender Rights Bill further solidified this recognition, and Khwaja Sira individuals are now subject to the Constitution of the Islamic Republic of Pakistan with equal protection and rights<sup>44,45,46</sup>. Research says that the transition in gender stereotype acceptance amongst communities has impacted a lot amongst the transgender community<sup>47</sup>.

40. United Nations Human Rights, *Child and forced marriage: a violation of human rights*, UNITED NATIONS HUMAN RIGHTS 03 November 2016 (Aug.6, 2024, 9.20 PM). <https://www.ohchr.org/en/stories/2016/11/child-and-forced-marriage-violation-human-rights>.
41. BBC News, *India LGBT couples: ‘My parents were ready to kill me for their honour’*, dated: July 28, 2023. BBC News, (Aug.6, 2024), <https://www.bbc.com/news/world-asia-india-66245194>.
42. International Women’s Media Foundation, *Pakistan’s Khwaja Sira Fight for Their Right to Be*, INTERNATIONAL WOMEN’S MEDIA FOUNDATION dated: Aug. 25, 2022, (Aug. 6, 2024, 10.05 PM), <https://www.iwmf.org/reporting/pakistans-khwaja-sira-fight-for-their-right-to-be/>.
43. Faris A. Khan, *Translucent Citizenship: Khwaja Sira Activism and Alternatives to Dissent in Pakistan*. OPENEDITION JRNLS. <https://doi.org/10.4000/samaj.5034>. <https://journals.openedition.org/samaj/5034>.
44. The Diplomat Magazine, *Meet the Khwaja Sira: Pakistan’s Transgender Community*. THE DIPLOMAT MAGAZINE dated: April 01, 2022. (Aug. 6, 2024, 10.25 PM), <https://thediplomat.com/2022/03/meet-the-khwaja-sira-pakistans-transgender-community/>.
45. Jovaria Ghani, *Peacebuilding in Pakistan: Khwaja Sira Activism*, HIPO Vol. 1. March 2018. <https://core.ac.uk/download/pdf/236986159.pdf>.
46. Pakistan Today Magazine, *the renormalisation of equal rights for Khwaja Siras*, PAKISTAN TODAY MAGAZINE dated: Jan. 11, 2024. (Aug. 6, 2024, 10.45 PM), <https://www.pakistantoday.com.pk/2024/01/11/the-renormalisation-of-equal-rights-for-khwaja-siras/>.
47. Sameena Azhar et al., “*I would prefer to be dead than to live this way*”: *Lived experiences of stigma and discrimination against khwaja sira in Swat, Pakistan*, 30 April 2024. CAMBRIDGE PRISMS: GLOBAL MENTAL HEALTH, Vol. 11. <https://www.cambridge.org/core/journals/global-mental-health/article/i-would-prefer-to-be-dead-than-to-live-this-way-lived-experiences-of-stigma-and-discrimination-against-khwaja-sira-in-swat-pakistan/9375CEFD7278AB-6589F978B80D638E5A>.

LGBT activists in the Middle East and North Africa are overcoming state-sponsored repression and social stigma, building alliances, networking across borders, developing national and regional movements, and combating homophobia and transphobia. The 2011 uprisings in Arab galvanized countless LGBT individuals to take part in activism for the first time, and activists in Egypt spoke more freely about gender and sexuality, articulating them within a human rights framework. Recent progress includes ending forced anal examinations in Lebanon and Tunisia, addressing violence based on sexual orientation and gender identity, and rejecting the interpretation of ‘unnatural offences’ as including same-sex sexual acts in Lebanon.<sup>48</sup> Social Media campaigns were launched to challenge anti-LGBTQ stereotypes and bullying, reaching over 300,000 people in 2017<sup>49</sup>.

The LGBTQ+ Community often faces unique challenges in the workplace due to deeply ingrained thoughts and unconscious biases which make assumptions about a person’s gender identity and other implicit biases that can significantly impact any workplace; to mitigate and address them, some workplaces have taken best practices for a more inclusive workplace culture as below:

Volvo workgroup highlights that stereotypes are incorrect beliefs and harmful to the LGBTQ+ community, including lesbians, bisexuals, transgenders, and intersex individuals. They also relate stereotype impact on the self-expression pressure LGBTQ+ individuals to conform to certain behaviours and being labelled as LGBTQ+, which pressures them to feel self-doubt, hate, and alienation. This makes them live double lives and face societal pressures. Volvo workgroup promotes stopping stereotypes with an open mind and breaking prejudices, and rather unlearning toxic habits of stereotypes act on others’ stereotypes<sup>50</sup>.

In a study on the prevalence of stereotypes against LGBTQ and higher education, the authors surveyed students and teachers to establish a baseline of stereotyping in North Carolina’s Public High School and analysed that high school had low levels of discrimination, where 70 percent of high school teachers downplay the experiences of LGBTQ students about bullying, resulting in less effective prevention of bullying. Teachers often intervene when they hear homophobic

48. SARAH SHAH, MARYAM KHAN & SARA ABDEL-LATIF, TOWARD A POSITIVE PSYCHOLOGY OF ISLAM AND MUSLIMS, Chapter: *Decolonizing Muslim Same-Sex Relations: Reframing Queerness as Gender Flexibility to Build Positive Relationships in Muslim Communities*, pp261–283, 16 July 2021, [https://link.springer.com/chapter/10.1007/978-3-030-72606-5\\_12](https://link.springer.com/chapter/10.1007/978-3-030-72606-5_12).

49. Human Rights Watch, *Audacity in Adversity -LGBT Activism in the Middle East and North Africa*. HUMAN RIGHTS WATCH dated: April 16, 2018. <https://www.hrw.org/report/2018/04/16/audacity-adversity/lgbt-activism-middle-east-and-north-africa>.

50. Volvo Work Group, *How stereotypes are harmful to the LGBTQ+ Community*, VOLVO WORK GROUP dated: Sep. 27, 2023. (Aug. 7, 2024, 9.25 AM), [https://www.volvogroup.com/en/careers/working-at-volvo-group/diversity-inclusion-stories/How\\_stereotypes\\_are\\_harmful.html](https://www.volvogroup.com/en/careers/working-at-volvo-group/diversity-inclusion-stories/How_stereotypes_are_harmful.html).



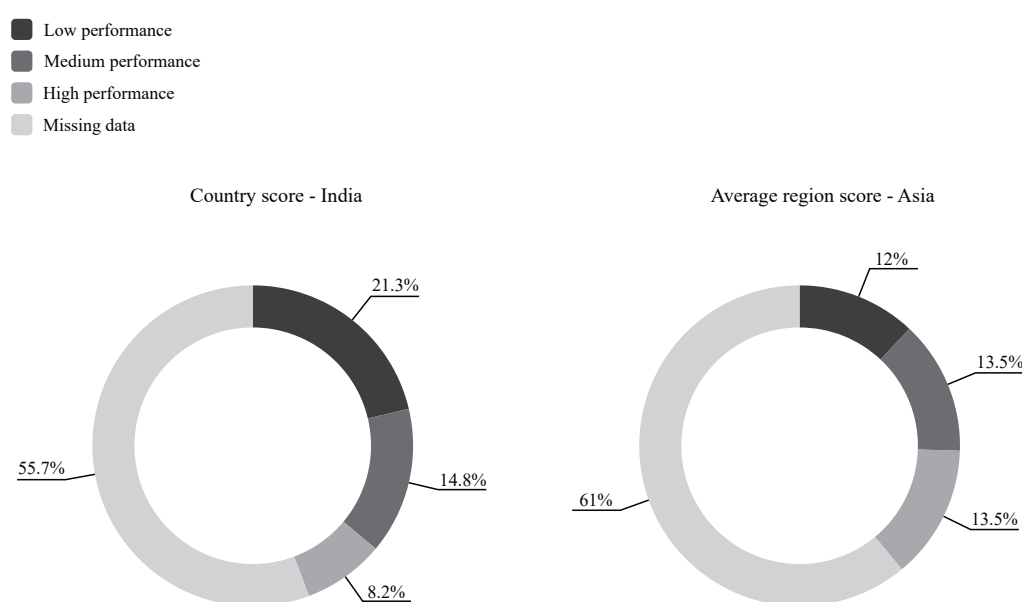
slurs when statements state gay boys are feminine and lesbian girls are masculine. From the student's perspective, they accept or tolerate gay students without discrimination. This proves that eliminating stereotypes from educational presentations and at school levels has a higher impact than the general population.<sup>51</sup>

Importance of uncovering biases, parents should examine their family values and beliefs on trans men and trans women are not normal and assumption that gay or bisexual people are promiscuous or that they may have many sexual partners are common misconceptions. As such, parents' biases can be passed down to children, whereas children can learn prejudices from their environment and media portrayals. Harvard researchers at Project Implicit offer hidden bias tests to uncover unconscious biases on various social topics, including LGBTQ+ identities<sup>52</sup>.

United Nations Population Fund-India is committed to gender and human rights, focusing on zero gender-based violence, ending gender-biased sex selection and other humanitarian crises promoting equal value for girls<sup>53</sup>. The UN Women highlights the gender gap and India's performance, as shown in Figure 1. Despite their performance improvements in India, the report states that 83.3 percent of legal frameworks promote gender equality under the Sustainable Development Goals SDG indicator<sup>54</sup>.

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51. Heather Wickersham & Deborah Vajner, *The Prevalence of Stereotypes Against the LGBTQ Community and the Effect of Education on Those Stereotypes*, JRNL. OF STUDENT RESEARCH 9(2), November 2020, DOI: 10.47611/jsrhs.v9i2.1049. LicenseCC BY-NC-SA 4.0. [https://www.researchgate.net/publication/348061421\\_The\\_Prevalence\\_of\\_Stereotypes\\_Against\\_the\\_LGBTQ\\_Community\\_and\\_the\\_Effect\\_of\\_Education\\_on\\_Those\\_Stereotypes](https://www.researchgate.net/publication/348061421_The_Prevalence_of_Stereotypes_Against_the_LGBTQ_Community_and_the_Effect_of_Education_on_Those_Stereotypes).
  52. Parents-together.org, Addressing unconscious LGBTQ+ biases that you may be passing along to your children, PARENTS-TOGETHER.ORG, dated: June 23, 2021, (Aug. 9, 2024, 9.25 AM), <https://parents-together.org/addressing-unconscious-lgbtq-biases-that-you-may-be-passing-along-to-your-children/>.
  53. United Nations Population Fund- India, *Gender and Human Rights*, UNITED NATIONS POPULATION FUND- INDIA, (Aug. 10, 2024, 11.25 AM), <https://india.unfpa.org/en/unfpa-india>
  54. UN WOMEN, India, UN WOMEN (Aug. 10, 2024, 11.45 AM), <https://data.unwomen.org/country/india>.





**Figure 1. Gender-related SDG data: dated August 9, 2024.**

*Source: UN Women. Org*

Based on UN Women data on women's productivity in India compared to Asia, there is scope for improvement in all industries.

In exploratory research on the authors' personal, informal interviews with the victims of gender discrimination in the U.S, U.A.E and India and various research, the authors come to the understanding that beyond equality in law, addressing gender justice and systemic practical inequalities in India and beyond might emphasize the ongoing challenges and the need for comprehensive societal changes to achieve gender equality. Gender injustice persists in various forms, including wage gaps, underrepresentation in leadership roles, and pervasive gender-based violence. To combat these issues, it is crucial to continue advocating for equal rights, creating policies that address systemic inequalities, and fostering a culture of respect and inclusion for all genders. Achieving true gender justice requires collective effort from individuals, communities, institutions, and governments worldwide. Only through sustained commitment and action can we hope to build a society where everyone, regardless of gender, has equal opportunities and rights<sup>55</sup>.

55. Dr. R. Balasubramanian, *Gender Inequality in India: Tracing Its Origins, Examining Its Outcomes and Charting a Path Forward*, JRNL. OF EMERGING TECHNOLOGIES AND INNOVATIVE RESEARCH (JETIR) [www.jetir.org](http://www.jetir.org) Nov.2023, Vol. 10(11), <https://www.jetir.org/papers/JETIR2311514.pdf>.

## CONCLUSION AND SUGGESTIONS

Gender justice is a complex issue with an intersection of gender, sexuality, and identity, resulting in discrimination, violence, and exclusion. To achieve gender justice, comprehensive legal frameworks are essential, including anti-discrimination laws, hate crime legislation, and laws recognizing diverse gender identities alongside inclusivity in all sectors. The intersection of Gender Equality and Human Rights is an inalienable human right and prerequisite for achieving sustainable development, peace and security. Developing effective strategies to address gender-based violence can create a more equitable world for all, which should start from an individual and can transform future generations into morally imperative generations.

India has made strides in addressing gender inequality, yet significant challenges persist<sup>56</sup>. To combat the complexities of gender justice and human rights in India, a multifaceted approach to the key factors can shape the lived experiences of gender discrimination and sexual minorities based on traditional gender norms, socioeconomic factors, intersectionality, violence against women, policy and more over community acceptance and support can work towards just and equitable society where everyone can live reaching their full potential.

Nevertheless, the reality is that gender discrimination in day-to-day lives still continues to pose substantial and systematic injustices and disadvantages, far from the progressive trajectory sketched by policy advocates and political institutions whereby it is crucial to improve the victim-support services as they, too, face psychological and societal challenges which need to be addressed by policymakers to foster and promote toll-free helpline numbers, or such services that are culturally sensitive and operates with strict confidentiality establishing a compassionate supportive environment for victims in India. Prevention-oriented programs aimed at reducing risk factors like peer pressure and family dynamics, as well as protective factors like school-based programs, community organizations, and sustainability, are the keys that can contribute to healthier communities and brighter futures for all genders.

Promoting gender-sensitive social norms is the need of the hour to establish a more fair and just society, which can shape individual behaviour and influence decision-making and role perception; government initiating and supporting such policies to create awareness and community voices to foster empathy towards gender equality. Education plays its part in developing healthy relationships among school children; suggesting and integrating gender-based education into school curricula can promote gender equality and informed decision-making making, ensuring the removal of myths and misconceptions of gender sexual violence,

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56. Daizy Thakur, *Gender Equality and Human Rights In India: Issues And Perspectives*, GAP INTERDISCIPLINARITIES -Vol. III(I) 269, <https://www.gapinterdisciplinarity.org/res/articles/%28269-275%29%20GENDER%20EQUALITY%20AND%20HUMAN%20RIGHTS%20IN%20INDIA%20ISSUES%20AND%20PERSPECTIVES.pdf>.

addressing cultural sensitivities to create a future generation who can understand and respect each other with humanity and promoting a more inclusive and respectful society and a sustainable world as quoted by *António Guterres*.

## **CUSTODIAL DEATH AND RAPE IN INDIA: A DARK SHADOW OVER JUSTICE**

Yashodhara Pattnaik<sup>1</sup>

### **INTRODUCTION**

Custodial violence remains a severe human rights issue in India, with numerous reports highlighting its prevalence across various law enforcement and governmental agencies. Despite legal frameworks aimed at safeguarding detainees, incidents of torture and abuse persist, affecting marginalized groups including women, dalits, indigenous people, and economically disadvantaged individuals.

Custodial violence is a blatant violation of human dignity, often leading to custodial deaths, which is considered the gravest crimes in societies governed by the rule of law. Despite this, custodial violence persists globally. The practice of torture has been pervasive and deeply entrenched in India since long. Unchecked and unchallenged, it has become a normalized and accepted practice throughout the country. Arrested individuals, under trials, and sentenced prisoners are often subjected to inhumane conditions. Although international law criminalizes torture, it continues to be widely practiced in India under the guise of crime investigation, extracting confessions, and meting out punishment by law enforcement agencies. Torture is inflicted not only on the accused but also on legitimate petitioners, complainants, or informants, leading to cruel, inhuman, and degrading treatment that severely undermines human dignity.

Women and girls are particularly vulnerable, facing custodial rape, molestation, and other forms of sexual harassment. Alarming, the victims are often from poor and marginalized sections of society. Many instances of torture go unreported as victims fear further persecution and suffer in silence. Consequently, perpetrators are rarely prosecuted, fostering an environment of lawlessness and impunity that perpetuates the prevalence of torture in India.

Given these circumstances, it is critical for India to enact specific legislation to combat torture. Unfortunately, the country has neither such legislation nor has it ratified the UN Convention Against Torture (CAT), albeit being a signatory to it<sup>2</sup>. The National Human Rights Commission

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1. Research Scholar, SNIL, Siksha O Anusandhan, Bhubaneswar, Odisha.
  2. Sanchita Kadam, *Why has India still not ratified UN Convention against torture?*, CJP, (Last accessed 23 July 2024, 10:00AM)<https://cjp.org.in/why-has-india-still-not-ratified-un-convention-against-torture/#:~:text=India's%20refusal%20to%20ratify%20UNCAT,sued%20in%20its%20own%20court.>

(NHRC) has persistently urged the Government of India to ratify the convention to facilitate the introduction of new domestic legislation addressing torture. The Universal Declaration of Human Rights, 1948 states “no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”<sup>3</sup>. Despite these efforts, there has been no progress.

In the absence of specific laws, the Supreme Court of India through various judgments has condemned custodial violence and torture, contributing to the development of legal framework on combating torture. Nevertheless, the need for India to ratify the UN Convention Against Torture and establish specific act or law to address torture remains paramount.

In India, custodial torture is a prevalent investigative tool used by law enforcement agencies. Often, entire criminal investigations rely on confessions extracted through various forms of torture. This practice is so widespread that the presence of a lawyer or an interested party at a police station often fails to deter torture. Such actions violate the constitutional guarantee of life and liberty under Article 21. While there are laws that prohibit rape, death and death by torture, these provisions are seen as inadequate, focusing on punishing the culprit without benefiting the victim. Therefore, the judiciary views it as their duty to protect citizens’ fundamental as well as human rights.

The politicization of the officers of the law has significantly impacted their performance. Although international laws criminalize custodial violence, it continues to be practiced widely in India. The various forms of custodial violence used by the government officials are often extremely inhumane. Allegations of incompetence, corruption, brutality, and violations of law have long been directed at the law enforcement agency. The deteriorating state of law and order and the increasing sense of insecurity in the country have intensified these accusations. The current system of administrative and political oversight of the police is very much flawed.

Torture involves the intentional administer of mental or physical pain or suffering (bearable or unbearable is absolutely irrelevant) by, or with the consent of the state authorities for specific purposes such as punishment, obtaining information or confessions, revenge, or creating fear. Torture aims to break the victim’s mental strength and is distinguished from other abuse by the severity of suffering involved. Common methods of physical torture include beating, electric shocks, stretching, submersion, suffocation, burns, rape, and sexual assault. Psychological torture, which often has long-lasting effects, includes isolation, threats, humiliation, mock executions, mock amputations, and forcing the victim to witness the torture of others. These form of custodial violence strips of every ounce of human rights of the people in custody often resulting in death. The current paper intends to discuss custodial death and rape which are some of the worst forms of custodial violence and torture in the hands of police personnel.

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3. Universal Declaration of Human Rights 1948: Article 5

## CUSTODIAL DEATH

Death occurring in police custody represent one of the gravest violations in an orderly society governed by the Rule of Law, posing a serious threat to an otherwise law-abiding civilized society. Custodial torture is a mockery of the justice system and society, violating basic human rights and bashing human dignity.

From the previous studies and several commission reports, it has been observed that victims of custodial violence and deaths are typically from poorer, weaker segments of society who are often unable to resist or seek redress for the injustices they face in the hands of people with power. One contributing factor to custodial deaths is the immense pressure on police to solve crimes, particularly severe ones. This often leads officers to resort to extreme methods to obtain quick results, sometimes causing excessive harm or inadvertently injuring vital organs, resulting in death. However, this is not an excuse to commit a heinous crime.

Police have admitted that suspects are often held in custody until they confess<sup>4</sup>. A 1994 survey revealed that officers used various methods to force confessions, violating human rights<sup>5</sup>. The Court, in the case of **Nilabati Behera V. State of Orissa**<sup>6</sup>, emphasized that the prisoners retain their fundamental rights under Article 21 of the Constitution, which mandates that “no person be deprived of life or personal liberty except according to the procedure established by law”<sup>7</sup>. The State is obligated to protect these rights, ensuring no unlawful deprivation of life while in custody, whether the individual is a suspect, under trial, or convict. The concept of “sovereign immunity” does not protect the State in such cases, and compensation can be granted under Article 226 of the Constitution for violations of fundamental rights<sup>8</sup>.

Prisoners retain their fundamental rights under Article 21, which “guarantees people their right to life and personal liberty and this includes the right to be treated with dignity”<sup>9</sup>. However, many jails in India are notorious for mistreating inmates, as noted in **Sunil Batra V. Delhi Administration**<sup>10</sup>. Jail authorities are the ones that are responsible to ensure the safety and

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4. Edwin R. Keedy, *The Third Degree and Legal Interrogation Of Suspects*, 85 UNIVERSITY OF PENNSYLVANIA LAW REVIEW AND AMERICAN LAW, 761-777 (1937)

5. James L. Trainum, *I Did It” – Confession Contamination and Evaluation*, POLICE CHIEF, (Last accessed 23 July 2024, 12:00PM) <https://www.policechiefmagazine.org/i-did-it-confession-contamination-and-evaluation/>

6. Nilabati Behera V. State of Orissa AIR 1993 SUPREME COURT 1960

7. INDIA CONST. art.21

8. INDIA CONST. art. 226

9. Ibid 6 article 21

10. Sunil Batra V. Delhi Administration 1978 AIR 1975

security of the prisoners, including criminals or accused persons, as observed in **Meena Singh V. State of Bihar**<sup>11</sup>.

In Odisha's Koraput District, an under-trial prisoner, died in judicial custody in 2010, reportedly from tuberculosis. His death raised concerns about the violation of prisoners' rights. The People's Union for Civil Liberties (PUCL) investigated and found several issues, including the lack of regular court appearances for under trial prisoners, inadequate health and hygiene conditions in the jail, and insufficient support for the victim's family<sup>12</sup>. PUCL demanded an independent judicial inquiry, proper compensation for the victim's family, strict implementation of legal provisions for regular court appearances of under trial prisoners, and medical examinations for all inmates to ensure proper healthcare.

Custodial violence in judicial custody is as severe a problem as in police custody. Judges and magistrates often overlook the well-being of prisoners after remanding them to prison. The Human Rights Commission has reported widespread violence in jails, including solitary confinement, brutal assaults, denial of basic facilities, and restricted contact with relatives. These abuses contribute to numerous deaths in custody. Magistrates responsible for overseeing custodial conditions often fail to investigate deaths thoroughly. Though magisterial inquiries are mandated under Section 176 of the Criminal Procedure Code (now known as the Bharatiya Nagarik Suraksha Sanhita), they are often reduced to formalities and lack adherence to principles of natural justice, leaving many dissatisfied with their outcomes. The Commission struggles to obtain information about custodial deaths due to non-cooperation from district magistrates and other law enforcement agency members at the same time face difficulty in smuggling information out of prisons.

## **CUSTODIAL RAPE**

Torture is a pervasive issue in India, particularly affecting those in underdeveloped zones, such as Dalits, indigenous and tribal communities, minorities, refugees, and economically disadvantaged groups, as well as women and children. Their vulnerability is often heightened by their location, caste, ethnic background, religious beliefs, and gender. Women are frequently targeted due to their gender. The National Crime Records Bureau (NCRB) reported within 2017-2022, police personnel were responsible for raping more than 270 women while they were in custody<sup>13</sup>.

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11. Meena Singh V. State of Bihar Cr. W. J. C. No. 42 of 1999

12. *Custodial death in Koraput*, SANHATI, <http://sanhati.com/narayanpatna/>, (Last accessed 23 July 2024, 12:30PM)

13. *275 cases of rape in custody registered during 2017-22: NCRB data*, BUSINESS STANDARD, (Last accessed 23 July 2024, 12:30PM), [https://www.business-standard.com/india-news/275-cases-of-rape-in-custody-registered-during-2017-22-ncrb-data-124022500133\\_1.html](https://www.business-standard.com/india-news/275-cases-of-rape-in-custody-registered-during-2017-22-ncrb-data-124022500133_1.html).



Women and girls are particularly vulnerable, facing custodial rape, molestation, and other forms of sexual harassment. Alarming, the victims are often from poor and marginalized sections of society. Many instances of torture go unreported as victims fear further persecution and suffer in silence. Consequently, perpetrators are rarely prosecuted, fostering an environment of lawlessness and impunity that perpetuates the prevalence of torture in India.

Among women, those from Dalit and tribal backgrounds are particularly vulnerable to such abuses. A stark example occurred in 2003, when three Special Police Officers (SPOs) gang-raped a 15-year-old tribal girl, near a camp in Gandacherra subdivision, Tripura.<sup>14</sup>

Although the Indian Penal Code (now known as Bharatiya Nyaya Sanhita) includes provisions for punishing custodial rape, such cases often remain hidden. Victims face significant societal stigma and fear retaliation from the accused police officers, who might use their authority to harass the victims or their families with false charges.

The landmark Mathura Rape Case, otherwise known as **Tuka Ram and Anr v. State of Maharashtra**<sup>15</sup> is a landmark case of custodial rape. The custodial rape of an underage tribal girl in 1972 sent shockwaves throughout the country. Following an F.I.R., the accused, two police constables were taken to the court where the Sessions Court found them not guilty as there was an old rupture in the vagina of the girl and the two-finger test determined that she was familiar to sexual intercourse. This erased the motive of rape and determined it as a consensual sex. The High Court then reversed the order and convicted the constables for rape of a minor tribal girl in custody.

The case of **State of Maharashtra v. C. K. Jain**<sup>16</sup> highlighted the incident of rape of women prisoner while in police custody. The Supreme Court upheld the judgment of Nagpur Sessions Court who had sentenced the accused, a sub inspector to 5 years of imprisonment and 1000/- fine. The Court also stated that there should be no leniency for crime committed by a person in uniform and such people should be penalized seriously.

In the case of **State of Maharashtra v. Madhukar Narayan Mardikar**<sup>17</sup>, the accused, a police inspector was had attempted rape on a women which she resisted and following that she registered a complaint. The Bombay High Court dismissed the accused after he stressed the woman's character of being easy and having relations outside marriage and therefore making her statements hard to believe. The Supreme Court stated that just by being an easy woman

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14. *Gangrape of dalit girl in Tripura*, TRIPURA POLICE, (Last accessed 23 July 2024, 5:30PM), <https://tripurapolice.gov.in/node/285>

15. *Tuka Ram and Anr v. State of Maharashtra* 1979 AIR 185

16. *State of Maharashtra v. C. K. Jain* 1990 AIR 658

17. *State of Maharashtra v. Madhukar Narayan Mardikar* (1991) 1 SCC 57

it does not invalidate her statement and found the accused guilty of his actions and had him removed from his service.

In **State of Punjab v. Gurmit Singh**<sup>18</sup>, a similar incidence was seen where a minor girl was raped by a police officer. The humiliating scenario of Mathura rape case was repeated here as well following which the High Court berated the lower court for not handling such cases with sensitivity. The High Court after holding the accused guilty of custodial rape stated how rape is an attack on the soul of a woman.

Early this year, there was a buzz in the state of West Bengal regarding custodial rapes of women in prison. The further investigation was silenced and till date this allegation remains in a dispute due to involvement of political influence in such scenario<sup>19</sup>. Prisons are meant to be a protective environment where people can repent their mistakes, but it has turned in to a place where women are being exploited sexually by others, especially people with authority. The women prisoners were regularly being sexually abused by the male prison staff<sup>20</sup>. Due to lack of female prison staff members, the male prison staffs were in charge of both women prison cells and men prison cells which allowed unrestricted access to the women prisoners. This allowed them to exploit the women without getting suspected. Additional to that, there is also allegation that these women were at many times ‘supplied’ to the male prison cell, where they were sexually abused and exploited by the male prisoners<sup>21</sup>.

Despite laws, there still exist numerous human rights violations in our country out of which only few come to the limelight, custodial death and rape being the most brutal and worst form of violation. The judiciary has many times rescued people and had put a stop to the continuing behavior of violation. Since last decade the country has seen misuse of power both by the politicians and police officials, but very limited action has been taken against them due to the nature of their occupation and their influence.

The Indian Judiciary’s observations in various cases reflect an acknowledgment of the need for a balance between effective law enforcement and upholding human rights. While it is

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18. *State of Punjab v. Gurmit Singh* 1996 AIR 1393

19. *Rape of women prisoners in West Bengal jail*, THE GUARDIAN, (Last accessed 25 July 2024, 12:30PM) <https://www.theguardian.com/global-development/2024/feb/23/rape-sexual-abuse-women-babies-indian-prisons-west-bengal>

20. *Sexual abuse in prison*, ABP LIVE, (Last accessed 23 July 2024, 12:30PM) <https://news.abplive.com/news/india/women-prisoners-pregnant-calcutta-high-court-ban-entry-of-male-employees-1663074>

21. *Children being born in prison*, DECCAN HERALD, (Last accessed 25 July 2024, 12:30PM) <https://www.deccanherald.com/india/west-bengal/62-babies-born-in-four-years-in-west-bengal-most-women-prisoners-were-already-expecting-sc-told-2894164>

recognized that combating crime and maintaining public order may require enhanced powers for security forces, this should not come at the cost of fundamental rights. The Court's rulings emphasize that even in the context of extreme situations, such as encounters with suspected terrorists, adherence to legal and ethical standards is paramount.

Custodial violence leaves deep and lasting scars on individuals, crumbling people's trust in the law enforcement agency and the justice system. It undermines the fundamental principles of human rights and dignity, and its effects ripple through families and communities, especially the victim, his family and people relating to him, perpetuating cycles of fear of the law enforcement agency and mistrust for the judiciary. Addressing this issue needs a serious and strong effort from all sectors of the society, including the implementation of more stringent oversight mechanisms, better training for law enforcement personnel, and a commitment to uphold the dignity and rights of every individual in custody.

## **CONCLUSION AND SUGGESTIONS**

There have been various attempts to grapple with the matter of custodial violence, more specifically on custodial death and rape in the past years but, none of them was able to retain its stability in addressing or eradicating the problem. With the change in society, there needs to be change in the way the issue has been dealt with so far.

Following are some suggestions to address custodial rape and death, while improving human rights protections:

- i. The government and judiciary should ensure that existing laws related to custodial violence are updated to reflect current human rights standards and are rigorously enforced. Periodically laws related to detention and custodial treatment should be reviewed and amended to address gaps and ensure they align with international human rights standards.
- ii. The government should develop and enforce clear protocols for the treatment of detainees, including procedures for reporting and investigating complaints of abuse. Mandatory regular public reporting and monitoring of prisoners and on custodial conditions and incidents of violence should be done to promote transparency and accountability.
- iii. The government should ensure that investigations into allegations of custodial violence are conducted promptly and transparently, with accountability for those found responsible. With the suspect of such cases being police personnel themselves, transparency becomes questionable. It is the duty of the government to ensure that no favoritism/ biasness or tampering of evidence takes places

- iv. Independent oversight body specific to custodial violence with the authority to investigate and take action against abuses by law enforcement and other agencies should be established so as to expedite the process of investigation. With the already existing pile of court cases, having a separate body to oversee such cases shall be helpful in upholding the integrity of the judiciary at the same time focusing on dealing with the particular issue only.
- v. Time and again it has been seen that there are many honest and people who actually take a stand, but are later berated for their choice, demoted or transferred to cover for the police brutality that took place in custody. Comprehensive human rights training for police officers, security personnel, and other authorities involved with custody related affairs ensures that they understand and respect detainees' rights, and shall uphold the same respect and integrity for them in any circumstance as they would have for any ordinary civilian without facing any negative consequences.
- vi. The government should ensure that victims of custodial violence and their families have access to legal aid and support services. Poor people who are mostly the victims of custodial violence due to lack of economic resource and knowledge are not able to get the help that they need. Furthermore, they are silenced by power and fear for their life, leading to not indulging in legal support.
- vii. Psychological counseling and support for victims and their families to help them cope with the trauma of abuse should be provided. Due to physical and sexual abuse many times the victims are not able to fully accept the situation and withdraw their statements or case in fear. Psychological counseling helps in providing emotional support and mental stability to those victims and their families.
- viii. In the last 10 yrs there has been a rise in the existence of civil societies and NGOs for various reasons. These civil society organizations, NGOs and human rights groups should be involved and mobilized in monitoring and advocating for improvements in detention conditions and accountability measures for the people in custody. Channeling their activity through various social media platforms will not just help in making people aware of the police brutality but will also keep people updated on various ways to handle the situation, legal aid clinics, counselors for the victims, dealing and reporting of the accused in the context.
- ix. Public awareness campaigns to educate citizens about their rights and the mechanisms available for reporting and addressing custodial violence should be conducted. This work should not be limited to just civil societies and NGOs but should be discussed in every level of the society. In the grass root level, the panchayat should make

an effort to enlighten people regarding police brutality and custodial violence. It should be the responsibility of civil societies to educate the dalits or the tribals, who are mostly the victims of custodial violence about it in a language or manner that they can understand it the best. The education should also include a brief discussion on their rights if detained and how to access legal aid as soon as possible.

- x. Various methods to prevent abuse and safeguard the people in custody, such as video recording of interrogations and regular health check-ups for detainees should be encouraged. Regular meet up with family and lawyer should be made in due consideration with the rule of law. The family and lawyer have every right to access the health and wellbeing of the detainees, grasping any form of custodial violence at its early stage.

By implementing these measures, India can take significant steps towards eliminating custodial violence, protecting human rights, and reinforcing the integrity of its justice system and people's faith towards it.

The systemic failure has resulted in gross violations of human rights. These are not just individual problems but rather show a broader aspect of systemic failure within the law enforcement agency. We are at a time where dignity and integrity is being tossed around like a football in the custody; disproportionately affecting the marginalized community, custodial death and rape is a very sensitive topic. It shows the failure of justice system in ensuring and upholding people's right to life with dignity, more so done by people who swore to protect it.

Judicial oversight and intervention highlight the crucial role of courts in addressing and mitigating these abuses. However, the effects of these measures are more often than not hampered by procedural delays and due to lack of accountability, and a general reluctance within law enforcement agencies to address internal misconduct.

The reports and judgments discussed illustrate that while some progress has been made in addressing custodial violence, significant challenges remain. The lack of consistent enforcement of legal protections, inadequate responses to complaints of abuse, and the systemic issues within various agencies all contribute to the persistence of custodial violence. But the politicization and protection of the police officials in the name of transfer has tarnished the reputation of law enforcement agency.

Addressing these issues requires comprehensive reforms, including stricter implementation of legal provisions, increased transparency and accountability, and enhanced oversight mechanisms. Ensuring that all authorities adhere to human rights standards and protecting the rights of detainees is essential to uphold the integrity of the judiciary and rule of law, whilst maintaining trust of public in the police and justice system. The fight against custodial violence

is not only a legal obligation but also a moral obligation that reflects the moral principles and values of a just and democratic society.

## AN INSIGHT INTO GLOBAL AND INTERNATIONAL INITIATIVES IN ACHIEVING GENDER JUSTICE

Dr. Anu Prasannan<sup>1</sup>

### INTRODUCTION

*“Half of the Indian population too are women. Women have always been discriminated against and have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all equities indignities, inequality and discrimination.”*

Justice K. Rama Swamy

The status of Indian women in society is reflected in Justice Rama Swamy’s remarks. Indian women have always been viewed as divine and worshipped as goddesses, yet they are also discriminated against and victimised by the social norms that are imposed by the male-dominated culture<sup>2</sup>. All sectors of society have worked to abolish this discrimination and establish gender equality. Thus, gender equality is the cornerstone of human rights law and a fundamental human right<sup>3</sup>. The very essence of human rights jurisprudence is that it symbolises the needs and interests of all the genders-women, men, transgenders thereby, allowing them to take independent decisions as human beings brushing aside all stereotypes and prejudices. In simple words, Gender Equality means equality in opportunities for women, men, transgender in fields of education, employment, health care, economic resources, leadership positions, participation in decision making process and thus contributing towards social, economic and political development of the nation<sup>4</sup>. Although these rights are guaranteed evenly to both men and women, the disparity exists even today and the intensity of the same varies from nation to nation and women are found to be more in a disadvantaged situation. If we see the statistics of women globally, it is found that women constitute half of the world’s population and therefore, deserve greater potentiality than what she actually enjoys. Providing more opportunities to

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1. Assistant Professor, Karnataka State Law University, Hubballi.
  2. MONICA CHAWLA, GENDER JUSTICE WOMEN AND LAW IN INDIA, (Deep & Deep Publications Pvt. Ltd 2006).
  3. *Peace, Dignity and Equality on a Healthy Planet*, UNITED NATIONS, (July. 28, 2024 1.15 A.M) <https://www.un.org/en/global-issues/gender-equality>
  4. Daizy Thankur, *Gender Equality and Human Rights in India: Issues and Perspectives* (July. 16, 2024 12.00 AM), <http://www.gapjournals.org>



women or shifting opportunities from men to women cannot be said to be a solution for gender equality but creating an environment where everyone has a right to realise their growth is required.<sup>5</sup> There are many ways to remove the stereotypes and prejudices. Globally, if we analyse the Sustainable Development Goal 5, (SDG 5) it emphasises on ‘Gender Equality and Empower all Women and Girls’. The Beijing Platform for Action, which was adopted at the Fourth World Conference on Women in Beijing in 1995, established gender mainstreaming as a strategy in the international gender equality policy, but the idea was first discussed at the UN Third World Conference on Women in Nairobi in 1985. In addition, various Conventions and soft laws were also adopted from time to time to achieve Gender Justice. Before analysing the same it is pertinent to look into the immediate causes of growing disparity in women.

### CAUSES AND EXTENT OF GENDER INEQUALITY

The main cause of increasing gender discrimination faced by women are because of the following factors:

- Illiteracy
- Poverty and Economic dependence
- Caste Restrictions and Religious Prohibitions
- Disability
- Gender based violence
- Early Marriage and Pregnancy

According to World Bank, In India women constitute 48 per cent of the population and presently for every 1000 men India has 1020 women.<sup>6</sup> Crimes and discrimination against women continue to rise. The society is still rife with horrific crimes like rape, as well as brutality from the spouse and family, assaulting a woman with the intention of offending her modesty, women being kidnapped and abducted and other atrocities. National Crime Record Bureau in its Report Accidental Deaths and Suicide in India 2021<sup>7</sup> has pointed out that the proportion of women

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5. ESUNA DUGAROVA, GENDER EQUALITY AS AN ACCELERATOR FOR ACHIEVING THE SDG’s (United Nations Development Programme 2019).

6. *Most Populous India has big gap in Sex Ratio*, (November 19, 2023, 2.30 PM), <https://www.livemint.com/news>

7. *Deaths by Suicide at their highest rate in 2021, shows NCRB data*, HINDUSTAN TIMES, August 29, 2022, <https://www.hindustantimes.com/india-news/suicide-rate-soars-to-highest-ever-in-2021-crimes-accidents-close-in-on-2019-levels-101661711716349.html>

who died by suicide was highest in case of marriage related issues followed by Impotence and Infertility<sup>8</sup>.

When it comes to illiteracy, the linkage between violence and education is well established. An illiterate woman facing violence may not be aware of the laws and resources to protect her rights.<sup>9</sup> In the same line women living in poverty and those who are economically dependent are more vulnerable to sexual exploitation such as human trafficking, early marriages, forced pregnancy. Women in need of income to raise their family will be prone to false economic incentives offered by the traffickers<sup>10</sup>. Disabled women are always looked as objects of discrimination and are said to be in double disadvantage for being born as a woman and suffering from disability as well. Gender based violence can take many vulgar shapes like honour killings and dowry deaths etc., The increase in the conflicts around the world has also parallelly led to an increase in the conflict related sexual violence incidents. The same aspect has been reflected in the statement made by the Chair of the Committee on the Elimination of Discrimination against Women (CEDAW). In the words of Ana Peláez Narváez - Chair, UN Committee on the Elimination of Discrimination against Women:

*“Sexual violence continues to be used as a means of warfare in armed conflicts world-wide.”<sup>11</sup>*

In civil wars gender-based violence occur in the form of child marriages wherein, families are forced anticipating safety and financial security of their daughters. Moreover, gender-based violence is allowed to continue in many countries because of the absence of laws to criminalise them. Of the 195 countries represented in the UN, 33 do not have laws prohibiting domestic abuse, and 48 do not have legislation prohibiting sexual harassment at work, according to UN Women. Moreover, it is to be noted that not all nations that have passed laws have adequately implemented and enforced them. The list of reasons for increasing gender inequality is not exhaustive and above all the traditional attitude towards the status of women in the society still remains unchanged resulting in more and more gender disparity.

8. *UNDP Report exposes India's Gender Bias Crisis*, FRONTLINE, (Nov. 11, 2023, 6.20 PM) <https://frontline.thehindu.com/news/the-latest-undp-report-reveals-biases-against-women-worldwide/article66985325.ece>.

9. International Women's Development Agency, *Why Illiteracy is a Women's Rights Issue*, (Nov. 14, 2023, 12.40 PM) <https://iwda.org.au/why-illiteracy-is-a-womens-rights-issue/>.

10. Bincheng Mao, *To Tackle Violence against Women, We Need to Alleviate Poverty*, World Economic Forum, (Nov. 1, 2023, 2.30 PM) <https://www.weforum.org/agenda/2022/11/to-take-violence-against-women-alleviate-poverty/>.

11. Five causes of Gender based Violence, CONCERN WORLDWIDE, (Nov. 13, 2023, 6.30 PM) <https://www.concern.net/news/causes-of-gender-based-violence>.

## INTERNATIONAL INITIATIVES IN ACHIEVING GENDER JUSTICE

In the International sphere United Nations has been taking various positive initiatives since its inception in achieving gender justice. The Preamble of the UN Charter itself reflects the same. The Preamble begins by referring:

*“Faith in fundamental human rights, in human dignity and worth, in the equal rights of men and women, and in the rights of all nations large and small.”*

Further, Art. 1(3) states that United Nations aspires to:

*“Achieve international cooperation...in advancing and motivating adherence to human rights and fundamental freedom for everyone, without distinction in race, sex, language, or religion.”*<sup>12</sup>

In addition to UN initiatives, it is pertinent to mention about various international instruments that aimed to achieve Gender Justice. They are as follows:

### **1. Universal Declaration of Human Rights, 1948**<sup>13</sup>

All human beings are born free and equal in terms of their rights and dignity, according to Article 1 of the Declaration. It also asserts that everyone has the same rights and freedoms outlined in the statement, regardless of distinctions of any sort, including those based on race, colour, sex, language, religion, political opinion, national or social origin, property or other status.<sup>14</sup> Men and women of full age have the right to marry and start a family, free from restrictions based on their race, nationality or religion, according to Art. 16 of the declaration. They are entitled to equal rights in marriage, during its subsistence and in its dissolution. Universal Declaration of Human Rights also states that everyone is entitled to equal protection under the law and are equal before the law.

### **2. Convention on the Elimination of Discrimination against Women, 1979**

The Convention’s preamble acknowledges that “extensive discrimination against women continues to exist” and emphasises how it goes against “equality of rights and respect for human dignity” when it occurs. Different dimensions of women are covered in the Convention namely, civil rights, legal status of women, reproductive rights and also cultural factors on gender relations. To highlight some of them, Art. 4 speaks on temporary special measures to accelerate *de facto* equality between men and

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12. Art. 13 of the UN Charter.

13. The General Assembly of the UN adopted the Universal Declaration of Human Rights Vide Resolution No. 217-A (III) at its third session on December 10, 1948.

14. Art. 2 of the UDHR.

women. Further Art. 5 of the Convention urges the member states to take all measures to modify the social and cultural patterns of conduct of men and women to eliminate all prejudices, inferiority/superiority distinctions and other stereotype roles. To achieve this, the Convention emphasises the importance of family education.

### **3. Beijing Declaration and Platform for Action 1995**

Beijing Declaration was adopted at the Fourth World Conference on Women<sup>15</sup> in Beijing unanimously by 189 countries. The declaration served as a platform for women's emancipation and is now the principal global policy document pertaining to gender equality. In 12 important areas of concern, the Beijing Declaration established goals and actions for the advancement of women and the realisation of gender equality. The Beijing Conference was preceded by three conferences on women and gender equality. They are:

- i. First World Conference on Women which took place in Mexico city in 1975 defined a World Plan of Action for the Implementation of the objectives of the International Women's Year, which offered a comprehensive set of guidelines for the advancement of women through 1985.
- ii. The second World Conference on the Status of Women was held in Copenhagen five years after the Mexico Conference in 1980. The World Conference of the United Nations Decade for Women aimed to review the progress in the implementation of the goals of the first world conference emphasising on education, employment and health.
- iii. Nairobi, Kenya hosted the third World Conference for Women, also known as the World Conference, to Review and Appraise the Achievements of the UN Decade for Women in 1985. The purpose of the conference was to devise specific strategies to overcome obstacles to achieve the decade's goals. In addition to 1,900 delegates from 157 Member States that attended the Conference, there were around 12,000 attendees in a parallel NGO Forum. The Nairobi Forward-Looking Strategies for the Advancement of Women was adopted by Governments which provided guidelines for advancing women's involvement in peace and development as well as gender equality at the national level.

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15. The four major UN conferences were followed by series of five-year reviews from the year 2000 to 2020.

#### **4. Sustainable Development Goals (SDGs)**

A better and more sustainable future for all is the aim of the SDGs, a set of 17 interconnected global objectives which are part of UN 2030 agenda for Sustainable Development. They are agreed by 193 countries in September 2015.<sup>16</sup> Goal 5 aims to achieve gender equality and empower all women and girls. Before SDGs under the UN initiative, Millennium Development Goals had set 8 goals to be achieved by 2015 which was entered into by 189 member states in September 2000. Among the eight goals MDG 3 was to empower women and promote gender equality. The number of girls attending schools increased in 2015 compared to 2000, indicating significant progress towards the global goal of eliminating gender disparity in education at all levels, including primary, secondary and tertiary and it is expected that gender parity will be achieved in all domains by 2030<sup>17</sup>.

### **ROLE OF INTERNATIONAL ORGANISATIONS IN ACHIEVING GENDER EQUALITY**

Since the inception of the United Nations Organisation UN has been very actively involved in achieving gender equality. This objective is taken up with the active involvement of the specialised agencies of the UN and other International Organisations. In this regard, it becomes pertinent to look into the major Specialised agencies involved therein. They are listed as follows:

#### **1. The Commission on the Status of Women (CSW)**

The primary international organization devoted solely to advancing women's empowerment and gender equality is CSW. By ECOSOC resolution 11(II) of June 21, 1946, it became the Economic and Social Council's (ECOSOC) functional commission. Promoting women's rights, capturing the lives of women around the globe, establishing international norms for gender equality, and empowering women are the key goals of CSW. By a resolution passed in 1996<sup>18</sup>, ECOSOC decided to give the Commission more authority and to assume a leading role in monitoring and reviewing progress and problems in the implementation of the Beijing Declaration and Platform for Action, and in mainstreaming a gender perspective in UN activities.

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16. UNITED NATIONS, <https://www.un.org/sustainabledevelopment/gender-equality/>, (Nov. 11, 2023, 5.30 PM)

17. MILLENIUM DEVELOPMENT GOALS MONITOR, <https://www.mdgmonitor.org/millennium-development-goals/>, (Nov. 11, 2023, 4.30 PM)

18. UN WOMEN, <https://www.unwomen.org/en/how-we-work/commission-on-the-status-of-women>, (Nov. 15, 2023, 3.30 PM)

## 2. UN Women

For many years United Nations has encountered serious obstacles in its efforts to advance gender equality including inadequate funding. In July 2010, the UN General Assembly created the UN Women to address this issue.<sup>19</sup> It is a UN Organisation that implements standards, laws and programs to protect women's human rights and make sure every woman and girl realises her full potential. UN Women facilitates the participation of civil society representatives and supports all aspects of the work of the Commission on the Status of Women. It works globally to make the vision of Sustainable Development Goals a reality. For empowering women and girls, the UN Women's main roles are to:

- i. Support inter-governmental bodies in the formulation of global policies, standards and norms
- ii. Help member states to implement these policies by providing suitable technical and financial support and to establish effective partnership with civil society
- iii. Co-ordinate the UNO's work in achieving gender equality

## 3. United Nations Office on Drugs and Crime (UNODC)

In order to achieve the Sustainable Development Goals UNODC collaborates with member states to advance women's and girl's access to justice, assist in the making of laws and policies that empower women and address violence against women.<sup>20</sup>

## 4. World Health Organisation (WHO)

WHO illustrates as to how gender inequalities in health and care negatively impact women. The direct link between gender equality, health and well-being and its negative impact on the economic insecurity has been highlighted in many reports of WHO. Research has indicated that women with higher levels of education have improved health and well-being, both for themselves and their families.<sup>21</sup>

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19. UN WOMEN, <https://www.unwomen.org/en/about-us/about-un-women>, (Nov. 13, 2023, 4.40 PM)

20. UNODC, *Strategy for Gender Equality and the Empowerment of Women* (2018-21), UNITED NATIONS, Vienna, 2018

21. WHO, *Gender Equality makes everyone Healthier*, (Nov. 13, 2023, 7.45 PM) <https://www.who.int/westernpacific/news/item/05-03-2017-gender-equality-makes-everyone-healthier-who>

## 5. United Nations Educational Scientific and Cultural Organisation (UNESCO)

In order to empower women, encourage inclusion, combat gender-based violence, and support women's empowerment in times of disaster and emergency, UNESCO aims to eradicate gender inequality in and via education.<sup>22</sup>

## 6. United Nations Children's Fund (UNICEF)

UNICEF forges global partnerships in order to expedite the advancement of gender equality. In order to guarantee that boys and girls achieve academic excellence and secure fulfilling careers, it collaborates with the education sector. Partnering with health sector ensures quality maternal care and promote sanitation and hygiene for women. They make investments in skill development for teenage females in order to protect them and to increase their economic empowerment. In addition, UNICEF runs initiatives to stop female genital mutilation, combat gender-based violence, assist menstrual health management, and more<sup>23</sup>.

## EDUCATION AS ONE OF THE MEANS TO GAP GENDER DISPARITY

After analysing the global initiatives through the various Conventions, soft laws and also the role of UN and other International Organisations, one of the major realisations is that there has been great progress in achieving gender parity and thereby, gender justice in Education. The same is reflected in the Global Gender Gap Report 2023<sup>24</sup>, which reveals that the global gender gap in health and education has narrowed over the past years. The Global Gender Gap Index bases its primary benchmarks on four dimensions: political empowerment, economic participation and opportunity, health and survival, and educational attainment. The research examines 146 nations worldwide, including India, to demonstrate the advancement of each nation's efforts to reduce gender disparities over time. The 2023 final report reflects that the global gender gap score for all 146 countries stands at 68.4 per cent closed<sup>25</sup>. The Gender Parity Index of Eight Regions as per the final report is listed as follows:

| Sl. No | Regional Result             | Gender Parity Index |
|--------|-----------------------------|---------------------|
| 1      | Europe                      | 76.3%               |
| 2      | North America               | 75%                 |
| 3      | Latin America and Caribbean | 74.3%               |

22. UNESCO, *Priority Gender Equality*, (Nov. 15, 2023, 3.30 PM) <https://www.unesco.org/en/gender-equality>

23. UNICEF, *Gender Equality*, (Nov. 15, 2023, 3.30 PM) <https://www.unicef.org/gender-equality>

24. This Report is based on the information collected and compiled by the World Economic Forum which is an International Organisation established in 1971 as a not-for-profit foundation and is headquartered at Geneva, Switzerland. The Global Gender Gap Index was first introduced by the World Economic Forum in 2006.

25. The result shows that there is an improvement of 0.3 per cent compared to 2022-23.



|   |                              |       |
|---|------------------------------|-------|
| 4 | Central Asia and Eurasia     | 69%   |
| 5 | East Asia and Pacific        | 68.8% |
| 6 | Sub-Saharan Africa           | 68.2% |
| 7 | Southern Asia                | 63.4% |
| 8 | Middle East and North Africa | 62.6% |

*Source: World Economic Forum: Global Gender Gap Report 2023*

No nation has attained complete gender parity, according to the ranking, and Southern Asia, including India, has the second-lowest score among the eight areas. Notably, out of the four benchmarks used for 146 countries, the Health and Survival Gender Index concluded at 96%, with Educational Attainment coming in second at 95.2%. Educational Attainment is the subindex with the second-highest global parity score with 4.8 per cent of the gender gap left to close. As per the report, India has 64.3 per cent overall gender gap ranking 127<sup>th</sup> on the global index and has attained parity in enrolment across all levels of education. This being the present status it should be noted that compared to other countries, India has made strides in equity when it comes to education.

## CONCLUSION

To conclude it reminds of the statement made by UN Secretary General. In his words:

*“The world’s biggest human rights challenge today is achieving Gender Equality and Empowering Women and Girls and is the unfinished business of our time<sup>26</sup>.”*

The statement holds absolutely true analysing the existing situation. Although there are plenty of laws both in the global and national scenario, the most desirable way to achieve the goal is to educate girl child and empower them. The State has a greater responsibility to effectively update and implement the programs and policies started to achieve gender equality and empower all women and girls in order to achieve the Sustainable Development goal of gender equality, even though women’s participation has improved in all fields with greater results in education. The Global Index for Gender Equality currently ranks India 127<sup>th</sup> out of 146 countries, which makes the duties even more stringent. In order to bring a change in the existing situation there should be a need from within and such realisation should happen within oneself and one’s family then in the Community and ultimately in the society wherein, the values of equality can be inculcated and thereby, breaking the social stigma that women is inferior and an object for discrimination.

26. *The UN Secretary General’s Message on International Women’s Day*, UN WOMEN (Nov. 15, 2023, 3.30 PM) <https://www.unwomen.org/en/news/stories/2018/3/statement-un-sg-iwd>

## TRANSITIONING THROUGH SURGERY: LEGAL ISSUES AND SOCIAL CONCERNS

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Dr. Santhosh Prabhu<sup>2</sup>

### INTRODUCTION

Gender reassignment surgery is used to treat gender dysphoria, a condition where individuals experience a sense of disengagement between their genders determined when born and their authentic experienced gender. These individuals often seek to transform to the gender they identify themselves with, which frequently involves invasive medical intervention like surgeries to transition their physical characteristics with that of their chosen gender. “Gender reassignment surgery” encompasses all surgeries that individuals pursue to alter their bodies to reflect their preferred gender. Reassignment surgery” specifically refers to surgeries aimed at reconstructing the genital area<sup>3</sup>.

Gender affirmation surgery encompasses various procedures designed to help align the physical body with the recognised gender expression. Unlike the sex designated at birth (either of binary gender), gender identity reflects how one perceives oneself and presents to others. Such surgery may be considered if there is a disconnect between the sex designated at the time of birth and perceived identity, a situation known as gender incongruence.

Gender dysphoria and gender incongruence describe individuals who feel uncomfortable with their designated sex and wish to have the physical characteristics typically associated with the other sex. Although not all, many of the Transgender Persons go through this experience. Current advancements in understanding, managing, and caring for transgender individuals have led to significant progress in psychological, medical, and surgical treatments aimed at alleviating gender dysphoria. In 2010, the World Professional Association for Transgender Health (WPATH) manifested the desire for the destigmatising of gender nonconformity. They emphasized that.

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  3. Gennaro Selvaggi & James Bellringer, *Gender Reassignment Surgery: An Overview*, 8 NAT. REV. UROL. 4 (2011).

It's crucial to understand that expressing gender in ways that challenge traditional expectations is a natural part of human diversity and should never be labelled as problematic or negative<sup>4</sup>.

Major concern regarding gender-affirming interventions for adolescents, as well as for socially transitioned children approaching adolescence, is the long term outcomes to be seen in the years to come. Appreciable deficit in information exist about the long-term benefits and risks for these patients. The surge in the number of trans-youth people has underscored the dearth of robust proof corroborating the advantages of gender transition. In recent years, there's been a notable increase in the number of female youth seeking gender affirmation surgeries for gender incongruence. Many of these youths first identified as transgender during adolescence and often had considerable underlying mental and cognitive disorders. These trends began in the mid 2000 and became more pronounced in a decade's time. Despite this, numerous clinicians and policymakers continue to assert that the advantages of conversion surgery for adolescents have been well-established by science<sup>5</sup>.

## HISTORY

Gender affirmation surgery has evolved significantly over the past 90 years. Initially a rare and experimental procedure, it gained acceptance and became a standard treatment for gender incongruence. The first documented sex reassignment surgery occurred in 1931 in Berlin, but it wasn't until 1952, following Christine Jorgensen's high-profile surgery, that the procedure gained international recognition. By 1966, Johns Hopkins University established the first US clinic for these surgeries. Despite controversy and the clinic's closure in 1979, standards of care were developed by WPATH, and advancements in surgical techniques continued. By the early 2000s, efforts shifted towards destigmatization and increased insurance coverage, culminating in the removal of gender identity disorder from the WHO's mental health disorders and Medicare coverage for gender affirmation surgeries. Today, the focus has shifted to ethical stewardship and improving access to care, especially for adolescents, amid ongoing challenges in the field<sup>6</sup>.

## MEDICAL EVIDENCE GENDER AFFIRMATION SURGERY

Contrary to expectations, evidence synthesis in this matter have failed to demonstrate a reliable association between medical or surgical gender transition and improved mental health

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4. Lawrence S. Chechter, *Gender Confirmation Surgery: An Update for the Primary Care Provider*, 1 *TRANSGENDER HEALTH*, 32 32-40 (2016) (last visited July 30, 2024).
  5. Stephen B. Levine & Elie V. Abbruzzese, Current Concerns about Gender-Affirming Therapy in Adolescents, 15 *Current Sexual Health Reports* 113 (2023), <https://doi.org/10.1007/s11930-023-00358-x>.
  6. Kelsey Mumford, Ethically Navigating the Evolution of Gender Affirmation Surgery, 25 *AMA J. Ethics* 383, 383-85 (2023).

outcomes in gender-dysphoric young people. Notable reviews by the National Institute for Health and Care Excellence (NICE) evaluated puberty blockers and cross-sex hormones, finding studies supporting their benefits to be methodologically flawed and their results are unreliable. Specifically, puberty blockers showed no significant improvement in mental health outcomes, while the benefits of cross-sex hormones were highly uncertain and fraught with risks. Similarly, Swedish, Finnish, and Florida health authorities concluded that the risks of hormonal treatments often outweigh the benefits for most adolescents. Long-term studies, including a notable 30-year Swedish follow-up, indicate elevated suicide rates and higher morbidity and mortality among transitioned individuals compared to their cisgender peers. These studies also failed to demonstrate long-term mental health benefits from hormonal or surgical transitions. Initial promising results from surgical outcomes were later discredited due to methodological flaws, revealing that individuals who did not undergo surgery had fewer serious suicide attempts. Overall, the evidence suggests that gender transition does not provide the anticipated mental health improvements and may even be associated with treatment-related harms.<sup>7</sup> Proponents of gender conversion have been accused of stifling discourse, disseminating misinformation, intimidating dissenters, and endeavouring to undermine scientific research that identifies the potential hazards associated with conversion.<sup>8</sup> The current evidence linking gender-affirming surgeries to mental health outcomes predominantly comes from studies that are small in sample size, cross-sectional in nature and lack control groups.<sup>9</sup>

## CRIMINALISATION OF GENDER AFFIRMATION SURGERY

In recent years, there has been a trend in several U.S. states to criminalize gender-affirming care (GAC) for minors. Over the past two years, 25 states have introduced legislation aimed at restricting access to GAC for adolescents. For instance, in 2021, Arkansas became the first state to prohibit medical professionals from offering gender affirmation care by both means of hormone treatment or surgery, despite a gubernatorial veto. Similarly, in 2022, Alabama passed the act called ‘the Alabama Vulnerable Child Compassion and Protection Act’, banning such care for minors.

It is criticised that legislative actions are often driven by political motivations rather than medical evidence. For example, a South Dakota bill from January 2020 criminalized Gender

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7. Levine & Abbruzzese, *supra* note 5, at 3.

8. Lucy Griffin, Katie Clyde, Richard Byng & Susan Bewley, Sex, Gender and Gender Identity: A Re-Evaluation of the Evidence, 45 *BJPsych Bull.* 291 (2021), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC 8596152>.

9. Almazan AN & Keuroghlian AS, Association between Gender-Affirming Surgeries and Mental Health Outcomes, 156 *JAMA Surg.* 611 (2021), available at <https://jamanetwork.com/journals/jamasurgery/fullarticle/ 2779429>.

Affirmation Care for minors under 16, coming shortly after a failed “bathroom bill” attempt. This pattern suggests that the focus has shifted from targeting specific policies to broader restrictions on transgender care, reflecting evolving political strategies against transgender rights. Critics argue that these laws are based on political agendas rather than scientific evidence, with legislators often disregarding expert medical opinions. The Endocrine Society and other medical groups emphasize that treatment decisions should be guided by medical evidence and not political considerations, advocating for care based on international medical standards rather than ideological stances<sup>10</sup>.

### **SEX RECONSTRUCTION SURGERIES IN INDIA: INDIA LEGAL AND SOCIAL DIMENSIONS**

There’s a growing global trend to acknowledge the entitlement to the gender of one’s choice, without requiring medical interventions for legal recognition. Internationally, there is a growing recognition that the right to one’s gender identity and its legal acknowledgment should not be contingent upon medical procedures. In the landmark case of, *Goodwin v. United Kingdom*, the European Court of Human Rights rule that despite the petitioner being a post-operative transgender individual, the medical science or scientific knowledge should not be the decisive factor in the legal status of transgender persons.<sup>11</sup>

The Supreme Court of India, in the landmark cases of *National Legal Services Authority v. Union of India* (‘NALSA’)<sup>12</sup> and *Navtej Singh Johar v. Union of India* (‘Navtej’)<sup>13</sup>, made significant declarations affirming the equality of legal rights of transgender and intersex persons. These decisions prioritized individual autonomy by recognizing self-determination of gender identity as a legal right, broadened anti-discrimination laws to include gender identity and sexual orientation, and asserted that gender identity is an inherent part of one’s identity, independent of medical intervention. However, on the ground, transgender individuals still face significant discrimination and are often required to provide evidence of gender affirmation surgery through certification by medical professionals to gain legal recognition and access basic rights. The Transgender Persons (Protection of Rights) Act 2019 also mandates medical certification for changing gender to male or female, which contradicts the Supreme Court’s acknowledgement of self-determination. The possibilities for abuse and fraudulent use of welfare benefits and

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10. Scott J. Schweikart, *What’s Wrong with Criminalizing Gender-Affirming Care of Transgender Adolescents*, 25 AMA J. Ethics 414, 414-20 (2023).

11. Jayna Kothari, *Trans Equality in India: Affirmation of the Right to Self-determination of Gender*, NUJS L. Rev., <https://nujlawreview.org/wp-content/uploads/2020/09/13-3-kothari-trans-equality-in-india.pdf> (last accessed Aug. 1, 2024).

12. *National Legal Services Authority v. Union of India*, 2014 SCC 438.

13. *Navtej Singh Johar v. Union of India* AIR, 2018 SC 4321.

reserved spots designated for transgender people is cited as the main reason for opposing a relaxation of these requirements. The prevalent argument against easing these requirements is the potential for fraud and misuse of welfare measures and reservations intended for transgender persons. Authorities insist that medical proof is necessary to prevent non-trans individuals from exploiting these benefits. This tension highlights the disparity between progressive legal declarations and the stringent regulatory practices that continue to restrict the legal status of transgender persons in India.<sup>14</sup>

The Transgender Persons Act 2019 was enacted to extend protection to transgender persons. This legislation prevents discrimination on multiple grounds and provides a pathway for transgender individuals to obtain legal recognition of their identity by applying to District Magistrates for identity certificates. The Act ensures transgender individuals have access to welfare programs and are protected from employment discrimination. It also upholds the right of transgender persons to live and utilize household facilities without discrimination alongside their families. It also upholds the right to residence, ensuring transgender persons can live with their families and use household facilities without discrimination. However, the Act falls short by not explicitly recognizing the right of transgender individuals to live together in chosen residences outside of legal frameworks. Critics argue that certain provisions of the Act contradict the NALSA judgment's emphasis on self-determination.

While Section 4 supports self-identification, Sections 5 and 6 insist on medical certification, undermining their decisional autonomy. Additionally, Section 7 mandates proof of gender-affirmative surgery for legal recognition as male or female, violating the principles of self-identification and the NALSA judgment. These provisions have triggered legal challenges from transgender rights advocates in the Apex Court of the country. The Act mandates that governments establish medical care facilities for transgender individuals, which include services such as sex reconstruction surgery, hormone therapy, and pre- and post-surgery counselling. Moreover, the act stipulates the development of a health protocol for gender-affirming surgical interventions, consistent with the Standards of Care outlined by the World Professional Association for Transgender Health (WPATH).<sup>15</sup> The Version 7 of WPATH Standards of Care is internationally accepted guidelines that act as the benchmark for conversion surgeries. These standards have been accepted by numerous countries through the implementation of legislation and guidelines to provide care for transgender and gender-diverse individuals. The ISOC-1 aims to establish comprehensive guidelines concerning surgery of transgender and gender-nonconforming individuals, aligning with the best of the practices outlined in the

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14. Kothari, *Trans Equality in India*, *supra* note 11, at 5.

15. Dipika Jain, *Right to Health & Gender-Affirmative Procedure in the Transgender Persons Act, 2019 in India*, 55(2) J. IND. L. & SOC. 205, 205–10 (2022).



WPATH standards. The ISOC-1 aims to incorporate best practices aligned with the WPATH standards, providing comprehensive guidelines for the surgical care of transgender and “gender incongruent” individuals. Additionally, it offers a section to help parents of “gender diverse” individuals. The ISOC-1 document claims to have been developed with input from transgender individuals to address regional differences in transgender healthcare in India. Importantly, the document lacks input from transgender or gender-variant individuals among its authors and contributors. The document, created by doctors and medical practitioners, targets the medical fraternity but lacks adequate representation and participation from the transgender community, making it exclusionary. This exclusion is evident in the lack of awareness and discussion about these standards among transgender and gender-variant individuals.

Developing effective policies for transgender healthcare, encompassing surgical procedures, infrastructure, and social support, necessitates extensive consultation and collaboration with transgender community. While ISOC-1 aims to sensitize medical professionals and community members to the needs of trans and gender-diverse persons, mostly those performing gender-affirmative surgeries, it has not been nationally adopted. Without endorsement from the Indian Council of Medical Research and legislative frameworks mandating adherence, the guidelines’ legitimacy is questionable. The absence of national policies and legal support creates significant obstacles for transgender and gender-variant individuals during their transition<sup>16</sup>.

Transgender individuals face an additional barrier to accessing healthcare: a mandatory requirement for medical certification. Medical certification is a legally mandated requirement for transgender individuals to access healthcare services, which are already difficult for them to obtain. Furthermore, The Act limits the definition of family to blood relatives, adopted children, and spouses, restricting who can give consent for transgender individuals, especially in medical emergencies. The ambiguities in the legal requirements for gender-affirming surgeries create significant uncertainty in the process of changing legal identification documents for transgender individuals. The Transgender Persons Act and Rules establish a process for changing gender attributes and names, involving two separate certification processes. The legal process for transgender individuals involves two stages: first, obtaining a “identity certificate” without medical evaluation, and second, providing evidence of surgery if seeking to change their legal gender to male or female. This is in contradiction with the *National Legal Services Authority v. Union of India and others (NALSA)* judgments<sup>17</sup> which emphasis on self-determination and has led to constitutional challenges. The Act’s “medical model” of recognition, which ties legal identity to surgical status, undermines the autonomy of transgender individuals, particularly those who do not conform to the gender binary or who choose not to undergo surgery. The healthcare

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16. *Id.* at 6.

17. *NALSA, supra note 1*, at 5.



system, by acting as a gatekeeper, medicalizes the legal climate around gender autonomy, thus undermining transgender protections regarding the principle of self-identification. Despite Section 15 of the Act requiring the government to provide comprehensive insurance coverage for medical expenses, most of the country still does not offer free or subsidized medical care for transgender individuals. A few states, like Tamil Nadu have extended financial aid for sex reconstruction procedures. Despite having policies in place, states like Kerala lack government-run hospitals equipped to perform these procedures.

The lack of standardized protocols for gender-affirming procedures significantly impacts the quality of healthcare received by transgender and gender-diverse persons. To overcome these systemic challenges, it is essential to create a legal framework in partnership with transgender advocates and key stakeholders in India<sup>18</sup>.

India currently lacks a comprehensive national legal framework for addressing surgeries on minors for gender-affirming. However, various High Courts have provided their perspectives on the matter through different rulings.

In the case of *Arunkumar v. Inspector General of Registration*<sup>19</sup>, the Madras High Court observed that the Apex Court's directions were not being followed and instructed the Tamil Nadu Government to comply with these directives. As a result, On August 13, 2019, the State Government issued a notification (GO Ms No. 355) prohibiting gender-affirming surgeries on children and infants, with exceptions granted solely in life-threatening situations. The order further mandated the Director of Medical Education to ensure strict adherence to this exception, preventing any instances of misuse.

In *Srishti Madurai Educational Research Foundation v. State (NCT of Delhi)*<sup>20</sup> the Delhi High Court dealt with the issue relating to gender-affirming surgeries for minors. The case originated from a petition filed by the Srishti Madurai Educational Research Foundation (SMERF) demanding a prohibition on unnecessary sex-assignment surgeries performed on intersex children and the establishment of clear guidelines for such procedures. The Delhi Commission for Protection of Child Rights (DCPCR) supported this stance, recommending a ban on these surgeries unless absolutely essential for the child's survival. The court then granted time to the Government of Delhi to decide on the DCPCR's recommendations.

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18. *Id.at* 7.

19. *Arunkumar v. Inspector General of Registration*, W. P. (MD) No. 4125 of 2019.

20. *Srishti Madurai Educational Research Foundation v. State*, WP(C) 8967/2021, 2022 Jul 27.

More recently, in *X v. Director of Health Services*<sup>21</sup>, the Kerala High Court was petitioned to permit genital reconstructive surgery for an intersex child to be raised as female. The court found that the minor could not consent and thus did not grant the request. The court mandated the formation of a state-level expert panel, comprising medical and psychological professionals, to assess the absolute necessity of such surgeries when a child's life is in jeopardy. Furthermore, the government was directed to establish comprehensive regulations governing sex-assignment surgeries for minors within a three-month timeframe. These decisions and state directives indicate that conversion surgeries are not permitted for infants due to the lack of their ability to consent. However, there is no clear stance on whether such surgeries can be voluntarily opted for by minors who are not infants<sup>22</sup>.

In India, while gender affirmation surgery (GAS) is becoming more common, there is a no robust regulatory framework to address the unique challenges it presents. The existing laws do not adequately cover the rights and concerns faced by transgender individuals. For instance the Personal laws, including the Hindu Marriage Act and other statutes governing marriage, maintenance, divorce grounds, and child custody, should be amended. The Hindu Adoptions and Maintenance Act of 1956 and the Hindu Succession Act, particularly Sections 8, 14, and 23, also require updates. Labour and industrial laws, such as the Employee's Compensation Act of 2010 and the Factories Act of 1948, must be modified to address job reservations and related issues. Furthermore, taxation laws should be reviewed to ensure that tax exemptions and benefits under the Income Tax Act, currently available only to women, are inclusive of transgender individuals<sup>23</sup>. The postoperative sexual and legal identity of the patient is another concern that needs addressing<sup>24</sup>.

## CONCLUSION AND SUGGESTIONS

Despite landmark legal victories like the NALSA and Navtej judgments, and the subsequent enactment of the Transgender Persons (Protection of Rights) Act, India's progress in ensuring transgender rights remains incomplete. Significant disparities and inconsistencies persist in the practical implementation of these legal advancements. The requirement for medical certification and gender-affirming surgery for legal recognition conflicts with the principle of self-identification. This undermines the autonomy and rights of transgender individuals, especially

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21. *X v. Director of Health Services*, 2023 SCC Online Ker 6244, decided on 7-08-2023.

22. Utsav Mukherjee & Harsimran Duggal, Gender Affirming Surgeries and Minors – The Law in India, SCC online (Dec. 13, 2023), <https://www.sconline.com/blog/post/2023/12/13/gender-affirming-surgeries-and-minors-the-law-in-india/> (last accessed Aug. 2, 2024).

23. Richie Gupta & Anil Murarka, Treating Transsexuals in India: History, Prerequisites for Surgery and Legal Issues, 42 Indian J. Plast. Surg. 226 (2009).

24. *Id.* at 9.

those opting against surgical intervention. The expense of gender affirmation surgeries in India is unaffordable for the economically backward transgender community, which can range from Rs 2 lakh to Rs 8 lakh, varying with the type of surgery and hormone replacement treatments involved. The expense of surgery varies depending on the hospital and the type of procedure, whether it's male-to-female or female-to-male<sup>25</sup>. It is crucial to harmonize legal provisions with the spirit of self-determination recognized by the Supreme Court. This includes revising existing laws to be more inclusive of transgender individuals, ensuring accessible healthcare, and developing collaborative legal frameworks with input from transgender activists and stakeholders. Only through such measures can the full rights and dignity of transgender persons be realized in India.

Lack of comprehensive legal frameworks and regulations, particularly for gender-affirming surgeries and the rights of minors, exacerbates these challenges. To address the challenges and issues surrounding such medical interventions, particularly for adolescents, and the criminalization of such care in certain regions, the following solutions can be proposed:

- Conduct high-quality, longitudinal studies with robust methodologies to better understand the lasting impacts and outcomes of gender-affirming treatments, including puberty blockers, cross-sex hormones, and surgical invasions.
- Encourage transparency and peer review in all studies to ensure reliability and validity of the findings.
- Promote an individualized approach to gender-affirming care, considering each patient's unique circumstances, medical history, and mental health status.
- Ensure comprehensive psychological support and counselling are integral parts of the treatment process, both before and after medical interventions. Affirmative therapy for queer individuals is a relatively new field offered by a select group of mental health professionals. This shortfall worsens the current imbalance between the demand for and supply of mental health care in the country. To address this, diversity competent therapy training should be included in the curricula for counsellors, psychotherapists, and frontline medical professionals.<sup>26</sup>

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25. Kumar Divyanshu, *In India, Transgender Persons Face Multiple Barriers to Gender Affirmation Surgery*, SCROLL.IN, <https://scroll.in/article/1027194/in-india-transgender-persons-face-multiple-barriers-to-genderaffirmation-surgery> (last accessed Aug. 5, 2024).

26. Patki, S.M., Gandhi, P., & Walawalkar, A.P., *Perceived Social Support, Self-Esteem, and Depression Among Indian Trans-Men with and Without Sex Reassignment Surgery*, 11 HUMANIT. SOC. SCI. COMMUN. 772 (2024).

- Develop and update clinical guidelines based on the latest scientific evidence, aligning with international standards as laid down by the World Professional Association for Transgender Health (WPATH).
- Provide training and resources for healthcare professionals to ensure they are well informed and capable of delivering appropriate and sensitive care to transgender individuals.
- Advocate for policies and laws that are informed by medical evidence rather than political or ideological motivations.
- Engage medical experts, including endocrinologists, psychiatrists, and paediatricians, in the legislative process to ensure that any regulations around gender-affirming care are based on scientific data and clinical best practices.
- Uphold the rights of transgender persons to avail gender-affirming care free of prejudice or undue restriction. Ensure that minors seeking gender-affirming care have access to appropriate medical and psychological evaluations and that their consent, along with that of their guardians, is respected in the decision-making process.
- Implement public education campaigns to educate the realities and needs of transgender persons, combating misinformation and stigma.
- Promote understanding of the importance of gender-affirming care along its pros and cons for the well-being and mental well-being of transgender adolescents and help them to make an informed choice knowing the long-term medical as well as the legal consequences.
- Also educate the Transgender Community about the pros and cons of gender affirmation surgeries and post-surgery health and allied issues and help them to make an informed choice.
- Expand access to gender-affirming care, particularly in underserved and rural areas, by providing funding and resources for specialized clinics and healthcare providers.
- Ensure that healthcare insurance plans cover gender-affirming treatments, reducing financial barriers for patients.
- Establish support networks and resources for transgender individuals and their families, including peer support groups, advocacy organizations, and online communities.
- Provide training for educators, social workers, and other professionals who interact with transgender youth to create a supportive and affirming environment.

By centering evidence-based practices, safeguarding transgender interests, and enhancing access to comprehensive care and support, these solutions aim to address the present challenges within gender-affirming therapy and its corresponding legal framework. Including legal remedies for misinformation on gender affirmation surgeries and penal provisions for deficiency in service in this sector can bring in a great measure of accountability and care in this sector for the marginalised Transgender Community. Some of the recent studies report improved quality of life after gender-affirming surgery (GAS), in low- and middle-income countries (LMICs). However, LMICs face challenges like inadequate infrastructure, limited access, and stigmatisation. Further research with standardized research methods and international alliance, can foster an improved provider training and knowledge sharing to achieve global surgical equity.<sup>27</sup>

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27. Shah V, Hassan B, Hassan R, Alexis M, Bhoopalam M, Agandi L, Liang F, *Gender-Affirming Surgery in Low- and Middle-Income Countries: A Systematic Review*, 13 J. CLINICAL MED. 3580 (2024).

## **GENDER INEQUALITY IN THE INDIAN CRIMINAL JURISPRUDENCE- A CRITICAL STUDY**

Harsh Maheshwari<sup>1</sup>

### **INTRODUCTION**

It's a crime in India to be born a guy. Marrying an Indian woman is also a big issue on hand as it comes with many challenges in the present era where the misuse of laws which are discriminatory like Sec 85 Bharatiya Nyaya Sanhita 2023, which states cruelty by husband or his relative on wife but nowhere it talks about where the victim is a man because the major perception is that India is a patriarchal society, which has changed now and still feminist leaders are fighting for the rights and equality of women where even women have edge over men in the present society. Men are also facing many problems related to sexual harassment, stalking etc. It is a preconceived notion in Indian society that women are the foundations of the family and follow all traditions, cultures etc and this seems to mitigate the liability of crime and justify the act of women. The Supreme Court were also of the opinion to end this stereotype prevailing in the present society. It is high time that there should be legislation passed which also ensures that the law protects men in some discriminatory provisions pertaining to Bharatiya Nyaya Sanhita 2023.

The major problem identified in the paper is that there are laws for women for their protection, but the laws are misused to a large extent such as Sec 85 Bharatiya Nyaya Sanhita 2023, which mentions cruelty by the husband of women, whether physically or mentally, special provisions are present in the Indian constitution for women and children for the welfare and upliftment of the section in the society<sup>2</sup>, there is an urgent need for gender-neutral laws which will ensure equal protection of laws to both men and women and no one will face inequality.

The society has moved from patriarchy which was prevalent in the Indian society, where women faced many problems and now it's not the case, due to provisions and laws in the statutes, the legislation has given much importance to women in terms of creating equality, and to be at equal footing with men, but it has gone the other way around, it has resulted in high misuse which has destroyed the ultimate aim of the Indian criminal jurisprudence i.e. to provide justice. The judiciary is looking at the cases of dowry harassment, and cruelty with a lens as there have been lots of false cases of cruelty reported by women against men. In the case *of*

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2. INDIA CONST.art.15, cl.3.

***Kahkashan Kausar v. State of Bihar***<sup>3</sup>, the court held that the relatives of the husband cannot be held liable for the case of dowry harassment when there is no specific dowry demand. The court also observed that even if acquittal is given to the accused, but it will inflict scars on the accused and such an exercise must be discouraged.

After the horrific incident of the Nirbhaya gang rape case the criminal law amendment Act 2013 came which included many provisions for the safety and protection of women in Indian society, it can be said that the legislation has given importance to women regarding their safety, still, the objective of providing justice and reduction in the no of cases of sexual harassment and rape has not yet achieved because the provisions are being misused by women.

“Shiv Narayan Dhingra”, a former judge of the Delhi High Court, acknowledged that “women are abusing this provision to annoy their spouses and in-laws. ***“Misuse of these laws is what he refers to as legal terrorism”***”.

The laws were made for the safety of women, but it has been used in the wrong way to meet their demands which is defeating the aim of the Indian criminal justice system, considering the problem, there is an urgent need to create gender neutrality in the Indian criminal jurisprudence.

In a report published in 2012 by the “National Crime Record Bureau, it was noted that over 2,000 000 persons are detained under this clause, but only 15% are found guilty in court, with the remaining claims being false”, the statistics prove that the false cases have been filed by women at a large extent, leading to the in-laws facing trouble and are victim of false case.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 was incorporated by the Indian parliament after the Vishaka guidelines were provided by the Supreme Court, when we can have laws for women for their safety, and we can’t have them for men when they are in need due to their vulnerability in society. There is a need for gender neutrality to prevail in Indian criminal jurisprudence.

## **WOMEN-CENTRIC LAWS AND ITS MISUSE**

The misuse of laws by women is a serious issue which needs attention, to ensure the safety and protection of women in society strict laws were made, but it has been used by the women for their advantage, women are filing false dowry harassment cases against the husband and in-laws in order to gain an advantage in the divorce or property disputes; when the demand of women is not fulfilled by the in-laws, the false case has been filed against them. The most vulnerable section is Sec 85 of Bharatiya Nyaya Sanhita 2023, where false cases have been filed of dowry harassment. The criminal law amendment Act gave a lot of provisions, keeping

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3. Kahkashan Kausar v. State of Bihar, 2022 (6) SCC 599.



in mind the safety of women, pertaining to sexual harassment, rape etc, incorporated after the horrific incident of gang rape in Delhi in 2012. The whole aim of the Indian criminal justice system is to provide justice to women, but they have taken the use of laws for wrongful acts which is in a way given a very bad impression in the society.

The main problem which will be faced by women in this situation is that if she is stating the truth that she has suffered harm from the in-laws, the court will look at it sceptically because lots of false cases of dowry harassment, cruelty have been registered, so it will ultimately affect the rights of women only.

### **Section 85 and 86 of Bharatiya Nyaya Sanhita 2023**

It states that cruelty done by the husband or relatives of husband or wife, nowhere it mentions about the man being a victim in any situation. It only focuses on women, this section came after lot of cases reported related to death of women because of violence demand for dowry etc, according to penal rules a male, man can never be sexually harassed assaulted, harassed etc, only women can be the victim of such offences. It focuses on the principle that “*male criminals are born; Heras female victims are born*”

### **Case laws on Misuse of laws.**

The preconceived notion of police officials and judiciary is what women speak is always truth, but “this myth was busted “in the present time as women are using it as a tool to fulfil their demands. In case of “*Preeti Gupta vs state of Jharkhand*”<sup>4</sup>, it was observed that Sec 498-A of IPC is highly misused. It was a case of dowry harassment, the complainant filed a case under Sec 498-A IPC (now Sec 85 of Bharatiya Nyaya Sanhita 2023), against all the immediate relations of her husband, the Supreme Court observed that the allegations by the women were false and there was no cruelty done by the relations on her. This poses a great challenge to the Indian legal system to determine the real truth of the case and not just believe in what the women said is deemed to be true.

The same ruling was given in the case of “*Arnesh Kumar vs State of Bihar*”<sup>5</sup>, the Supreme Court responded to the special leave petition filed by Arnesh Kumar and his family members challenging the arrest, it identified that some women are using Sec 85 Bharatiya Nyaya Sanhita 2023, as a potent tool which ended up in the arrest of innocent individuals.

Sec 85 Bharatiya Nyaya Sanhita 2023 is a highly misused law in the Indian legal system, SC also termed it as “legal terrorism”. The main reason for this kind of exploitation is that laws do not take gender into account. In a report released in 2012 by the National Crime Record Bureau,

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4. Preeti Gupta v. state of Jharkhand, 2010 (7) SCC 667.

5. Arnesh Kumar v. State of Bihar, 2014 (8) SCC 73.

it was highlighted that although over 2,000,000 people are imprisoned under this provision, only 15% of those people are ultimately found guilty in court, with the majority of the charges being untrue. As a result, men are dying off at higher rates. Contrary to popular belief, if a woman kills herself, her husband is immediately detained and imprisoned; but, if a guy does the same, his wife is never questioned.

The National Crime Records Bureau Report<sup>6</sup> from 2015 reveals the startling statistic that 1,33,623 people committed suicide, 91,528 of whom were males (68%) and 42,088 of whom were women. ***“There were 86,808 married people who died by suicide overall, 64,534 (74%) of them men, and 26% of them women”***.

### **DOMESTIC VIOLENCE ACT 2005**

The safety under this Act is only provided to women, the Act has failed to recognize the facts that a man can also be a victim of such offence in case of matrimonial disputes. According to United Nations crime statistics, India’s rank is third with regard to wives beating their husbands.<sup>7</sup>

It states that “harasses, harms, injures or endangers the aggrieved person with a view to coerce her or any other person related to her to meet any unlawful demand for any dowry or other property or valuable security”<sup>8</sup>, it only talks about the women, where if man is a victim ,he will not have any course of action.

***“The Domestic Violence Act 2005”*** has given an undue influence on women where she can use it to exploit, threaten, and distort the lives of men and their families. There is no limit in filing complaints under the Domestic Violence Act, in case of ***“Kamtachi vs Laxmi Narayanan”***<sup>9</sup>, it was held that there can be multiple complaints filed under the Act.

### **ANALYSIS OF RAPE LAWS**

After examining the legality of the rape laws in India, it is determined that the laws are biased towards women and fail to recognize men. Male rape victims are not recognized by the law and the law does not recognise male victims, but only considers females . A man can also be a victim of a heinous crime, “rape law should be made gender neutral”, there has been a shift

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6. THE HINDUSTAN TIMES, <https://www.hindustantimes.com> (last visited Aug. 04, 2024).

7. COASTALDIGEST, <https://www.coastaldigest.com/indian-wives-ranked-third-world-beating-their-husbands> (last visited 20 July 2024).

8. The Protection of Women from Domestic Violence Act ,2005. No. 43 Acts of Parliament, 2005 (India)

9. Kamtachi v. Laxmi Narayanan, 2022 SC 627.

in society and women are using the law to harass the man for financial gain, so it's time for us to move forward and to update the law to reflect this.

According to a report from PUCL Karnataka, both transgender men and women are at risk of being raped. According to the research, 10.5% of male college students were raped, and 10.5% were the targets of attempted rape. In a different survey by the Centres for Disease Control and Prevention, 67.4% of women were identified as sexual assault perpetrators. Although sexual offences cause injury to males, they are not able to seek legal redress for this problem.

### **DISREGARD FOR ARTICLE 14 OF THE INDIAN CONSITUTION**

“It states that the state shall not deny to any person equality before law and equal protection of laws”<sup>10</sup>.

The first expression means “*the rule of law*” which means no one is above the law, everyone irrespective of his/her rank, is treated equally, on the other hand, the second expression is corollary to the first expression. it is very difficult to observe violation of protection of laws where no violation of “equality before law” exists. “Discrimination based on sexual orientation” or gender identity is also covered under Article 14.

The women-centric laws violate the right to equality of men, there should be a balance between the rights of men and women, the state has indirectly violated the right to equality of male members in the Indian society by not making gender-neutral laws.

Courts have upheld the right to equality about women, in the case of *Air India v. Nargesh Meerza*<sup>11</sup>, the court held that the conditions imposed by the airlines are retirement on attaining the age of 35 years, if they are married within 4 years of the said service or on their first pregnancy, is violative of Art 14 of the Indian Constitution. It observed that there is no reasonable ground for the termination of air hostesses from the service which amounts to inequality.

When the court can uphold the fundamental right of equality for women, why can't it be done for men when there is a need of it. The fundamental rights are there for both men and women, so it is time to understand the violation and to include gender-neutral laws.

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10. INDIA CONST.art.14.

11. Air India v. Nargesh Meerza, 1981 (4) SCC 335.

## **VIOLATION OF ARTICLE 15(1) OF THE INDIAN CONSTITUTION**

“The state shall not discriminate any citizens on the ground of religion, race, caste, sex and place of birth”<sup>12</sup>. It is observed that in the case of women-centric laws, the discrimination against men were solely based on sex which violates fundamental rights.

Even though under “Article 15(3) of the Indian constitution state can make special provision for women and children”<sup>13</sup>, the women-centric laws are made to improve the conditions of women in the patriarchal society, but as time passes in the present society where the notion of the patriarchal system does not work, women have been observed using the laws as a tool for financial gains which has destroyed the overall aim of the constitution in making laws.

After looking into the legislations and provisions mentioned in the Indian Constitution that favouring women, it has been observed that very less provisions or laws are there which are in favour of men, the laws for women are made to create gender equality but it has gone the other way around as it created an imbalance, laws favouring men is the need of the hour to create equality.

## **IMPORTANCE OF ARTICLE 13 IN CREATING GENDER EQUALITY**

“It states that “the state shall not make any law which is violative of the fundamental rights of individual, a law made in contravention, be void”<sup>14</sup>.

In the case of women-centric laws, it has mentioned only women and not men, which is in “violation of Article 14” of men, which is a fundamental right.

Article 13 mentions the “doctrine of severability” which state that any part of the law which is violating the fundamental right can be removed while remaining the rest portion as it is.

Even the court has the power to strike down the whole law if after removing some portion of the law, still it is violating the fundamental right. In the case of gender inequality in the laws of India, Article 13 can be an important tool in reducing the gap between men and women and can ensure gender equality in the Indian criminal jurisprudence by removing that part of the law which is taking away the fundamental right.

The court has interpreted the doctrine through many case laws, in the case of *A.K. Gopalan v. State of Madras*<sup>15</sup>, the court held Section 14 of the Preventive Detention Act void while

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12. INDIA CONST.art.15, cl .1.

13. INDIA CONST.art.15, cl .3.

14. INDIA CONST. art.13.

15. A.K. Gopalan v. State of Madras, AIR 1950 SCC 27.

stating that the whole statute cannot be struck down, but the violative provision of the Act can be held void.

In the case of *State of Bombay v. F.N. Balsara*<sup>16</sup>, the court held that the portion from the Bombay Prohibition Act can be separated from the rest of the act to the extent it violates the fundamental right.

## CONCLUSION AND SUGGESTIONS

The “misuse of women-centric laws” led to great havoc in Indian society as it led to the arrest of innocents which destroyed the basic aim of the Indian criminal jurisprudence that not a single innocent should be held guilty even if many guilty persons are acquitted. Due to the change in society over time, there is a need to have “gender-neutral laws” as crime against men has also increased. The inequality in Indian criminal jurisprudence has violated the fundamental rights of men in society. High misuse of laws by women for financial gain has been observed in recent times which is again defeating the aim of the Indian legal system in ensuring justice to an individual.

To ensure justice in Indian society, there is an urgent need for gender-neutral laws where even men are included in such a category. Article 13 of the Indian constitution can be used as an important tool to remove the part which is violative of the fundamental right and if the whole law is violative then to remove the whole law, which can ensure gender equality in the Indian criminal jurisprudence.

It is most important to look into the matter of gender inequality in the Indian criminal jurisprudence and to take punitive actions against the women’s who are misusing the laws

There are many organizations which are working for the welfare of women such as “*The Convention on the Elimination of All Forms of Discrimination against Women*”, this convention works for the protection of the rights of women, specially known as the International Bill of Rights for Women. There is a need for such organizations should protect the rights of men, as their vulnerability has increased.

There are many provisions and laws for the protection of rights of women but on the side of men it is lacking, it is an urgent need for the authorities to look into the matter to include provisions which create gender equality in the Indian criminal justice system.

The concept of rule of law should be upheld as it is there in the statutes, but it lacks practicality, as there is gender inequality among the laws.

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16. State of Bombay v. F.N. Balsara, AIR 1951 BOM 210.

When there is equality upheld for women in cases such as *Air India v. Nargesh Meerza*<sup>17</sup>, so it can be upheld for men when there is inequality in the provision of the law.

In addition, lawmakers should understand that not only women can be victims of rape even men do in the present society.

The most important point which needs attention is the investigation part which should be fair, and not discriminatory in the case of men and women who are registering an FIR, and the investigation officer must conduct a preliminary enquiry before registering the case of cruelty and dowry harassment before registering the case and the guidelines of Arnesh Kumar must be followed in case of arrest.

Gender neutrality is the most important element to reduce the cases of misuse of laws, strict actions must be taken against the women filing false cases which will ensure that such false cases are not reported even the Supreme Court in the case of *Prateek Bansal vs State of Rajasthan and Ors*<sup>18</sup>, the court ordered the father of the daughter to pay 5 lakh compensation to the husband for filing multiple false cases in the different police stations to harass him. The whole aim of the justice delivery should not go in vain so gender-neutral laws is the need of the hour.

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17. *Air India v. Nargesh Meerza*, 1981 (4) SCC 335.

18. *Prateek Bansal v. The State of Rajasthan and ors*, 2024 (4) SCC 58.

## **VISION OF LAW AND JUSTICE TO TRANSGENDER COMMUNITY BASED ON THE RAPE LAWS OF INDIA**

Kausikan G<sup>1</sup>

Suresh Kanna<sup>2</sup>

### **INTRODUCTION**

Living as a transgender individual in India brings frequent struggles across numerous fronts, namely education, jobs, health care, and housing – despite the passing of the Transgender Persons (Protection of Rights) Act in 2019, intended to curtail discrimination. The act's loopholes enable continuous prejudiced treatment. One pressing concern is the absence of official acknowledgement of chosen genders since requiring people to submit to medical evaluations and furnishing evidence of surgical interventions contradicts basic liberties and pushes them into unnecessary medical treatments. This starkly opposes principles of independence and personal choice.

Contrary to popular belief, the idea of transgender people—whether Hijras or Kinnars—is not new or contemporary. Different cultures have different perspectives on this population, but virtually all of them include some favourable or bad representation of the transgender community in their mythology or history. This is particularly evident in Indian mythology.

One of the most well-known examples of these is Princess Ambai from the Mahabharata. She appeared in the epic as a princess whose life was destroyed by Bhishm, a significant figure in the same narrative. In order to exhibit her revenge, she obtained a boon that gave her the ability to kill Bhishm in her next life by being born as a transgender male.

Among all the transgender individuals, Aravanis was the most prominent and frequently mentioned in numerous Hindu mythologies and other religious writings. This contains the Kama Sutra, a revered ancient Hindu literature that describes many sexual positions and behaviours. Given that it was composed between 400 BCE and 200 CE, it is not only a very progressive text but also one that is supportive of LGBTQ+ individuals, including the transgender community, lesbians, and gays.

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## **DISCRIMINATION AGAINST TRANSGENDERS**

Transgender individuals, all over the world, are faced with the sad reality of discrimination and marginalization in their daily lives. This discrimination is often a reflection of the laws and policies that shape our societies, impacting their access to essential services and their overall well-being. Let's take a deeper look at some of the key areas where transgender people face challenges:

### **Healthcare**

Healthcare for transgender people is obviously their right and it can be scary, when you don't know what steps to take. More and more transgender individuals experience obstacles in getting the needed medical care, whilst the medical sector lacks education of such issues and suffers discrimination against them. With this, we mean improving the situation, for example, providing someone with these sexual-identity- altering medical services— sometimes this can be a matter of survival for some. In a few countries transgender persons are completely deprived of accessing medical assistance and in articulated sadistic cases they are made an object of underhanded operations like sterilizations without their appraisals.

This manner of accessing transgender healthcare services is inconvenient even in the regions where they are available. However, financial barriers to accessing transgender healthcare services can be huge. Insurances exclusions or stomachache non-insurance-related care creates indigestion expenses to high. Apart from that, the difficulties in getting a health care professional to respect his/her gender identity or so-called addressing issues in a wrong way might be the case for some transgender people with the result that they avoid getting medical support altogether.

### **Employment and Housing**

The discrimination transgender persons face at the workplace often manifests itself at the recruiting stage, such as alienation or unfair sacking. They may become prey for double digits or missed out the career growth opportunities as well as sea of hostility at the workplace. This discrimination, being enhanced by factors such as race, specific social class and gender expression is a reflected one.

On the other hand, with regards to dwellings, we can also witness that transgender people are mostly vulnerable and unprotected from these forms of discrimination. Apart from being denied housing by landlords, they could also encounter problems to obtain mortgages, and probably residents of the close by neighborhoods could harass or evict them. But the lack of compromise generates the homelessness problem and that makes the tasks harder.

### **Legal Recognition and Identity Documents**

Changing the gender designation on official records can be a complex and intrusive activity. Several nations have laws that are in place and comprise cumbersome procedures, such as high costs as well as psychological and medical evaluations. Some localities make involuntary sterilization or divorce a prerequisite to the legal recognition of an accused person's gender.

In the absence of documented legal status, transgender people are denied access to different fields of life. Some of its critical functions are employment, travelling, access to public services, and voting. Apart from that, they may have a higher probability of discrimination or physical menace when the gender identity is different from that in official documents.

### **Criminalization and Violence**

In some countries a person may be prosecuted just for existing biologically or in the chosen genders that do not fall under the binary system. Laws that penalize cross-dressing and passing as the opposite sex are adjudicated to arrest, fine and imprison transgender individuals, a fate that hampers their socialization and integration into the local affairs.

Therefore, the incidence of violence and hate crimes is one of the specific groups that face the heightened risk. They could turn into victims of physical or sexual violence and in some cases a murder only because of being identified as LGBTQ+ individuals. This mayhem is stirred up with the addition of transphobic views and absence of the required legal protections, being allotted to highly vulnerable transgender women of color.<sup>3</sup>

### **Bathroom and Public Accommodation Access**

The argument as to whether restroom access of transgendered persons should be allowed or not has been a hard one to swallow. Transgender individuals have to deal with harshness and even physical attacks at public restrooms that do not in line with their gender IDs. Some local governments have passed by laws restricting people to use the bathroom after biological sex tests ignoring the rights of transgender individuals.

It goes beyond bathrooms and into appearances in schools, shops, restaurants, and other public places of entertainment. Private bathrooms can be used by transgender people, yet they can be restricted from entering or be a victim of discrimination.<sup>4</sup>

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3. Police harass transgenders most, says study, TIMES OF INDIA, (June 21, 2024), [https://timesofindia.indiatimes.com/city/chennai/police-harass-transgenders-most-says-study/amp\\_article-show/51869919.cms](https://timesofindia.indiatimes.com/city/chennai/police-harass-transgenders-most-says-study/amp_article-show/51869919.cms).

4. Trans teens face higher sexual assault risk when schools restrict bathrooms, study finds, NBC-NEWS.COM (July 7, 2024), <https://www.nbcnews.com/feature/nbc-out/trans-teens-face-higher-sexual-assault-risk-when-schools-restrict-n1002601>.

## **Family and Relationship Recognition**

Transgender individuals can face disregard or discrimination from their own families, likewise, hence, they do now have legal protection in case of marriage, adoption, or being a parent. On some occasions, they are also denied parental rights or confronted with various challenges with respect to foster or adoptive care because of their gender.

The bumps and splinters that they confront run even greater for people who do be in same-sex relationships, particularly in places where the government does not provide legal recognition for such union, and where such marriage or civil union is not allowed.

## **Mental Health and Well-being**

Being on the receiving end of constant discrimination tarnishes the mental health of transgender people, limiting their ability to cope with harassment and threats of violence. Such threats can cause severe emotional damage and lasting psychological effects. they will suffer much higher risks of developing depression, anxiety, jumping into drug use, or PTSD (post-traumatic stress disorder). Such barriers as lack of access to the supporting members such as transgender-specific support groups or counseling services make these hurdles even bigger.

## **Intersectionality**

It is significant to understand that transgender people very often suffer from the overlapping layers of victimization. Transgender people of color, transgender immigrants, transgender people living with disabilities, and those from low socio-economic communities may at times face substantial amounts of oppression because of the complicated nature of the different aspects of their lives.

## **Policy and Legal Responses**

Some countries and jurisdictions have actually had some great strides in legally addressing transgender discrimination through anti-discrimination legislation and healthcare reforms, but these progresses are widely not uniform. A lot is left to be desired in the protection of transgender rights as it is not acknowledged or protected in several places. Activism and advocacy have become persistent factors in the struggle for equal rights and non-discrimination of transgender people in law and as well as in community.<sup>5</sup>

In summary, however, the case is that transgender individuals are a good example of discrimination and marginalization in all the dimensions of their living. This discrimination is co-founded by social stereotypes, views and structures which are shorter ways to say cultural stereotypes, views and structures that are mostly overlooked. Achieving a more equal society

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5. Qatar: Security forces arrest, abuse LGBT people, HUMAN RIGHTS WATCH (June 24, 2024). <https://www.hrw.org/news/2022/10/24/qatar-security-forces-arrest-abuse-lgbt-people>.

that embraces diversity with talents and differences of all people goes through a complex process that embraces not only legal reforms but also education, cultural respect and acceptance coupled with transgender participation in decision making. Teamwork is the way forward and, only through us, uniting and making the world around us where people with clear sexual identity can receive the right to have respect from others.

## **RAPE LAWS IN INDIA BEING GENDER-NEUTRAL AND ITS CONSTITUTIONAL VALIDITY**

A wide debate on the constitutional validity of rape laws in India has started, specifically regarding their gender generic characteristics. This is a very sensitive and complicated issue which affects a great number of people. It is a good idea to explore the individual facets of this below.

### **Gender bias in Indian Rape laws**

Historical bias in the formulation of the IPC is exposed mostly through the definition of rape. Referring to section 63 of the IPC, rape happens when a man forcibly has sexual intercourse with a woman subject to certain particular circumstances. It omits those male victims as well as female perpetrators what is contested by gender neutral advocates. It misses the point of sexual harassment which is committed on men by women as well.

### **Challenging the Constitution**

In regards of the Indian Supreme Court in terms of rape laws and sex discrimination, the problem has been raised. It is rather than absurd that the constitutional infringements occur from the attitudes to law as depending on sex, which is contrary to equalization constitutions (Article 14) and proscriptions of gender discrimination (Article 15). The last thing for the court to determine is whether these laws are category or not, well always the left one targets a gender, the other does not, instead.

### **Amending the Laws**

Considered as an improvement of the BNS, truly inclusive and sensitive rape laws have been given a try. The Criminal Law (Amendment) Act, 2013 brought a lot of change that rapes now included some other acts of sex and the humanity that the young and the transgender individuals faced. Meanwhile it was the first step they did, yet they did not go so far as to make laws completely gender neutral.

### **International Perspective**

Each of the international human rights law takes the position which, in an essence, aligns with gender-neutral rape laws. CEDAW treaty, which constitutes the backbone of the Indian anti-discrimination policy, uniquely demonstrates the commitment to equality for women.

CEDAW supports abolishment of gender discrimination recognizing existing discriminative laws that legitimize gender inequality. Moreover, countries have been asked to be gender-neutral when referring to the sexual violence and they have agreed to do so through the treaties like the Istanbul Convention. These frameworks basically sound out that India needs to follow the international laws' rape standards.

### **Advocating for Gender-Neutral Laws**

Supporters of gender-neutral definition of rape argue that the current one has a limited scope in recognizing male victims or being inclusive of females in their role of rape, whereas opponents of gender-neutral definition of rape are concerned about the falsity of gender-stereotypes being prevalent and a way of normalizing harassment. The activists who support that approach argue that the aim should be a gender-sensitive measure that would defend the rights of people of any gender and punish the violators regardless of their gender identity. This point underscores the necessity of throwing away of traditional gender roles stereotypes for the best comprehension of sexual violence issue.

### **Counterarguments**

The critics of gender-neutral legislations have doubts on the ability of these laws to engage issues of patriarchy and gender-based violence actively. They contend that rape laws mirror the fact that sexual assault occurs mostly by men targeting women.

### **Impact on society and shifting cultural norms**

The discussion of rape laws is not only about the legal sophisticated points, but it also has to do with the deep existential questions of society's norms and cultural beliefs. A gender-neutral tactics for the rape laws could be a turning point for the opposition against traditional gender stereotypes and the promotion of a more universal perception of sexual violence.

We should realize that men too can be the victims or the attackers, hence can make the male victims to come and report the assaults freely. This might solve the problem of the underreporting of sexual violence against male gender, which is usually hidden due to the social and gender expectations.

### **A Call for Transformational Change**

The Indian constitution's appropriate approach toward rape laws is a complex debate. Even though the gender gaps in the legal system are getting more comprehensive, yet Indian juridical system as a whole has not fully succeeded in applying total gender neutrality.

Among all factors to widely accepted constitutional legitimacy, the mere legal changes are not sufficient for getting true constitutional legitimacy. It will entail a human's metamorphosis

through improved justice, offering one-stop victim support services as well as challenging the gender stereotypes and norms that are a foundation of everything.

However, it has to be admitted that the sexual violence has a court character as well as the social one, and the cooperation in the issue improvement will guide to the creation of the socially positive tomorrow for everyone. By means of decrease of the stereotypes, getting community to know the problem, and giving people grounds to show their bravery in facing the violence, sexual violence can be eliminated regardless of the gender status or social position of the victim.

*In general, the constitutionally correct rape laws a nation-way is a process that the stop and each of us should pay a part in developing the culture which is based on the equality of genders, sympathy and justice for sexual abuses survivors.*<sup>6</sup>

### **THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019**

The Transgender Persons (Protection of Rights) Act, 2019 was welcomed as a progressive step into the world of interaction for the transgenders in India. It affirmed that one of the Act's primary purposes was to safeguard the liberties of persons who identified as trans and to promote the welfare of those who expressed this kind of identity. However, as the law has been implemented there are some issues whether it can indeed protect these rights.

This discussion looks at the provisions of the Act, in an attempt to weigh the advantages and disadvantages of the Act.

They include the following.

**Legal Recognition and Self-Identification:** It gives the transgender the legal permission to establish their identity due recognition that was denied for a long time. Most notably, they can choose their gender of male, female or transsexual, which is part of human rights.

**Right to Residence and Inclusion:** The legislation makes it possible for the transgender persons to reside freely with relatives, or in any area of their preference, without undergoing legal complexities. It safeguards their liberty to live in areas of their choice, they cannot be ejected in what amounts to injustice.

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6. Alexandra Oancea, *The shortcomings of India's new Transgender People's Act The Shortcomings Of India's New Transgender People's Act (2021)*, HUMAN RIGHTS PULSE (June 21, 2024) <https://www.humanrightspulse.com/mastercontentblog/the-shortcomings-of-indias-new-transgender-peoples-act?format=amp>.

**Prohibition of Discrimination:** The Act has provisions that outright prohibit discrimination of transgender persons especially in sensitive sectors such as education, employment, health and access to public facilities. It aims at ensuring that there is an ideal world in which the transgenders can work, learn, marry and be employed among other dreams without prejudice.

**Education as an Equalizer:** The Act also mandates central and state authorities to make education a reality specially for the transgender persons. This refers to the provision of development opportunities and the creation of appreciation for such aspects when one is young.

**Welfare Measures for Holistic Support:** Thus, to improve the quality of life of the problem, the Act promotes several programs. It assembles talents, generates employment opportunities, and invests efforts in the areas of health and therapeutic intervention with the intention of coming up with strategies to assist the community gain power.

**National and State Councils for Representation:** Accordingly, the Act has set up councils at the national level and the state level in order to offer policy advice to the government and to enforce the compliance. Their purpose is to ensure that the transgender voice is heard in decision making bodies and in the formulation of policies thus the councils.

**Some of the critical issues with the enacted measures include the following**

**Legal Recognition and a Loss of Agency:** Whereas the legal acknowledgment is a good progress, the need to prove to a screening committee one's gender identity has been soundly frowned. Such a process can be violating confidentiality, acting in compliance with stereotyped thinking patterns and erasing the individual's right to self-identify.

**Right to Residence, But Not Always Accepted:** Even as the Act recognizes the right to residence, it states no clear instructions regarding enforcement of such a right especially to persons who are rejected by their families.

**Discrimination Still Exists:** While the Act looks into specific areas like education and employment, it does not delve into other important areas like marriage, adoption, and reproductive rights whereby the lives off transgendered people are enveloped in discrimination.

**Insufficient Penalties:** There are sections in the Act which provides for penalties for discriminating against individuals, stipulations that are felt to be mild and thus compromises its enforcement.

**Boards Without Representation:** While it is appreciable that Transgender Social Welfare Boards are being constituted but the absence of legal mandate to constitute Transgender Social Welfare Boards with representatives of trans-gender persons makes it questionable of their efficiency to serve the cause of the community.



**Criminalizing Survival:** The Act in its provisions renders begging as unlawful and unbecoming of a right citizen despite it being a likely survival strategy albeit, a very disadvantageous one and particularly so for the transgenders among them due to their very low chances of landing productive employment. It has also been said that this provision is severe.

**Insufficient Involvement in Authorship:** While the responsibility for the implementation of the Act lies with the central government, the same has not been clear and there has been a very poor participation of the Transgenders on the said issues.

**Missing Social and Economic Support:** Wherefore though the Act provides for legal recognition the marginalization in social and economic realms is not well provided for. Thus, the absence of proper housing, health care, education, and job opportunities keep the empowered dream out of reach for many people of the community.

### **Outcomes in terms of effects produced by the research on the Transgender community**

In this regard, the deficiencies observed in the Act are a cause of concern and create considerable difficulties for the transgender population in question, inclined to improve their well-being. Current tendencies include social exclusion and discrimination in the workplace and various forms of harassment, which discourages individuals from obtaining legal recognition and consequently, the connected rights. Currently, societies lack universal anti-discrimination laws and regulation as well as lack proper implementation to protect the transgender group.

Even though it is an attempt to provide the needed guarding, it is still not totally comprehensive protectors from unwanted information. These blemishes indicate that adding provisions and other measures may be important in both supporting the transgender group as well as improving existing boundaries. Applied protection involves not only legislative reforms but social change; it involves embracing the varied community and respecting transgender people's rights accordingly. Society must be designed in such a way that all people in the society should be empathized, and they must be given what respect and dignity they deserve.<sup>7</sup>

### **IMPORTANCE OF GENDER-NEUTRAL LAWS**

It really is worth mentioning that gender-neutral laws absolutely are the basis for a correct society in which everyone is treated equally gender identity and expression is not taken into consideration and there is no discrimination. These laws aim at being neutral regarding an

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7. Big Companies in India inc ramp up hiring of transgender workers, THE ECONOMIC TIMES, (July 1, 2024), <https://economictimes.indiatimes.com/jobs/hr-policies-trends/big-companies-in-india-inc-ramp-up-hiring-of-transgender-workers/articleshow/108858528.cms>.

individual gender or sex, guaranteeing to everyone what regards their rights, responsibilities and opportunities equal and independent of the sex.

Gender-neutral laws are all about giving voice and inviolable equality to the other gender; the ones standing behind. These laws help us achieve gender equality as they support the use gender-inclusive language that ensures that the persons of any gender identity are treated with equity and given equal respect in the society. This crumbles down conflicts and discrimination out of our society and provides an opportunity for everyone to be on a level playing ground.

However, these laws are mostly aimed to support the rights of transgender individuals, intersex people and non-binary people. Unfortunately, minority groups that set aside their own territories for community living usually get as response from the majority of society discrimination, harassment and even violence. Gender-neutral laws work like a shield protecting their rights from being marginalized and having them the same access to legal protections and opportunities, as they as others have. It is related to making a space that is intended for all and journey together in paths that are made for us as people.

Diversity is an asset, and gender-neutral laws are such complements that highlight and honor gender diversity. By recognizing the presence of an individual with diverse gender identities, and not delegating the rights, we create a culture which not only accepts, but tolerates others with different gender identity than our own. It is about creating the place where everyone forms the community where everyone feels valued and respected, who identifies or reveals their gender whichever way they feel.

Statute enacted, long before gender equality existed, undoubtedly bring in a lot of barriers, especially for the women and gender influential class. They may dispossess them from education opportunities and also limit their access to employment and leadership. The laws that are gender-neutral, lead to the shattering of these barriers, which enable everyone to follow their dream that in turn contributes to their flourishing regardless of a gender. Carpenter's campaign is about personalized mission of developing their own cultural significance.

Very basic and practice rules are crucial for the smooth flow of justice. Gender-neutral language facilitates the operation of the law in a uniform manner, and it is interpreted by everyone in the same way without any mix ups. This makes clear the rules, fair guidelines and also helps in standing against the loopholes that would otherwise be taken advantage of. This is nothing but fulfilling the responsibility and ensuring that nobody escapes the justice under the fair law of the land.

As many nations have made commitments on ending gender discrimination through the instruments like CEDAW and ICCPR, a number of global treaties play a vital role in this matter at the international level. Making gender-neutral laws one of the main plots of our efforts is of

course the basic job needs to be done first in order to make human rights principles workable in the true sense of the word on the global scale. One thing i have learned is that we need to walk the talk — if we want to set an example then we need to lead by example.

The equating of men and women via the enactment of gender equal laws offer benefits beyond the social and gender itself. It is a tool that gives from the best health and education outcomes to the increased economic participation, increased productivity and lowered poverty. Communities that are gender-equal are likely to be prosperous as people from all genders, families, communities, societies, and nations all enjoy the benefits together. It is all about bringing a bright perspective on humanity with every global development.

Free-of-gender laws have a crucial place for error correction in the outdated and negative gender stereotypes. Once women start distancing from the conventional gender-based roles people are bound to be freer from the shackles of society to express who you really are or follow your hobbies and predilections. It's all about accepting individuality, detailing a society that provides an atmosphere of self-expression.

The above-mentioned making and implementation of the rules help us to deliberate upon the gender-specific nature of our society. It increases the public consciousness of gender disparity thorough and fosters the idea that more steps should be taken to attain this ultimate state of equality. It enables citizens to propose policies that guarantee each citizen an equitable status and prevents one social group from discriminating against another.

A language is an evolving being, and with it a mutual role in the progress of the understanding of genders. Words not biased towards a particular gender demonstrate a wider acknowledgment that the entire society, including transgender people, is important. It deals with the matter of treating with respect, sharing values of inclusivity, and making the commons feel like home to all.

The final consideration is that gender-neutral laws are the key for the establishment of a just and fair society. They safeguard gender male and female equalities, create community, eliminate obstacles, and make legality clear. It is like a matter of taking one step further while aspiring for a world in which all genders regardless of the particular gender will have equal rights and opportunities. That is the future which ensures leaving no one behind and rejoicing diverse people as the power.<sup>8</sup>

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8. Guneev Puri, *10 LGBTQ friendly companies in India*, NAUKRI'S OFFICIAL BLOG (July 29, 2024), <https://www.naukri.com/blog/10-lgbtq-friendly-companies-in-india/>.

## Judicial Interpretations

In the case of *Sudesh Jhaku vs. K.C. Jhaku*<sup>9</sup> the argument made before the court about the importance of gender-neutral laws by the Justice Jaspal Singh

*“Men who are sexually assaulted should have the same protection as female victims, and women who sexually assault men or other women should be as liable for conviction as conventional rapists. Considering rape as a sexual assault rather than as a special crime against women might do much to place rape law in a healthier perspective and to reduce the mythical elements that have tended to make rape laws a means of reinforcing the status of women as sexual possessions.”*

In the case of *National legal Service Authority of India vs. Union of India*,<sup>10</sup> the Court decided that Hijras and Eunuchs will be recognized legally as “third gender.” Furthermore, the Court directed the Centre and State Governments to establish HIV Zero-Surveillance Centres, provide separate restrooms for transgender individuals, and ensure that transgender patients receive appropriate healthcare in hospitals. In addition, they were instructed to develop a number of social awareness programs for the benefit and welfare of the transgender community and to inform the public about the difficulties they encounter in an effort to reestablish the community’s previous sense of respect and confidence.

*Sakshi v. Union of India*<sup>11</sup> further promoted gender-neutral rape laws, which eventually resulted in the Law Commission of India’s 172nd Report, which suggested replacing the term “rape” with the entirely gender-neutral offense of “sexual assault.” The result of this was the Criminal Law (Amendment) Bill, 2012, which put out a definition of rape that is entirely gender neutral. But the rape case in *Nirbhaya* turned everything upside down, and as a result, the Justice Verma Committee was formed (The Committee). The Committee went on to suggest that while the perpetrator should remain gender-neutral, the victim of rape should not. It recommended that, with the exception of custodial rape or rape in a setting where there is an obvious power differential, the perpetrator should always be presumed to be male.

## Statistics

The National Crime Records Bureau (NCRB) recorded 236 victims (or 0.006% of all crime victims) who were transgender persons in 2020 and registered no cases of rape, buying and selling of minors for prostitution in which trans persons were victims. Experts say this is not a reflection of a low crime rate, but of the lack of documentation of transgender persons that leads to a misleading record of crimes against the community.

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9. *Sudesh Jhaku vs. K.C. Jhaku* AIR 2004 SC 3566.

10. *National legal Service Authority of India vs. Union of India*, AIR 2014 SC 1863.

11. *Sakshi v. Union of India* AIR 2004 SC 3566

In 2014, in the case filed by the National Legal Services Authority of India (NALSA), the Supreme Court said that a person's gender would not be based on their biological sex but on how they identify. Yet, "even after 2014, a very small percentage of transgender persons has had their certificates made or documents updated," said queer rights activist, Philip C. Philip. "So, when any crime happens the police end up looking at a document with a binary marker. That is the reason the recorded numbers are so low for crimes against the transgender community<sup>12</sup>."

According to a survey of nearly 5,000 transgender people by the National AIDS Control Organization in 2014-15, one fifth said they had experienced sexual violence in the past 12 months.

A 2017 study by the National Human Rights Commission (NHRC) found that "they (transgenders) do not get justice from police, if they approach," and even in cases of gang rape, they cannot go to the police for assistance, for fear of harassment and their inability to pay bribes.

"Transgender persons face excessive harassment even when they do try to report a crime, most of the police officers, not just the SI or ASI rank (lower ranking police officials) even the IPS officers (high ranking police officials) aren't aware of how to deal with a transgender person," said Baruah, the judge<sup>13</sup>.

### **Other Countries Laws**

Despite the absence of a federal law exclusively concerning transgender rape in the United States, the Violence Against Women Reauthorization Act of 2013 gives transgender people equal protection from gender-based violence, including sexual assault. It is, however, important to note that some of the states in different region of the world have already legalised provisions regarding the offence of transgender rape. For instance, books containing descriptions of different forms of sexual penetration found in the California Penal Code include penetration of the genitals of a person of the opposite or same sex who is a male-to-female transsexual. Moreover, New York and Illinois consider transsexuals as the objects of the hate crime law that prescribes a heavier punishment for the sex offenders.

The Sexual Offences Act 2003 of the UK expanded the definitions further where any individual is legally held responsible for rape if the assaulter used a penis to conduct vaginal,

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12. Vandana Bansal, *Why only 236 trans person victims of crimes were recorded in India in 2020*, INDIA SPEND, (23 July, 2024). <https://www.indiaspend.com/gendercheck/why-only-236-trans-person-victims-of-crimes-were-recorded-in-india-in-2020-823034>
  13. Mitra, E. (2020) *India's rape laws don't cover transgender people. they say it's putting them at risk*, CNN. (August 1, 2024). <https://edition.cnn.com/2020/12/08/india/india-transgender-rape-laws-intl-hnk-dst/index.html>

anal, or oral penetration. Another legislation that offers protection to one's discrimination against the Transgendered person is the Equality Act of 2010 which also shields the Transgendered person in situations where he/she becomes a victim of rape, molestation or other unlawful actions motivated by hatred and hostility.

In Canada, sexual assault is a criminal activity as governed by the Criminal Code because it encompasses any sexual act without consent of the other party. The crime of rape is not exclusively prosecuted under any laws involving the transgender situation, but the devious identity and expression are protected following Bill C-16, [click here](#), and provoke more severe punishments for persecutions fuelled by gender-based hatred.

The legislation in regard to sexual assault in Australia is characterized by the fact that it is applied in different ways depending on the state or territory of the country while each of them has its criminal code comprising of provisions on sexual offenses. While these codes do not directly name explicit rape of a transsexual, it includes forcible and non-consensual sexual union or contact. Moreover, federal and state anti-discrimination laws afford protection to Transgender persons against discrimination and vilification and are likely to deal with some of the root causes of bias that often results in sexual assault of females.

## **CONCLUSION AND SUGGESTIONS**

Our research brings attention to the pressing necessity of implementing gender-neutral rape laws in India. This is imperative to guarantee equal protection and access to justice for every survivor of sexual violence, transcending gender boundaries. Present laws, primarily centred around women, neglect the experiences of transgender individuals who unfortunately face higher risks of sexual violence incidence. Despite the progressive intent of the Transgender Act 2019, it insufficiently addresses sexual violence and the demand for gender-neutral statutes. Extensive literature explorations expose the detrimental consequences of sexual violence on transgender individuals, ranging from aggravated mental health problems and hindered healthcare accessibility to complications encountered while pursuing legal aid. Eradicating these predicaments relies on enhancing police trainings, incorporating trauma-informed strategies, and bolstering community-oriented establishments tailored to serve transgender survivors uniquely. Thus, embracing gender-neutral rape laws emerge as a paramount stride in nurturing a compassionate and impartial society for every individual, irrespectively of their gender affiliations.

To truly protect the rights of transgender individuals, several amendments and additional measures are necessary:

By abandoning the medical requirement for gender identity determination, and granting people self-determination and respecting their human dignity, these policies indicate societal progress toward humanization. Fix social anti-discrimination measures that explicitly mention the rights of marriage, adoption and reproductive care. See to it that these laws are implemented fully and that the masses appreciate the idea of transgender rights. Legalize begging and turn it into a possibility to support the economic necessities of poor people who will be able to overcome the causes of economical marginalization.

Create a chance for trans individuals to tell their stories in a forum such as Transgender Social Welfare Committees, to ensure that their input is used in the policy formulation process. Give economic and social services to the disadvantaged, for example, to do with the healthcare, housing, education, and employment fields, so as to take away from their deinstitutionalization. Improve knowledge and sensitivity in law enforcement, healthcare workers, educators and general community to raise knowledge and respect for transgender rights.



## **TRANSGENDERS ON THE PRINCIPLES OF EQUAL REMUNERATION ACT – AN ANALYSIS BASED ON THE CODE ON WAGES, 2019**

Lakshya Leo Gerald<sup>1</sup>

### **INTRODUCTION**

In the contemporary era, the discourse surrounding gender equality in the realm of labour rights and the inclusion and recognition of transgender individuals is found to remain a pivotal point which is often overlooked in the legislative aspect. At the intersection of gender identity, labour rights and societal perceptions, there is found to be a complex web of challenges and opportunities concerning transgender rights who are seeking equality in the workplace and fair treatment in the work environment. To analyse the challenges put forth, it's crucial to first understand the concepts of gender and sex to better create an environment that provides equal treatment. On the note of this backdrop, the enactment of the Code on Wages, 2019 holds significant responsibility since it is repealing the Equal Remuneration Act and will be subject to great scrutiny for its effectiveness in addressing the rights and concerns of transgender workers in providing an equal work environment.

The paper will first delve into the fundamental concepts of gender and sex, where the nuances and the differences between the two shall be highlighted. The societal implications of the two along with their misinterpretations shall also be dealt with. Gender and sex, irrespective of the way the terms are used, the two terms are widely different where one is a social construct while the latter is a term that's associated with the biology of the person. Gender is a social construct which is imposed on the person based on the biological confines of the sex, and the people who find within themselves a difference between the two lead to confusion in society and thereby are discriminated against, among whom transgenders are one category of people who are faced with such situation.

Code on Wages, 2019 is found to have major gaps in being inclusive of transgenders while carrying forward the principles of the Equal Remuneration Act, 1976. The first sub-clause of S.3 of the Code<sup>2</sup>, which talks about the payment of wages for employees, comprehensively includes transgenders, unlike the predecessor ERA. However, the 2<sup>nd</sup> sub-clause of the very

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2. Code on Wages, 2019 §, No. 29, Acts of Parliament, 2019 (India)

same act that talks about recruitment, which is the very first hindrance that any person of the minority community faces, invites many questions about the applicability and the inclusivity of the provision. It states that there cannot be discrimination based on 'sex' during employment or recruitment until or unless there is any specific legislation that directly places a ban on the recruitment of 'women' for that particular role. This significant difference in the use of the terms raises substantial questions as to the intent of the legislators since it is blatantly registered that gender and sex are different by various authorities, and cannot be used interchangeably, which shall be discussed in the paper. To make the 2<sup>nd</sup> sub-clause even more complicated to be interpreted to include transgenders, the clause uses the term 'women' explicitly making the clause specific only to women. The paper shall conclude itself with a proposed amended section of the code after a thorough analysis of the international position of reference in terms of gender and sex for transgenders, the efficiency of the code along with a word-to-word analysis of the section from the perspective of transgenders.

Through a multifaceted examination and analysis of the legal frameworks, social perceptions and policy implications, an attempt to contribute to the ongoing discourse on gender equality and human rights is made.

## **GENDER V. SEX – MISINTERPRETATIONS AND THE IMPLICATIONS**

The terms 'gender' and 'sex' have always been used interchangeably to refer to the binary difference between 'male' and 'female' throughout the country. However, it's important to understand that the terms are not synonymous with each other, even though they are two aspects of the identity of a person. It could be said that the terms gender and sex are different, the latter is a classification based on the biological appearance of the reproductive system of the person, while the former refers to the social construct that is imposed on the person to align with the sex that the person was classified into<sup>3</sup>. In simple, sex refers to the biological and physiological characteristics that distinguish males and females, whereas gender refers to the social constructs and the cultural characteristics that define what it means to be a man or woman in a particular society. The term sex brands a person as to whether the person is male or female, while the term gender labels a person as to whether the person is masculine or feminine<sup>4</sup>.

The term sex is a characterization based on the biological organs. When a person does not conform to the expectations that are associated with their sex that was assigned at birth or presumed to be assigned at birth, then they would usually be identified as transgenders, whereas

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3. GAROFALO, E.M. AND GARVIN, H.M., 2020. THE CONFUSION BETWEEN BIOLOGICAL SEX AND GENDER AND POTENTIAL IMPLICATIONS OF MISINTERPRETATIONS. IN *SEX ESTIMATION OF THE HUMAN SKELETON* (pp. 35-52). Academic Press.

4. Riswan, M., 2021. Conceptualizing sex and gender.

the term cisgender is used to refer to someone whose gender identity and expression is in line with the sex assigned at birth<sup>5</sup>. Thus, the term sex and gender are different, and transgenders are a type that is in relation to the various social constructs imposed on people. The difference in the terms is also acknowledged by the ILO which defines transgender as a person whose gender identity differs from what was typically associated with the sex that was assigned at birth<sup>6</sup>. Along the same lines, the definitions of the terms sex and gender are also acknowledged by the ILO and it's evident that the ILO is aiming for the promotion of a work environment that is equitable for all genders and sex irrespective of their orientation, which is the root of the ILO's principles<sup>7</sup>.

There is a high need for a definite understanding of these terms and proper application of the same to make sure that there are no loopholes and misinterpretations in the transgender community. It is important to provide solidified legal protection to the community without leaving it up to the discretion of the judges who are responsible for the case. The idea of leaving a matter to the discretion of the judge may not be a bad option unless the matter at hand that is in consideration is socially and morally condemned. Though the phenomenon of a person being transgender is widely understood on a scientific basis, it's still subject to moral condemnation and attached to a social stigma which also means that the law has to be direct when dealing with the rights that the states provide for the community. Scholars also agree that there is a dire need for the precise appropriation of rights such that there shall not arise a need for a struggle to attain the rights that are rightfully theirs, which is against every principle of justice<sup>8</sup>. The fact that transgender person is already facing significant challenges concerning employment opportunities, limiting their economic opportunities is a major setback in the labour legislation of the state<sup>9</sup>.

Predominantly the labor laws are not directly inclusive of the trans workers. The countries predominantly try and interpret the international standards and principles to be inclusive of the trans workers within the ambit of their labor rights. The Yogyakarta principles<sup>10</sup>, which

5. Garofalo and Garvin, *supra* note 3.

6. Morrison, K., 2022. Inclusion of lesbian, gay, bisexual, transgender, intersex and queer (LGBTIQ+) persons in the world of work: A learning guide.

7. Convention C100 - Equal Remuneration Convention, 1951 (No. 100), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_Ilo\\_Code:C100](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_Ilo_Code:C100) (last visited Apr 3, 2024).

8. Garofalo and Garvin, *supra* note 3.

9. Sangwan, S., *Interpretation of Labour Laws of Transgenders in India*, 2 INDIAN JL & LEGAL RSCH., 4 (2022)

10. YOGYAKARTAPRINCIPLES.ORG, *The Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, <https://yogyakartaprinciples.org/> (last visited

specifically lays down the principles for the rights of the LGBTQ+ Community provides the principles directly to states to take into consideration to make their laws inclusive of transgenders. The Treaty of Functioning of the European Union (TEFU)<sup>11</sup> specifically states about the discrimination while the Charter of Fundamental Rights of the European Union<sup>12</sup> specifically mentions the factors of sex and sexual orientation into its list of factors for which discrimination shall be condemned. According to the Istanbul Convention<sup>13</sup>, discrimination on the grounds of gender is prohibited where the scholars were found to have interpreted the same to be inclusive of transgenders for transgender rights. A similar interpretation is also considered for the European Convention on Human Rights (ECHR)<sup>14</sup>. One of the major interpretations to be considered is the interpretation of the principle laid down by the Universal Declaration of Human Rights (UDHR)<sup>15</sup>. In its list of grounds for the prohibition of discrimination, apart from sex the declaration also gives ‘other status’ as one of the factors for the grounds of non-discrimination. According to scholars, it is interpreted to be used to include transgenders in its ambit<sup>16</sup>. Thus, it could be understood that the transgenders are brought under the umbrella of the gender category and not the sex category when it comes to the protection of their rights on an international perspective.

### INTENT BEHIND THE S.3 OF THE CODE ON WAGES

On a judicial aspect, India has been proven to have a system that is inclusive of the transgenders into its ambit of law. However, the legislation still has scope to improve itself in its inclusivity of transgenders within the ambit of the law. Despite the Judiciary officially recognizing transgenders as the third gender<sup>17</sup> and there being an explicit act to protect the rights of the community, the legislature is still short in making sure that the laws made are inclusive

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Apr 7, 2024).

11. Treaty on the Functioning of the European Union (TFEU) - The Faculty of Law, [https://www.jus.uio.no/english/services/library/treaties/09/9-01/tfeu\\_cons.html](https://www.jus.uio.no/english/services/library/treaties/09/9-01/tfeu_cons.html) (last visited Apr 8, 2024).
12. Charter of Fundamental Rights of the European Union, 326 OJ C (2012), [http://data.europa.eu/eli/treaty/char\\_2012/oj/eng](http://data.europa.eu/eli/treaty/char_2012/oj/eng) (last visited Apr 8, 2024).
13. About the Convention - Istanbul Convention Action against violence against women and domestic violence - [www.coe.int](http://www.coe.int), [istanbul convention action against violence against women and domestic violence, https://www.coe.int/en/web/istanbul-convention/about-the-convention](https://www.coe.int/en/web/istanbul-convention/about-the-convention) (last visited Apr 8, 2024).
14. European Convention on Human Rights - The European Convention on Human Rights - [www.coe.int](http://www.coe.int), THE EUROPEAN CONVENTION ON HUMAN RIGHTS, <https://www.coe.int/en/web/human-rights-convention> (last visited Apr 8, 2024).
15. United Nations, *Universal Declaration of Human Rights*, UNITED NATIONS, <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (last visited Apr 8, 2024).
16. Mawed, *supra* note 1.
17. NALSA vs. Union of India (2014) 5 SCC 438

of the community. The lack of specificity and the implementation of the labor laws from the lens of the transgender community creates a major issue for the community as a whole. Due to the same, transgenders are subjected to significant challenges in accessing formal employment opportunities due to employment discrimination which in turn leads to the limitation of their economic opportunities<sup>18</sup>.

On the lines of the same, transgenders are predominantly discriminated against by society based on illogical social and moral grounds. As a result of which, transgenders are subject to great discrimination in their opportunities for education and employment. On the intersection of labour laws, and human rights lies the ERA. The ERA is a legislation that has its main objective to make sure that women are given equal remuneration for any equal work done at par with men. The legislation being a law drafted in the year 1976, is justified to have been focused only on the women as a marginalised section of the society that needs legislation to protect them. However, currently, the Wages code was passed by the parliament in the year 2019, 5 years after the NALSA Judgement, which means that such an absence of inclusion of the community cannot be accepted. The Code has the assent of the president which would repeal the ERA and implement the principle of equal wages for equal work in the Indian labour system.

Upon<sup>19</sup> analyzing the wages code, the whole crux of the ERA is found to be encapsulated in the S.3 of the code. The S.3 of the code goes as follows:<sup>20</sup>

|    |                                                                                                                                                                                                                                                                                                 |                                                    |
|----|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------|
|    | <b>3. (1) There shall be no discrimination in an establishment or any unit thereof among employees on the ground of gender in matters relating to wages by the same employer, in respect of the same work or work of a similar nature done by any employee.</b>                                 | Prohibition of discrimination on ground of gender. |
| 35 | (2) No employer shall,—                                                                                                                                                                                                                                                                         |                                                    |
|    | (i) for the purposes of complying with the provisions of sub-section (1), reduce the rate of wages of any employee; and                                                                                                                                                                         |                                                    |
| 40 | (ii) make any discrimination on the ground of sex while recruiting any employee for the same work or work of similar nature and in the conditions of employment, except where the employment of women in such work is prohibited or restricted by or under any law for the time being in force. |                                                    |

The first clause clearly states that no discrimination shall be done on the grounds of gender, thereby reinforcing the equal wages for equal work principle. The second clause talks about discrimination during recruitment and prohibits the same on the grounds of sex. It is well established that the terms of sex and gender are widely different and this difference in terms

18. Sangwan, *supra* note 9.

19. Code on wages, *Supra* note 3

20. Code on Wages, *Supra* note 3

used shall lead to confusion and loopholes which shall not be allowed in a welfare statute for a marginalized sector.

As explored before, transgenders are brought under the umbrella of the grounds of gender rather than the ground of sex due to the variation in the terms and based on the phenomenon of a person becoming transgender. The second clause, even more, substantiates the non-inclusivity of the transgenders by the subsequent use of the phrase “except where the employment of ‘women’ in such works is prohibited or restricted”, which shows that the intended beneficiary of the statute is women only and not towards transgenders or general. The specificity shown in adding the term women in the second clause makes it even harder to provide a leeway for the transgenders to make the statute applicable for them.

The intent may be substantiated further such that based on the public documents released by the government<sup>21,22</sup>, critical analysis of the scholars<sup>23</sup>, the review of the code by the standing committee<sup>24</sup>, the statute is focused only on the development of opportunities for women and the inclusivity of transgender has not been considered.

### **EFFICIENCY OF THE CODE IN SUBSTITUTING THE EQUAL REMUNERATION ACT FROM THE TRANSGENDERS PERSPECTIVE**

It is well well-known fact that trans people are subjected to a great deal of discrimination, have very few opportunities and have greater odds of being unemployed which leads to a situation of poverty arising for the community as a whole. There may arise a question that since the judiciary is very well inclusive of the transgenders why there will be an issue with the ambiguity that is in place with the legislation. It is to be understood that the judiciary is supposed to be an intervening organ of the Indian legal system. It's not the law-making body. The legislation has to make laws that are specific, clear and without any ambiguity.

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21. PRS INDIA, <https://prsindia.org/billtrack/prs-products/prs-standing-committee-report-summary-2924> (last visited Apr 3, 2024).

22. LABOUR CODES MINISTRY OF LABOUR & EMPLOYMENT|GOVERNMENT OF INDIA, <https://labour.gov.in/labour-codes> (last visited Mar 28, 2024).

23. SHRADDHA, C, LABOUR LAW REFORMS AND WOMEN'S WORK IN INDIA: ASSESSING THE NEW LABOUR CODES FROM A GENDER LENS, Institute of Social Studies Trust (2023). India has seen a wide-ranging retrenchment of hard-won labour rights with serious \nconsequences for working communities in general, and for the rights of women workers. This has only \nbeen exacerbated by the global pandemic, which as elsewhere, has exposed and deepened the \nfault-lines and the structural inequalities that inhere in Indian society. While the country was already \n witnessing a serious crisis of unemployment prior to the pandemic, the pandemic and the \ngovernment's response in the form of a brutal and stringent lockdown that was enforced on 1.3 billion \npeople with 4 hours of notice on 24 March 2020 has had devastating consequences particularly for \n those in already precarious contexts (Ghosh 2020)

24. Supra note, 21



Having a law system where the judiciary is required to intervene every time will only lead to the accumulation of suits in the court of law, waste of resources, etc. It not only is detrimental to the judicial system, but it also puts the part seeking justice through a long process which would be unnecessary if the legislation had been clear in the initial stage itself. Such a situation will eventually lead to a scenario where the belief in the judicial system goes down.

Considering the factors that the transgender community is put through, lack of equal education opportunities, lack of proper equitable workplace environment, the transgenders are also subject to poverty which will not put them in an ideal situation to initiate a suit in case of discrepancies<sup>25</sup>. Having an ambiguous statute shall also lead to the issue of where the decisions made by the different regions may be different until or unless there arises a superior precedent that gets ruled by the apex court. By the time such a ruling comes into place, there may even be irreparable damage to the community.

Considering a sensitive community such as the transgenders, due to the illogical moral and social stigma that is associated, leaving the interpretation of the law up to the judges may not always be fruitful. Though controversial to acknowledge, there may even be judges who may be prejudicial towards transgenders and in such scenarios, the principles of human rights get defeated. It has to be acknowledged that to prevent such situations in a practical sense, straightforward legislation with strict interpretation must be present.

## CONCLUSION AND SUGGESTIONS

Throughout the comprehensive analysis, the situation of transgenders concerning the issue of equal remuneration in the workplace was examined. Upon analyzing the inclusion of transgenders within the umbrella of sex and gender, it was understood that sex and gender are two completely different terms that are acknowledged by various international organizations and authorities. It was also deduced that transgenders are brought under the ambit of gender predominantly since the categorization is much more related to the biological characteristics of the person, which may or may not also be a factor for a person to identify as a transgender.

Upon exploring the inclusivity of S.3 of the wages code for transgenders specifically, it's well established that the lawmakers were not in consideration of the transgender community. It's evident through the word-to-word analysis of the section along with the other documents that were released along with the bill and the report of the standing committee on the section. In other words, it may be said that the transgenders were neglected during the drafting of the section. The need to include transgenders is high due to the lack of availability of solidarity in a workplace environment that shall be available for a transgender. Unlike women in a workplace,

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25. Green, *supra* note 2.



or any other class of workers for that matter, there may hardly be one or two transgenders in a workplace, and this leads to a lack of opportunity for the same to raise any issue that may arise concerning any discrimination. There is a need to raise the issue collectively since the workers may not be financially sound due to the vicious cycle that they are pushed into, which again corroborates the need for a specific unambiguous law.

The section talks about non-discrimination to gender in matters of wages, however, when it comes to recruitment and other treatments in the workplace, the ground is mentioned as sex and not as gender. The aspect of recruitment is much more important for transgenders since the hardship in the workplace environment starts right from the stage of recruitment.

On a suggestive note, a change in the wording used in the statute may be changed. The ideal statute upon solving the issues identified may seem as follows:

“(1) There shall be no discrimination in an establishment or any unit thereof among **all** employees on the ground of gender, **sex, or any other such grounds**, in matters relating to wages by the same employer, in respect of the same work or work of a similar nature done by any employee.

(2) No employer shall, —

(i) for the purposes of complying with the provisions of sub-section (1), reduce the rate of wages of any employee; and

(ii) make any discrimination on the ground of sex, **gender or any other grounds** while recruiting any employee for the same work or work of similar nature and in the conditions of employment, except where the employment of **such person** in such work is prohibited or restricted by or under any law for the time being in force.”<sup>26</sup>

By adding the term gender and sex to both the clause shall prevent any type of lacuna and loopholes concerning the opportunities that may be made available to the transgenders. Also, removing the term women and replacing it with the term such person, shall make the clause general and applicable to transgenders directly without any scope for ambiguity. If required, the section may even contain an explanation which may explicitly state that transgenders are included within the ambit of the section.

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26. An excerpt from the Code on Wages, 2019 that is altered for the purposes of the project – the bold underlined parts of the sections are the altered parts of the excerpt.

## **LAW AS A TOOL FOR SOCIAL CHANGE: ADVANCING GENDER NEUTRALITY IN LEGAL SYSTEMS**

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### **INTRODUCTION**

This is an issue scholar in the past have studied for a really long time—the interaction between law and society. Laws operate both as reflections of social norms and values and as powerful tools to shape and transform the same norms. That is what makes this dual nature of laws—being at one moment a mirror and at another moment a cultural instrument for change—get special recognition in the current global efforts toward gender equality and gender neutrality within the legal framework.

Its focus is on law as an instrument of social change and, in this context, on developments toward gender neutrality in legislation. It discusses how legal regimes that, by tradition, have fortified gender inequities are often being harnessed today to change and address these very prejudices to further equity and inclusiveness. The result is that movements for gender-neutral laws are major strides toward correcting systemic gender bias and leading to a more just society.

Legal systems are responsible for driving social behaviour and setting downs norms for society in its thrust towards the goals of social justice and equality. This paper looks at the changing scenario with reference to Indian law in the direction of gender neutrality and how the same can be used for social changes towards gender equality. The law has undoubtedly, in many ways, even earlier, codified and perpetuated certain forms of social biases, but it has equally been a means to challenge and rectify these prejudices.

The concept of gender neutrality within the purview of law is definitely a bold step away from the traditional gendered legislations that had long perpetuated discrimination and stereotypical gender roles. Gender-neutral laws strive to serve everybody equally—regardless of one's gender identity. This acquires more relevance in the context of India, where deep-rooted cultural norms and historical practices had slowly caused the emergence of gender-based discrimination in almost all walks of life.

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This paper explores the historical context of gender in Indian law, to understand how the shift from being gender-specific to gender-neutral has taken place. Further, this paper will trace the theoretical underpinnings for such a move towards gender neutrality and then check some of the key areas of Indian law in which implementation has either been sought successfully or unsuccessfully. Further, this paper puts into a comparative analysis those areas with other jurisdictions to highlight both progresses made and the challenge in achieving comprehensive gender neutrality in Indian law.

The social impact of de-gendered laws in India will also be ascertained by the present study, understanding how legal reforms have been taking place on the ground with respect to the attitude and gendered relationships of one another within society. The degree to which such laws can be implemented in compilation toward gender neutrality and strategies through which hindrances can be overcome are proposed. In this regard, this situation will have far-reaching implications for a wider discussion on gender equality and legal reform in India.

Legal reforms form an essential ingredient for progress, but they can only form one constituent of a wider societal shift towards gender equality. The paper argues cogently for such comprehensive changes: legislative ones, combined with reforms in policy, community engagement, and educational initiatives, to bring about a lasting social change toward gender equality in all walks of Indian society.

## **THE HISTORICAL BACKGROUND OF GENDER IN INDIAN LAW**

The gender issue in Indian law has evolved through a complex mix of cultural traditions, colonial influences, and post-independence changes. Grasping the historical background is essential for identifying the problems and progress toward gender neutrality in Indian policy.

### **Pre-Colonial Era**

Religious writings and customary laws had supplied the base of the legal systems in ancient and medieval India. Important among these religious writings is the Dharmashastra, especially Manusmriti, which played a significant role in the crystallization of legal rules. Even as some of these laws acknowledged women's rights to property ownership under special conditions, others codified patriarchal practices and gender-based responsibilities.<sup>3</sup>

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3. FLAVIA AGNES, *LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA* Oxford Press (1999).

## Colonial Period

The British colonial and post-colonial eras changed the legal system of India to a great extent. The establishment of English common law and the codification of personal laws based on religious ties had far-reaching consequences for gender relations:

**Hindu Law:** The codification of Hindu law frequently reinforced patriarchal views, notably those concerning inheritance and marriage<sup>4</sup>

**Muslim Law:** The colonial administration's interpretation of Muslim personal law occasionally resulted in the loss of rights that women had previously had under Islamic law<sup>5</sup>.

**Criminal Law:** The Indian Penal Code of 1860, which introduced the principle of equality before the law, also mirrored Victorian morality and gender prejudices in areas such as adultery and rape legislation<sup>6</sup>.

## Post-Independent Era

The promulgation of the Indian Constitution in 1950 was a watershed moment in the fight of gender equality. The key provisions include:

Article 14 ensures equality before the law and provides equal protection under law.

Article 15 prohibits discrimination on grounds of religion, race, caste, sex, or place of birth.

Article 16 ensures equality of opportunity in public employment. Despite these provisions, however, gender equality was a difficult concept to implement.

There were some gradual changes during the period spanning from the 1950s to the 1970s, particularly in the case of Hindu personal law:

The Hindu Marriage Act, 1955; the Hindu Succession Act, 1956; and the Hindu Adoption and Maintenance Act, 1956.

These legislations aimed at enlarging the rights of women in marriage, divorce, inheritance, and adoption. However, they still retained.

## The Legal Reforms and the Women's Movement

The women's movement in India gathered momentum in the 1970s and 1980s, with far-reaching changes in legislation. Some of these include the following:

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4. ARCHANA PARASHAR, WOMEN AND FAMILY LAW REFORM IN INDIA: UNIFORM CIVIL CODE AND GENDER EQUALITY (1992).
  5. TAHIR MAHMOOD, MUSLIM PERSONAL LAW: ROLE OF THE STATE IN THE INDIAN SUBCONTINENT (1995).
  6. PRATIKSHA BAXI, PUBLIC SECRETS OF LAW: RAPE TRIALS IN INDIA (2014).

The Criminal Law (Amendment) Act of 1983 amended the rape-related rules, introducing the category of cruelty to women under the Indian Penal Code.

- Under the Family Courts Act, 1984, special courts were established to take jurisdiction over all family cases.

- Under the Commission of Sati (Prevention) Act of 1987, sati and its glorifying have been declared illegal.

### **Moving Toward Gender Equality**

The terms and the concepts in Indian law started evolving to be more gender-neutral towards the end of the 20th and the beginning of 21st centuries.

The Protection of Women from Domestic Violence Act of 2005: This act was steered towards widening the ambit of domestic relationships, keeping the protection of women as its main goal.

The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, addressed concerns regarding workplace harassment, although it continued to specifically focus on women.

Current discussions on the policy to formally recognize marital rape and to make rape policy gender-neutral underscore the move by stakeholders to gender neutrality.<sup>7</sup>

### **Judicial Activism**

The Indian judiciary has played an important role in interpreting legislation that promote gender equality. In the Landmark cases, such as *Vishaka v. State of Rajasthan* (1997)<sup>8</sup> on sexual harassment and *National Legal Services Authority v. Union of India* on transgender rights<sup>9</sup>, have had a profound impact on the legal system in India. This historical overview highlights how Indian law has gradually evolved from gender-specific to increasingly gender-neutral methods<sup>10</sup>. However, it also emphasizes the continued difficulty in achieving gender neutrality in all areas of policy. These following sections of this paper will look more into these issues and the possibility for future adjustments.

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7. Gautam Bhan, Notes on a Jury: Performing Gender in Public, in *Inter-Asia Cultural Studies Reader on Gender* (S. Krishnan & A. Kurian eds., 2019).

8. *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

9. *National Legal Services Authority v. Union of India*, (2014) 5 SCC 438.

10. Rituparna Bhattacharyya, Understanding the Spatialities of Sexual Assault against Indian Women in India, 23 *Gender, Place & Culture* 1375 (2016).

## **THEORETICAL FOUNDATIONS FOR GENDER NEUTRALITY IN LAW**

The concept of gender-neutral lawmaking is grounded in several academic structures and legal concepts. These underpinnings are important in understanding the success and problems of adopting gender-neutral laws for India and globally.

### **Equality before the Law**

Equality before the law is one of the cardinal principles underlying the modern legal system and has been the reason behind gender-neutral legislation. To be very precise, Article 14 of the Indian Constitution means that all persons, irrespective of gender, are treated on par before the law.<sup>11</sup> This idea has a theoretical basis in the natural equality of all persons demanded by philosophers such as John Locke and Jean-Jacques Rousseau.<sup>12</sup>

### **Feminist Legal Theory**

Feminist legal thought has made a great contribution to the move toward gender-neutral law. The discussion was helped by several schools of feminist legal thought, including these-

-Liberal feminism- Belief in equal rights and equal opportunities within present legal systems<sup>13</sup>.

- Radical Feminism: Sees an underlying masculine bias in judicial systems and seeks radical changes<sup>14</sup>.

-It is in fact, a domain of intersectional feminism, focused on connections between social categorizations and their bearing on discrimination<sup>15</sup>.

In the Indian context, one can look at the work of feminist legal academia such as Flavia Agnes and Ratna Kapur towards the bolstering of such theories in the ambit of Indian law and society.

### **Gender as a social construct**

The recognition of gender as a social construct rather than a binary biological determinant has far-reaching ramifications for legal philosophy. This viewpoint, promoted by researchers

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11. . D.D. BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA (2018).

12. NIVEDITA MENON, RECOVERING SUBVERSION: FEMINIST POLITICS BEYOND THE LAW (2004).

13. ARCHANA PARASHAR, FEMINIST LEGAL THOUGHT: AN OVERVIEW, IN REDEFINING FAMILY LAW IN INDIA, A. Parashar & A. Dhanda eds., (2000).

14. Catharine A. MacKinnon, Toward a Feminist Theory of the State (1989).

15. Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. Chi. Legal F. 139.

such as Judith Butler, questions standard gender-based categorizations in law and advocates for more inclusive and flexible legal terminology<sup>16</sup>. In India, this theoretical approach has been especially relevant in recent legal discussions about transgender rights and non-binary gender identities<sup>17</sup>.

### **Non-Discrimination Principle**

The principle of non-discrimination, which prevents discrimination based on protected characteristics such as gender, is important to the legal idea of gender neutrality. This notion is represented in international human rights treaties and state laws globally. Under India, it is incorporated under Article 15 of the Constitution and has helped to challenge gender-based discriminatory legislation and practices.

### **Gender mainstreaming**

Gender mainstreaming is an approach for advancing gender equality that includes including gender perspectives into policy development, design, implementation, monitoring, and evaluation<sup>18</sup>. This method, used by the United Nations and many other nations, including India, provides a theoretical foundation for introducing gender neutrality into all aspects of law and policymaking.

### **Capabilities Approach**

The capabilities approach, established by Amartya Sen and Martha Nussbaum, emphasizes on individual freedom to pursue well-being. This idea has consequences for gender neutrality in law by highlighting the need to establish conditions that allow all persons, regardless of gender, to attain their full potential. This method has affected gender equality talks in India, including education, work, and personal legislation.

### **Intersectionality and Law**

Gender neutrality is now trending in legal discussions around the notion of intersectionality, which highlights the interconnectedness of social categories including gender, race, and class. The method becomes even more important in India's complex social context, as it highlights the necessity for laws to tackle the many overlapping issues related to discrimination against women and gender minorities<sup>19</sup>.

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16. Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1990).

17. Ranjana Nagarajan & Archana Parashar, *Gender and Law: Theory and Practice* (2013).

18. Martha C. Nussbaum, *Women and Human Development: The Capabilities Approach* (2000).

19. Amita Dhanda & Archana Parashar, *Engendering Law: Essays in Honour of Lotika Sarkar* (1999).



## **GENDER NEUTRALITY IN INDIAN LEGISLATION: PROGRESS AND CHALLENGES**

Although there has been a lot of movement towards gender neutrality in Indian law, there are still many obstacles to overcome. The main areas of Indian law where gender neutrality has been applied or is being discussed are examined in this part, with an emphasis on both the successes and the areas that still need revision.

### **Constitutional Provisions**

The Indian Constitution establishes a solid framework for gender equality.

- Article 14 ensures equality before the law.
- Sex discrimination is prohibited under Article 15.
- Article 16 assures equal opportunity in public employment.

However, the meaning and execution of these clauses has changed throughout time. The Supreme Court's broad interpretation of Article 21 (right to life and personal liberty) has been very useful in advancing gender equality.

Progress- The Constitution (Ninety-third Amendment) Act of 2005 added clause (3) to Article 15, providing specific measures for the progress of socially and educationally backward classes, including women.

Balancing formal equality with substantive equality is a continuing difficulty in constitutional interpretation<sup>20</sup>.

### **Criminal Law**

Criminal law has had substantial improvements aiming at gender neutrality, but it is still a difficult issue.

Progress- The Criminal Law (Amendment) Act of 2013 broadened the definition of rape and included gender-neutral measures for sexual harassment and stalking.

The Transgender Persons (Protection of Rights) Act of 2019 acknowledges transgender identities under criminal law (but it has been criticised for other issues).

Challenges- The discussion over gender-neutral rape legislation is ongoing, with arguments for and against modifying the present gender-specific definition. While adultery is no longer a criminal offense, civil laws nevertheless use gendered terminology.

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20. Amita Dhanda, Realising the Right to Development for Persons with Disabilities, in India Development Report 2008 (K.S. Parikh & R. Radhakrishna eds., (2008).

### **Family Law**

Gender neutrality has specific issues in Indian family law, which is primarily influenced by religious personal rules.

Progress- The Hindu Succession (Amendment) Act of 2005 gave daughters equal inheritance rights in ancestral property.

The Muslim Women (Protection of Rights on Marriage) Act of 2019 criminalized triple talaq, with the goal of protecting Muslim women's rights.

Challenges: Personal laws still include gender-specific rules for marriage, divorce, and inheritance. The issue over a Uniform Civil Code as a method of achieving gender equality remains divisive.

### **Labor Laws**

India's labor policy has made steps toward gender neutrality, but loopholes persist.

Progress- The Equal Remuneration Act of 1976 requires equal compensation for equal labor, regardless of gender.

- The Maternity Benefit (Amendment) Act of 2017 extended maternity leave and included provisions for adoptive moms.

Challenges: The absence of comprehensive paternity leave regulations perpetuates gendered parenting norms<sup>21</sup>.

- Many informal sector workers, including women, are exempt from labor rules (Raveendran, 2016).

### **Property Rights**

Property rights have made great progress toward gender neutrality, notably in Hindu law.

Progress: Amendments to the Hindu Succession Act have equalized inheritance rights for sons and girls (Agarwal, 2005).

Several governments have implemented steps to boost women's property ownership, such as cheaper stamp duty for female property buyers.

Challenges: Some areas' customary rules continue to discriminate against women in property concerns.

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21. Madhura Swaminathan, Rethinking Childcare: A Trade Union Initiative, 54 ECON. & POL. WKLY. 65 (2019).

Implementation gaps continue, particularly in rural regions where understanding of legal rights is generally low.

### **Political Representation**

Efforts to expand female political engagement have produced varied outcomes.

Progress: The 73rd and 74th Constitutional Amendments required 33% reservation for women in local government bodies (Panchayati Raj institutions).

The Women's Reservation Bill, which proposes 33% reservation for women in the Lok Sabha and state legislative assemblies, has been waiting for more than 20 years.

### **LGBTQ+ Rights**

In recent years, there have been significant advances in recognizing and defending LGBTQ+ rights, with laws moving toward more gender inclusivity.

Progress: The Supreme Court's ruling in *Navtej Singh Johar v. Union of India*<sup>22</sup> decriminalised consensual same-sex relationships.

- The NALSA decision (2014) acknowledged transgender people's right to self-identification of gender.

Challenges: Many laws continue to function in a binary gender framework, unable to properly accommodate non-binary and transgender identities<sup>23</sup>.

- The Transgender Persons (Protection of Rights) Act of 2019, while a step forward, has been criticized for several elements that may promote binary gender standards<sup>24</sup>.

### **Gender-Neutral Language in Legislation**

The employment of gender-neutral terminology in law is a continuous trend in India. Recent legislation and amendments have increasingly used gender-neutral wording (for example, "person" rather than "he" or "she").

Older legislation and established legal terminology frequently include gendered language, necessitating a thorough assessment and updating<sup>25</sup>.

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22. *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1.

23. Arvind Narrain, *Right to Love: Navtej Singh Johar v. Union of India - A Transformative Constitution and the Rights of LGBT Persons* (2018).

24. Saptarshi Chhabra, *The Transgender Persons (Protection of Rights) Act, 2019: A Critique*, 55 *Econ. & Pol. Wkly.* 14 (2020).

25. Archana Parashar & Amita Dhanda, *Redefining Family Law in India: Essays in Honour of B. Sivaramayya* (2008).

In conclusion, while India has made tremendous progress toward gender neutrality in numerous areas of policy, obstacles remain. The interaction of progressive legislative reforms and firmly ingrained social conventions provides a challenging environment for establishing real gender neutrality. Future changes must address not only the wording of the legislation, but also its execution and societal consequences, in order to effect significant change.

## COMPARATIVE ANALYSIS: INDIA AND OTHER JURISDICTIONS

This comparative analysis examines India's progress towards gender-neutral legislation by comparing its approach to that of other countries. This will highlight areas where India is leading, lagging, and has potential to learn from international best practices.

### Constitutional Provisions

Comparison: -

**United States:** The Equal Rights Amendment, which would explicitly prohibit discrimination on the basis of sex, has not been ratified (Neuwirth, 2015).

**Canada:** The Canadian Charter of Rights and Freedoms explicitly guarantees equality “without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability” (Section 15).

### Comparison

India's constitution provides strong guarantees of equality and non-discrimination and allows for affirmative action for women. This is relatively stronger compared to the United States, which has not ratified the Equal Rights Amendment, but lags behind Canada's explicit Charter protections<sup>26</sup>.

While India's constitutional framework for gender equality is robust, the implementation of these provisions remains a challenge.

### Criminal Law

**United Kingdom:** The Sexual Offences Act 2003 uses gender-neutral language for most sexual offenses, including rape.<sup>27</sup>

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26. Jessica Neuwirth, *Equal Rights Amendment: Unfinished Business for the Constitution* (2015).

27. Philip N.S. Rumney, *In Defence of Gender Neutrality Within Rape*, 6 *Seattle J. Soc. Just.* 481 (2007).

**Germany:** The criminal code uses gender-neutral language for sexual offenses, focusing on the act rather than the gender of the perpetrator or victim<sup>28</sup>.

### Comparison

India's rape laws remain gender-specific, defining rape as an act by a man against a woman. In contrast, the UK and Germany use more gender-neutral language for sexual offenses. This reflects India's tension between protecting vulnerable groups and ensuring equal treatment under the law.

### Family Law

India- Personal laws based on religion govern many aspects of family law, often with gender-specific provisions.

- Efforts towards a Uniform Civil Code have been contentious.
- **Turkey:** Adopted a secular civil code in 1926, replacing Islamic family law with gender-neutral provisions<sup>29</sup>.
- **South Africa** The Recognition of Customary Marriages Act 1998 attempts to balance customary practices with constitutional equality provisions<sup>30</sup>.

### Comparison

India's approach to family law reflects its complex religious and cultural diversity. While countries like Turkey have opted for secular, gender-neutral family laws, India's challenge lies in balancing religious freedoms with gender equality<sup>31</sup>.

India's family laws are governed by personal laws based on religion, often with gender-specific provisions. This contrasts with Turkey's adoption of a secular, gender-neutral civil code, and South Africa's attempts to balance customary practices with constitutional equality.

India's challenge lies in balancing religious freedoms with gender equality in this domain.

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28. Tatjana Hörnle, *The New German Law on Sexual Assault and Sexual Harassment*, 18 German L.J. 1309 (2017).
  29. Ihsan Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralisms in England, Turkey and Pakistan* (2016).
  30. Chuma Himonga & Elena Moore, *Reform of Customary Marriage, Divorce and Succession in South Africa: Living Customary Law and Social Realities* (2015).
  31. Flavia Agnes, *Family Law Volume 1: Family Laws and Constitutional Claims* (2011).

## Labour Laws

**Sweden:** Offers 480 days of parental leave, with 90 days reserved for each parent, promoting shared parental responsibilities<sup>32</sup>.

**Japan:** Revised its laws to offer gender-neutral parental leave, though societal norms often prevent men from taking advantage of it<sup>33</sup>.

## Comparison

While India has strong protections for women workers in certain areas, it lags behind in promoting gender-neutral parenting policies compared to some developed countries.

India has strong protections for women workers, such as the Maternity Benefit Act, but lacks comprehensive paternity leave provisions. Countries like Sweden and Japan have made strides in promoting gender-neutral parenting policies.

While India has progressive policies for women workers, it lags behind in fostering equal parental responsibilities.

## Political Representation

**India:** Women are granted a 33% reservation in local government entities. The Women's Reservation Bill is still pending in state and federal legislatures.

**Rwanda:** has the greatest percentage of women in parliament worldwide (61.3% as of 2023)<sup>34</sup>.

**Finland:** Through party policies and cultural norms, the country achieved strong female representation (46% in the parliament) without the need for legal quotas<sup>35</sup>.

## Comparison

India has taken a progressive stance on women's political representation at the municipal level, although it falls behind other world leaders in this regard nationally.

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32. Ann-Zofie Duvander & Mats Johansson, *What are the Effects of Reforms Promoting Fathers' Parental Leave Use?*, 22 J. EUR. SOC. POL'Y 319 (2012).

33. Hideki Nakazato & Junko Nishimura, Japan, *Leave Policy and Realities*, in *Parental Leave and Beyond*, Recent International Developments, Current Issues and Future Directions (P. Moss et al. eds., 2019).

34. Inter-Parliamentary Union, *Women in National Parliaments* (2023), <http://archive.ipu.org/wmn-e/classif.htm>.

35. Aino Jokinen, *Explaining the Gender Balance in the Finnish Parliament*, in *Gender Equality in Local Politics and Leadership* (S. Pikkala ed., 2020).

India has a 33% reservation for women in local governance, but the Women's Reservation Bill for national and state legislatures remains pending. In comparison, Rwanda has the highest percentage of women in parliament globally, achieved through constitutional quotas, while Finland has high female representation without formal quotas.

India's approach is progressive at the local level but trails global leaders in women's political representation at the national level.

### **LGBTQ+ Rights**

**India:** In 2018, same-sex relationships were become legal. Acknowledged transgender people's right to self-identification as their gender.

**Netherland:** was the first nation to allow same-sex unions in 2001 and has strong anti-discrimination legislation that safeguard LGBTQ+ people<sup>36</sup>.

**Argentina:** In 2012, the country passed one of the most progressive laws pertaining to gender identity in the world, which permits people to alter their gender on official papers without a doctor's diagnosis<sup>37</sup>.

In spite of recent notable advancements in LGBTQ+ rights, India remains far behind other nations in providing complete legal safeguards and acknowledgment for LGBTQ+ people<sup>38</sup>.

India has made significant progress, decriminalized same-sex relations and recognizing the right to self-identification of gender for transgender persons. However, it still lags behind pioneers like the Netherlands and Argentina in comprehensive legal protections for LGBTQ+ individuals.

### **Gender-Neutral Language in Legislation**

**India:** While many earlier laws still use terminology that is gendered, new legislation is gradually embracing gender-neutral language.

In contrast:

**Canada:** The Government of Canada (2015) has criteria for gender-neutral phrasing in laws and routinely evaluates and modifies prior legislation.

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36. Kelly Kollman, *Pioneering Marriage for Same-Sex Couples in the Netherlands*, 24 J. EUR. PUB. POL'Y 100 (2017).

37. Eduardo J. Arrubia & Mariana Brocca, *The Expanding Boundaries of Human Rights: The Systemic Approach of the Inter-American Court and the Issue of Gender Identity*, 24 ANUARIO IBEROAMERICANO DE JUSTICIA CONSTITUCIONAL 11 (2020).

38. ARVIND NARRAIN, *RIGHT TO LOVE: NAVTEJ SINGH JOHAR V. UNION OF INDIA - A TRANSFORMATIVE CONSTITUTION AND THE RIGHTS OF LGBT PERSONS* (2018).



**New Zealand:** The Interpretation Act 1999 provides that phrases in legislation indicating one gender embrace all genders (New Zealand statute, 1999).

**Analysis:** India is making headway toward gender-neutral phrasing in laws, while it does not follow some other countries' systematic policy of examining and revising all laws [Archana Parashar, Gender Inequality and Religious Personal Laws in India, 14 Brown J. World Aff. 103 (2008)]. India is progressively adopting gender-neutral language in new legislation, while many older laws maintain gendered terminology. In contrast, Canada and New Zealand have systematic processes to evaluate and amend laws to guarantee gender neutrality.

India's approach to gender-neutral terminology in legislation is growing but lacks the complete and systematic approach found in some other nations.

In conclusion, our comparative research demonstrates that although India has made great achievements in many areas of gender-neutral law, there are still chances to learn from the more progressive methods used by other countries. India's unique cultural and religious diversity brings both obstacles and possibilities in creating legislation that successfully promote gender equality.

## IMPACT OF GENDER-NEUTRAL LAWS ON INDIAN SOCIETY

This section covers the multiple implications of establishing and implementing gender-neutral legislation in India, noting both the good developments and the obstacles that have surfaced across numerous fields.

### Shifting Social Norms and Attitudes

Gender-neutral legislation have played a vital role in changing conventional gender norms and stereotypes in Indian culture.<sup>39</sup> The positive benefits include increasing public knowledge of gender equality concerns and a gradual adjustment in ideas about gender roles, especially in metropolitan areas. However, the revisions have received pushback from conservative elements of society who consider these rules as a threat to traditional values, and there is a mismatch between legislative reforms and social practices, particularly in rural regions.

### Economic Participation and Empowerment

Gender-neutral labour legislation and property rights have affected women's economic engagement and empowerment. The positive benefits include a rise in women's employment involvement, particularly in the formal sector, and more financial independence owing to equal

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39. MAITRAYEE CHAUDHURI, FEMINISM IN INDIA: THE TALE AND ITS TELLING, REVUE TIERS MONDE, (2017).

inheritance rights. Yet, issues exist, such as a persistent gender wage disparity despite equal pay laws and persisting occupational segregation and glass ceiling effects.

### **Family Dynamics and Personal Laws**

Changes in family laws have had a substantial influence on household relationships and power dynamics. The positive implications include more fair allocation of property among families and better protection for women in situations of domestic abuse and divorce. However, there remains opposition to changes in personal laws, especially in minority populations, and the continuance of patriarchal behaviours notwithstanding legislative improvements.

### **Political Representation and Governance**

Gender-neutral political representation laws, particularly at the local level, have altered the landscape of Indian politics. The positive impacts include increased visibility of women in political roles, especially in rural areas, and greater attention to women's issues in local governance. Challenges remain, such as instances of male family members exercising de facto power despite women holding elected positions and the limited trickle-up effect to state and national politics.

### **Education and Professional Opportunities**

Gender-neutral educational policies have influenced access to education and professional opportunities. The positive impacts include a narrowing gender gap in educational enrolment and literacy rates, as well as increased representation of women in professional fields. However, persistent gender disparities in STEM fields and socio-economic factors still limiting educational opportunities for girls in some regions pose ongoing challenges.

### **Legal System and Access to Justice**

Gender-neutral legislation has altered the operation of the judicial system and access to justice. The positive implications include higher reporting of crimes against women owing to more gender-sensitive legislation and processes, and more presence of women in the court influencing legal interpretations. Yet, impediments to obtaining justice, especially for rural and economically poor women, and insufficient execution of gender-neutral legislation owing to lack of gender sensitization within law enforcement agencies continue to remain issues.

### **LGBTQ+ Rights and Social Inclusion**

Recent legislative reforms have profoundly influenced the LGBTQ+ population in India. The positive implications include increasing visibility and acceptance of LGBTQ+ persons in society post-decriminalization of same-sex relations and rising acknowledgement of varied gender identities outside the binary. However, ongoing societal stigma and discrimination,

as well as restricted economic prospects and social support networks for LGBTQ+ persons, remain issues.

### **Media Representation and Public Discourse**

Gender-neutral legislation has altered media depiction and public conversation on gender problems. The positive benefits include a more fair and sympathetic presentation of gender problems in mainstream media and greater public discussion and understanding of gender equality and rights. Yet, the persistence of gender stereotypes in popular culture and advertising, as well as the pushback and online abuses suffered by proponents of gender equality, provide continuous obstacles. In conclusion, the influence of gender-neutral legislation on Indian society has been substantial and far-reaching, catalysing good developments in numerous fields. However, substantial obstacles persist, as the gap between legal rules and social reality underscores the need for a holistic strategy that combines legislative measures with education, awareness, and social change programs. The path towards a genuinely gender-neutral society in India is continuing, with laws acting as a significant instrument for change, but their success is intricately related to their execution, public acceptability, and the larger cultural environment.

### **OBSTACLES TO ACHIEVING FULL GENDER NEUTRALITY IN INDIAN LAW**

Despite substantial progress, India faces many critical hurdles in establishing total gender neutrality in its legal system. This section addresses the key problems limiting this procedure.

#### **Cultural and Religious Resistance**

One of the biggest barriers is the opposition resulting from deep-rooted cultural and religious customs. Personal laws founded on religious traditions sometimes collide with the idea of gender neutrality, and cultural norms and patriarchal attitudes continue to affect the interpretation and application of laws.<sup>40</sup> The discussion around the Uniform Civil Code emphasises the contradiction between female equality and religion personal rules.

#### **Socio-Economic Disparities**

Socio-economic factors play a significant role in hindering the effective implementation of gender-neutral laws. Economic inequalities limit access to legal remedies, particularly for women from marginalized communities, while educational disparities affect awareness of legal rights and the ability to navigate the legal system.<sup>41</sup> The persistence of the gender wage gap, despite equal pay legislation, reflects these deeper socio-economic inequalities.

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40. Siobhán Mullally, *Feminism and Multicultural Dilemmas in India: Revisiting the Shah Bano Case*, 24 OXFORD J. LEGAL STUD. 671 (2004).

41. JEAN DRÈZE & AMARTYA SEN, AN UNCERTAIN GLORY: INDIA AND ITS CONTRADICTIONS (2013).

### **Political Will and Legislative Inertia**

The lack of political will and legislative inertia pose significant obstacles to advancing gender-neutral legislation<sup>42</sup>. The long-pending Women's Reservation Bill exemplifies the political challenges in implementing gender-neutral reforms, and resistance from various interest groups often leads to watered-down legislation or delayed implementation.

### **Institutional Biases**

Biases within legal and law enforcement institutions pose challenges to the effective implementation of gender-neutral laws<sup>43</sup>. Gender biases among law enforcement officials and judiciary members can influence the interpretation and application of laws, and the underrepresentation of women in higher judiciary positions impacts the gender sensitivity of legal interpretations.

### **Intersectionality and Diverse Needs**

The diverse nature of Indian society, with its various intersecting identities, presents challenges in crafting universally applicable gender-neutral laws. Laws that appear gender-neutral may have disproportionate impacts on different groups based on caste,<sup>44</sup> class, religion, or region, and the needs of transgender and non-binary individuals are often overlooked in binary-focused gender neutrality efforts.

### **Limited Gender-Disaggregated Data**

The lack of comprehensive, gender-disaggregated data hinders effective policymaking and law formulation. Insufficient data on the differential impact of laws on various gender groups makes it challenging to craft truly neutral legislation, and the absence of reliable data on transgender and non-binary individuals further complicates the process of achieving inclusive gender neutrality.<sup>45</sup>

### **Media Representation and Public Perception**

Media portrayal and public perception of gender issues can significantly influence the acceptance and implementation of gender-neutral laws. Stereotypical representation of gender roles in media can reinforce biases and hinder the acceptance of gender-neutral concepts,

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42. SHIRIN M. RAI, *THE GOOD LIFE: ASPIRATIONS, DIGNITY, AND THE POLITICS OF WOMEN'S QUOTAS IN INDIA* (2017).

43. ERIKA RACKLEY, *WOMEN, JUDGING AND THE JUDICIARY: FROM DIFFERENCE TO DIVERSITY* (2013).

44. ARVIND NARRAIN, *RIGHT TO LOVE: NAVTEJ SINGH JOHAR V. UNION OF INDIA - A TRANSFORMATIVE CONSTITUTION AND THE RIGHTS OF LGBT PERSONS* (2018).

45. UN Women, *Turning Promises into Action: Gender Equality in the 2030 Agenda for Sustainable Development* (2018).

and sensationalized reporting of gender-related issues can skew public perception and policy responses.

### **Implementation Gaps**

The gap between legislation and implementation remains a significant obstacle to achieving gender neutrality in practice. Lack of resources and training for law enforcement and judicial officers hampers the effective implementation of gender-neutral laws, and inadequate monitoring and evaluation mechanisms fail to track the real-world impact of legislative changes.

### **Resistance to Changing Traditional Gender Roles**

Efforts to promote gender neutrality in sectors historically associated with distinct genders meet significant opposition. Attempts to make rape legislation gender-neutral have been met with criticism from certain feminist organisations who claim it may undermine safeguards for women, while resistance to paternity leave measures demonstrates the continuation of conventional gender roles in parenting.<sup>46</sup>

In conclusion, establishing complete gender neutrality in Indian law is a challenging problem that needs tackling deep-rooted social, cultural, and institutional prejudices, bridging socio-economic gaps, and guaranteeing effective execution of laws. The intersectional character of gender problems in India's varied culture further complicates this process, demanding a multi-pronged strategy that combines legislative changes with social awareness initiatives, institutional reforms, and attempts to shift public opinions.

## **CONCLUSION**

The process of making the Indian legal system gender-neutral is sure to be long-drawn-out and multi-dimensional, needing a multi-pronged strategy. In the light of the deeply-entrenched barriers identified in the foregoing research, it has to be appreciated that removal of barriers and progress toward a Comprehensive Legal Framework with Full Gender Equality would not be possible without an action plan that comprises legislative reforms, social awareness campaigns, improvement in institutions, and focused intervention.

It must therefore be founded on legislative reforms that open up opportunities for full analysis and evaluation of current law with a view to removing gender-specific wording and provisions. This should be governed by the principle of substantive equality, so that laws are not facially non-discriminatory but substantively provide equal treatment to individuals and communities of all genders. The personal rules founded upon the religious traditions should

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46. Madhura Swaminathan, *Rethinking Childcare: A Trade Union Initiative*, 54 ECON. & POL. WKLY. 65 (2019).

be an exception owing to the delicate combination of gender equality and cultural or religious values.

A significant social awareness effort should accompany the planned legal amendments so that the latter might counteract the very deep-rooted cultural and religious hostility to gender neutrality. Such efforts should be geared at altering cultural attitudes and mindsets, addressing all levels of stakeholders, from the general public to law enforcement officials and politicians, if this transformation is to come about. Digital platforms, community and school outreach and education initiatives, as well as strategic collaborations with civil society groups, may increase expectations on what is conveyed to the key stakeholders about the philosophy of gender equality and gender-blind legislation.

The second cardinal part of the strategy would be doing away with the institutional biases that lie in the way of effective implementation of gender-neutral legislation. This would involve intensive training and sensitization initiatives for law enforcement personnel, judges, and legal practitioners. An institutional culture that is sensitive in approach on gender, impartial in application of legislation, and with a proper knowledge of the unique needs and experiences of differently gendered individuals is what has to be established.

Moreover, there should be efforts toward overcoming such socioeconomic inequalities that keep some individuals away from legal remedies, especially from disadvantaged locations. Such concentrated interventions might be in the form of pro bono services, legal aid clinics, community outreach initiatives, or training individuals with knowledge and skills to understand their legal rights and the system, particularly women and gender minorities.

Another crucial feature of this method is the necessity to gather thorough, sex-disaggregated data. Data of this sort will be possible to monitor and assess real impacts of such laws, enabling the creation of more flexible, and effective gender-neutral legislation. This will also require effective methods for the collecting and analysis of data, including collaboration across government agencies, academic institutions, and civil society groups.

It should significantly be founded on inclusive policy-making methods that take meaningful input from a broad range of stakeholders, notably members of LGBTQ+ groups and leaders of disadvantaged populations. It becomes extremely crucial for ensuring that when gender-neutral legislation is drafted and enforced, the unique experiences and difficulties of individuals of all genders are integrated into them.

An essential feature of this strategy is also the demand for the questioning and reformation of established gender norms, especially in those nations most hostile to gender neutrality. This may entail creating societal reforms that allow for shared parental duties and challenging the

gendered division of labor, as well as properly articulating the goals of gender neutrality with the protection of vulnerable populations.

A more inclusive and more equitable legal system can only be ensured where the method that leads to complete gender neutrality in Indian law harmoniously integrates these approaches: data-driven policymaking, socio-economic interventions, institutional change, legislative reform, socio-cultural campaigns for social awareness, and the shift of traditional gender roles. This comprehensive strategy would therefore be able to overcome deeply entrenched hurdles to the fulfillment of a genuinely gender-neutral legal framework by adequately adjusting itself in varied settings among India's diversified people.

Without question, it is quite difficult to establish gender neutrality in Indian law; it should demand ongoing attention, perseverance, and a willingness to disturb age-old cultural conventions. Still, if India continues with this multi-pronged strategy, then it may easily accomplish an amazing leap toward concretizing some very fundamental concepts of equality and nondiscrimination into significant realities for persons belonging to any gender identity.



## **EVALUATING THE REALITY OF GENDER EQUALITY LAWS FOR MEN: A PERSPECTIVE ON GENDER JUSTICE AND HUMAN RIGHTS**

Priya Roy<sup>1</sup>

### **INTRODUCTION**

The discourse about gender equality has mainly centered on women's rights and empowerment, often overlooking the complexities faced by men within the framework of gender justice. While significant strides have been made in support of women's equality, men's disclosure of gender equality laws also deserves critical examination. This finding is necessary, because gender equality is not just a women's issue; it is a social anxiety that affects all individuals irrespective of gender. Historically, gender norms have imposed rigid expectations on men, forcing them to conform to perceptions that dictate their roles as providers and protectors. These expectations can lead to adverse mental health outcomes, restrict emotional expression, and perpetuate harmful behaviours. Furthermore, the legal frameworks aimed at promoting gender equality<sup>2</sup>, while beneficial for women, can sometimes inadvertently marginalize men's experiences and needs. For instance, laws that prioritize women's rights in all areas such as family law or domestic violence, these laws may not adequately address the challenges faced by men, leading to feelings of isolation and injustice. Moreover, a comprehensive approach to gender equality must recognize that men, too, are victims of systemic inequalities and stereotypes. Engaging men as allies in the pursuit of gender justice is critical to dismantling patriarchal structures that harm both men and women<sup>3</sup>. By encouraging an inclusive dialogue that considers the perspectives of all genders, society can work towards a more equitable future. The main aim of this paper is to assess the reality of gender equality laws for men, examining their impact within the wider context of human rights and social justice. Through this analysis, we seek to highlight the necessity of a balanced approach to gender equality that acknowledges

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1. Phd. Research Scholar, Adamas University, School of Law & Justice
  2. UNDP, <https://www.undp.org/bosnia-herzegovina/blog/role-men-achieving-gender-equality>, (last visited, August 08, 2024)
  3. UNICEF, <https://www.unicef.org/rosa/media/1761/file/Genderglossarytermsandconcepts.pdf>, (last visited, August 08, 2024)

and addresses the unique challenges faced by men, ultimately contributing to a more just and equitable society for everyone<sup>4</sup>.

Gender justice applies to the equitable and unbiased handling of all genders, recognizing that every gender suffers various difficulties and discrimination. While initiatives to promote gender equality have traditionally concentrated on women, it is essential to keep in mind that men might also face disadvantages as a consequence of inflexible gender norms and expectations. This point of view corresponds with the wider human rights paradigm in which emphasises the equality and inherent dignity of all individuals, regardless of gender<sup>5</sup>.

Achieving gender equality implies gender justice, particularly promotes the crucial importance of equal rights and opportunities for all genders. It involves addressing with structural inequalities while making assured that laws and regulations support justice and fairness for both men and women. Gender justice and human rights were profoundly interconnected, according to recent inspections, and states must adhere to their obligations under international agreements like the Beijing Declaration and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Gender justice is composed of two main components: equality and accountability. While equality ensures that each individual have equal access to resources and opportunities, accountability entails putting in place mechanisms to stop discrimination and make solutions for current inequities. This two-pronged approach is essential<sup>6</sup>.

International human rights treaties, such as the International Covenant on Civil and Political Rights and the Convention on the Elimination of Discrimination Against Women (CEDAW), establish a foundation for gender equality. These instruments advocate for non-discrimination and equal rights for all individuals, including men. However, the implementation of these laws often focuses primarily on women's rights, potentially sidelining issues that affect men.

The legal framework for gender equality is a complex and evolving landscape that encompasses various international, regional, and national laws aimed at promoting equal rights and opportunities for all genders. This framework is essential for addressing the systemic

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4. UN WOMEN <https://www.unwomen.org/en/how-we-work/gender-parity-in-the-united-nations/laws-and-policies>, (last visited, August 07, 2024)
  5. SPRINGER LINK, [https://link.springer.com/referenceworkentry/10.1007/978-3-319-95687-9\\_70](https://link.springer.com/referenceworkentry/10.1007/978-3-319-95687-9_70), (last visited, August 05, 2024)
  6. GAP INTERDISCIPLINARITIES, [https://www.gapinterdisciplinarity.org/res/articles/\(269275\)%20GENDER%20EQUALITY%20AND%20HUMAN%20RIGHTS%20IN%20INDIA%20ISSUES%20AND%20PERSPECTIVES.pdf](https://www.gapinterdisciplinarity.org/res/articles/(269275)%20GENDER%20EQUALITY%20AND%20HUMAN%20RIGHTS%20IN%20INDIA%20ISSUES%20AND%20PERSPECTIVES.pdf), (last visited, July 07, 2024)

inequalities that persist in many societies, and it is crucial for achieving broader goals of human rights and social justice<sup>7</sup>.

To achieve gender equality, women must be educated about men's perspectives, experiences, and challenges, and then work hand-in-hand with men as vital allies to transform the world into a place where both sexes can thrive equally. Men in privileged positions within diverse social, political and economic fora can use their influence on echo messages of equality and lead by example among their peers, catalysing impact and triggering truly transformative change towards gender equality.

Gender inequality also affects men greatly. Unfair gender roles and harmful stereotypes can stifle men's emotions, limit their ability to seek support, and place unrealistic expectations on them to be dominant, rugged, independent breadwinners. These social and psychological pressures are particularly harmful in deprived socio-economic contexts where work opportunities are limited.<sup>8</sup> Rigid gender norms can also fuel risky behaviours that lead to violence, poor health, and reduced life expectancy.

## **INTERNATIONAL LEGAL FRAMEWORKS**

### **Overview of International Legal Protections**

The international legal framework provides essential protections for all persons, including men, through various treaties, conventions and customary laws. The framework aims to uphold human rights and ensure equality before the law, addressing issues that directly or indirectly affect men.

At the international level, several key treaties and conventions lay the groundwork for gender equality. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is perhaps the most significant, as it outlines the obligations of states to eliminate discrimination against women in all forms. Although CEDAW does not explicitly mention violence against men, the CEDAW Committee has interpreted it as a human rights violation, thereby reinforcing the need for states to address this issue within their legal frameworks. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights also contribute to the legal basis for gender equality by affirming the rights of all individuals to be free from discrimination. These international instruments serve

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7. UNESCAP, <https://www.unescap.org/sites/default/files/Gender%20Statistics%20in%20Armenia.pdf>, (last visited, July 14, 2024)

8. EUROPEAN INSTITUTE OF GENDER EQUALITY, [https://eige.europa.eu/gender-mainstreaming/tool-kits/gender-budgeting/annex-2-eus-gender-equality-legal-and-policy-framework?language\\_content\\_entity=en](https://eige.europa.eu/gender-mainstreaming/tool-kits/gender-budgeting/annex-2-eus-gender-equality-legal-and-policy-framework?language_content_entity=en), (last visited, July 11, 2024)

as benchmarks for national laws and policies, encouraging countries to adopt measures that promote gender equality and protect against discrimination.

### **Key International Instruments**

- 1. International Covenant on Civil and Political Rights (ICCPR):** The treaty guarantees fundamental rights such as the right to life, liberty and security of person, as well as equality before the law. It emphasizes that all persons, regardless of sex, are entitled to these rights without discrimination.
- 2. International Covenant on Economic, Social and Cultural Rights (ICESCR):** The agreement protects rights related to work, education, health and an adequate standard of living. It mandates that states take steps to ensure that these rights are realized for all persons, including men.
- 3. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW):** While primarily focused on women's rights, CEDAW also recognizes the role of men in promoting gender equality. It encourages the destruction of harmful stereotypes that can negatively affect men and boys, thereby contributing to a more just society<sup>9</sup>.

### **Regional Frameworks**

In addition to global treaties, regional frameworks play a vital role in advancing gender equality. For instance, the European Union (EU) has established a comprehensive legal and policy framework that includes directives aimed at ensuring equality in the workplace, access to goods and services, and social security. The EU's dual approach combines gender mainstreaming—integrating gender perspectives into all policies—with specific measures designed to eliminate gender inequalities. This approach is reflected in the 2020-2025 Gender Equality Strategy, which outlines objectives such as closing gender gaps in the labour market and achieving gender balance in decision-making. Similarly, the Organization of American States (OAS) has developed legal instruments like the Inter-American Convention on the Granting of Civil Rights to Women, which mandates equal civil rights for women and men across member states. These regional frameworks not only provide legal backing for gender equality initiatives but also facilitate cooperation among countries to share best practices and resources.

### **National Legal Frameworks**

At the national level, the implementation of gender equality laws varies significantly. Many countries have adopted legislation that enshrines the principles of gender equality in

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9. UNHRC, <https://www.unhcr.org/sites/default/files/legacy-pdf/47cfad542.pdf>, (last visited, July 14, 2024)

their constitutions and legal systems. For instance, Armenia has made strides in this area with the adoption of the Law on Provision of Equal Rights and Equal Opportunities for Women and Men, which aims to ensure equal rights in various fields, including political and economic spheres. This law reflects a broader trend where national legal frameworks increasingly recognize the importance of gender equality as a fundamental human right. However, despite the existence of these laws, challenges remain in their effective implementation. Many countries still grapple with cultural and societal norms that perpetuate gender discrimination, making it difficult for legal frameworks to translate into real-world equality. For example, while laws may prohibit discrimination, enforcement mechanisms are often weak, and victims of gender-based violence may face significant barriers in accessing justice.

The national legal framework under the concept of “MAN” typically encompasses various laws and policies aimed at promoting equality and protecting the rights of men, as well as addressing issues that affect men specifically. Here are some key components and considerations within such frameworks:

### **Key Components of National Legal Frameworks for Men**

- 1. Constitutional Provisions:** Many countries include provisions in their constitutions that guarantee equality before the law and prohibit discrimination based on sex. These provisions lay a foundation for laws that protect the rights of all persons, including men.
- 2. Legislation Addressing Gender-Based Issues:** National laws often address specific issues that disproportionately affect men, such as:
  - **Domestic Violence:** Although often enacted in the context of protecting women, laws must consider the rights of men who may be victims of domestic violence.
  - **Paternity Rights:** Legal frameworks can establish custody, visitation, and parental leave rights for fathers, promoting shared parenting responsibilities.
- 3. Employment and Labor Laws:** Laws governing equality in the workplace, anti-discrimination policies can significantly affect men, particularly in areas where traditional gender roles can affect employment opportunities<sup>10</sup>.
- 4. Health and Well-being:** Legal frameworks may include provisions for men’s health issues, including mental health services, access to health care, and support for male victims of violence.

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10. EGYANKOSH, <https://egyankosh.ac.in/bitstream/123456789/7683/1/Unit-2.pdf>, (last visited, July 14, 2024)

- 5. Education and Awareness Programs:** National policies can promote awareness and education about men's rights and issues, encourage social change, and reduce stigma around discussing men's health and mental well-being.

### Challenges and Considerations

- **Cultural Norms:** In many societies, traditional gender roles can impede the effectiveness of legal frameworks aimed at promoting men's rights. Legal changes may require cultural changes to be fully effective.
- **Intersectionality:** Men's experiences are not exclusive; Factors such as race, socioeconomic status, and sexual orientation can influence how laws affect different groups of men<sup>11</sup>.
- **Implementation and Enforcement:** Even within strong legal frameworks, effectiveness often depends on the enforcement of laws and the availability of resources to help men access their rights<sup>12</sup>.

### EVALUATING GENDER EQUALITY LAWS

Evaluating the effectiveness of gender equality laws requires a nuanced understanding of both legal provisions and the socio-political context in which they operate. It is essential to assess not only the existence of laws but also their impact on the lives of individuals<sup>13</sup>. This evaluation can be informed by various indicators, including access to education, employment opportunities, and representation in political and economic decision-making. Moreover, it is crucial to adopt an intersectional approach that considers how various forms of discrimination such as those based on race, class, and sexual orientation intersect with gender. This perspective can help identify gaps in legal protections and inform more comprehensive strategies for promoting gender equality<sup>14</sup>.

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11. WORLD BANK <https://www.worldbank.org/en/about/legal/publication/compendium-of-international-and-national-legal-frameworks>, (last visited, April 10, 2024)

12. EUROPEAN UNION AGENCY OF FUNDAMENTAL RIGHTS, <https://fra.europa.eu/en/content/national-legislative-framework>, (last visited, July 14, 2024)

13. UN WOMEN, <https://www.unwomen.org/sites/default/files/2023-02/Legal-frameworks-for-gender-responsive-procurement-en.pdf>, (last visited, July 10, 2024)

14. UNESCAP, <https://www.unescap.org/sites/default/files/Gender%20Statistics%20in%20Armenia.pdf>, (last visited, July 18, 2024)

## Gender-Based Laws and Their Impact on Men

1. **Family Law:** In many jurisdictions, family law can disproportionately affect men, particularly in cases of divorce and child custody. Laws that favor maternal custody can lead to perceptions of bias against fathers, impacting their rights as parents<sup>15</sup>.
2. **Domestic Violence Laws:** While domestic violence is a critical issue that predominantly affects women, men can also be victims. However, societal stigma<sup>16</sup> and legal frameworks often overlook male victims, leading to underreporting and inadequate support services.
3. **Employment and Education:** Gender equality laws aimed at promoting women's participation in the workforce can sometimes inadvertently disadvantage men, particularly in fields traditionally dominated by women. Initiatives that prioritize female recruitment may lead to perceptions of reverse discrimination among men.

## The Role of Societal Norms

Societal norms play a significant role in shaping the experiences of both men and women regarding gender equality. Traditional notions of masculinity can restrict men's emotional expression and vulnerability, leading to mental health issues and societal isolation. Conversely, these norms can also perpetuate harmful stereotypes about women, reinforcing the need for comprehensive gender justice that addresses the root causes of inequality.

The role of social norms from a male perspective encompasses several dimensions, including the expectations placed on men, the implications of these norms for gender equality, and the ways in which they influence men's behaviour and identity. Gender Equality in Practice.

Gender norms are social norms that dictate how individuals of different genders should behave. These norms often reinforce traditional roles, such that men are seen as providers and protectors, while women are often relegated to caretaker roles. For men, societal expectations typically emphasize traits such as dominance, toughness, and emotional stoicism, which can lead to a narrow definition of masculinity that discourages vulnerability or emotional expression. From a male perspective, adherence to these norms can shape personal identity and self-worth. Men may feel pressured to conform to ideals of power and competition, which may foster an environment where emotional expression is limited.

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15. EUROPEAN INSTITUTE OF GENDER EQUALITY, [https://eige.europa.eu/gender-mainstreaming/tool-kits/gender-budgeting/annex-2-eus-gender-equality-legal-and-policy-framework?language\\_content\\_entity=en](https://eige.europa.eu/gender-mainstreaming/tool-kits/gender-budgeting/annex-2-eus-gender-equality-legal-and-policy-framework?language_content_entity=en), (last visited, July 22, 2024)

16. OHCHR, <https://www.ohchr.org/en/statements/2022/03/using-international-and-regional-legal-framework-stop-all-forms-violence-against>, (last visited, July 15, 2024)



Furthermore, these norms can create a cycle of discrimination, which not only affects women but also limits men's roles in family and caregiving contexts. For example, men may be discouraged from participating in domestic responsibilities, which may hinder their relationships with children and partners<sup>17</sup>.

Social norms are learned through various channels including family, education and media. The process of socialization begins in childhood, where boys are often taught to prioritize toughness and independence, while girls are encouraged to be nurturing and cooperative<sup>18</sup>. These learned behaviors are reinforced through social interactions and institutional practices, making it difficult to challenge or change existing norms<sup>19</sup>.

The practical application of gender equality laws often reveals disparities in how these laws are enforced and perceived. For instance, while laws may exist to protect the rights of both genders, the societal response to violations often reflects a gendered bias. This can lead to a lack of accountability for perpetrators of violence against men and inadequate support for male victims.

## CASE STUDIES

**Sweden's Gender Equality Policies:** Sweden is often cited as a leader in gender equality, yet its policies have faced criticism for neglecting men's issues, particularly in family law. The country has made strides in promoting women's rights, but the lack of attention to men's rights has sparked debates about the balance of gender justice.

**The United States' Domestic Violence Laws:** In the U.S., domestic violence laws have evolved to include protections for all genders. However, the implementation of these laws often reflects societal biases, with male victims facing challenges in accessing support services and legal recourse.

### Different dress requirements for men

In 2003, the Anti-Discrimination Tribunal in Queensland, Australia ruled that a school's policy requiring different dress standards for male and female students, specifically prohibiting male students from wearing earrings, was discriminatory on the basis of sex. The tribunal

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17. SAVE THE CHILDREN, <https://www.savethechildren.org/us/charity-stories/how-gender-norms-impact-boys-and-girls>, (last visited, July 10, 2024)
  18. OXFAM LIBRARY, <https://oxfamilibrary.openrepository.com/bitstream/handle/10546/621237/rr-masculinities-misconceptions-women-girls-empowerment-310821en.pdf%3Bjsession-id=C86DD786BD541C80844F2170BD764A87?sequence=1>, (last visited, July 12, 2024)
  19. NCBI, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7028109/>, (last visited, July 15, 2024)

ordered the school to publish an explanation for amending its policy and to apologize for the delay in resolving the issue.

### **Sex discrimination in construction site hiring**

In 2017-2018, a complaint was filed in Queensland, Australia regarding sex discrimination in hiring for a construction site. The respondents provided a written apology, retracted the statement that the job was too hard for females, agreed to change their recruitment advertisements, undergo anti-discrimination training, and pay the complainant an undisclosed amount of compensation.

### **Workplace ignores sexist comments**

In 2017-2018, a complaint was filed in Queensland, Australia regarding ongoing sexist and sexual comments in the workplace that were ignored by the employer. The complaint was resolved by the respondent paying financial compensation to the complainant and completing anti-discrimination training.

### **Gender discrimination and harassment on a farm**

In 2016-2017, a complaint was filed in Queensland, Australia regarding gender discrimination and sexual harassment on a farm. The parties reached an agreement prior to a formal conference, including the respondent providing a written apology, undergoing anti-discrimination training, and paying financial compensation to the complainant.

### **The Intersection of Gender and Other Identities**

It is crucial to recognize that gender does not exist in a vacuum; it intersects with other identities such as race, class, and sexual orientation. These intersections can complicate the experiences of both men and women in relation to gender equality laws. For example, men of color may face compounded discrimination that affects their access to justice and equality.

### **The Importance of Inclusion in Gender Equality Discourse**

To achieve true gender justice, it is essential to include men's experiences and perspectives in the conversation. This inclusion can foster a more comprehensive understanding of gender equality that recognizes the complexities of human rights.

## **CONCLUSION**

The evaluation of gender equality laws for men reveals a nuanced landscape where the rights and experiences of all genders must be considered. While significant progress has been made in promoting women's rights, it is imperative that the discourse expands to encompass the challenges faced by men as well. By recognizing and addressing these challenges, we can move towards a more equitable society that truly embodies the principles of gender justice and human rights for all. In sum, the path to gender equality is not solely about uplifting one gender at the

expense of another; it is about creating a framework where all individuals can thrive, free from discrimination and bias. Only through inclusive dialogue and comprehensive policy reform can we hope to achieve a balanced approach to gender justice that benefits everyone.

The legal framework for gender equality is a vital component of efforts to achieve social justice and human rights. While significant progress has been made through international, regional, and national laws, ongoing challenges necessitate a commitment to reform and enforcement. By strengthening legal frameworks and ensuring their effective implementation, societies can move closer to realizing true gender equality, benefiting not only women but all individuals regardless of gender. In summary, the journey toward gender equality is ongoing, and it requires a collaborative effort among governments, civil society, and individuals to create a world where everyone can enjoy equal rights and opportunities.

A number of case studies illustrate the challenges men face within the framework of gender equality legislation. For example, allegations of workplace discrimination against men in traditionally female-dominated fields such as nursing and education highlight the need for policies that support male participation in all fields. Additionally, cases involving discriminatory family court rulings demonstrate the need for laws that ensure fair treatment for fathers, particularly in matters of custody and support.

To achieve true gender equality, policies must be inclusive and consider the needs of all genders. This includes promoting men's involvement in caring roles, addressing stereotypes that limit men's choices, and ensuring that laws do not inadvertently perpetuate discrimination against men. For example, implementing non-transferable parental leave for both parents can encourage shared responsibilities and challenge traditional gender roles, benefiting families as a whole.

In conclusion, assessing the reality of gender equality legislation for men underscores the importance of a balanced approach to gender justice. While a focus on women's rights is critical to correcting historical injustices, it is equally important to recognize and address the unique challenges faced by men. By fostering an inclusive dialogue and developing policies that promote equality for all genders, society can move toward a more just and equitable future. This approach not only benefits individual men and women but also strengthens the social fabric through mutual respect and understanding among all members of society.

## REFORMING JUSTICE: SENTENCING POLICY IN THE NEW CRIMINAL LAW AMENDMENT ACT

Chandi Prasad Khamari<sup>1</sup>

### INTRODUCTION

The criminal justice system plays a vital part in maintaining societal order by enforcing laws and delivering justice. Sentencing policy is a vital part of this framework, guaranteeing that offenders are properly rebuffed while thinking about the more extensive objectives of prevention, restoration, and societal protection. The New Criminal Law Amendment Act (thus after alluded to as NCLAA) addresses a huge change in the way to deal with sentencing, reflecting contemporary values and addressing the limitations of the previous legal framework. Sentencing is a basic part of the law enforcement framework, filling in as the scaffold between a criminal conviction and the requirement of the law. It reflects society's reaction to criminal way of behaving and expects to adjust revenge, discouragement, restoration, and societal protection. The idea of sentencing is rooted in the principle that punishments ought to be proportionate to the crime committed, guaranteeing justice for both the person in question and the offender<sup>2</sup>.

Sentencing incorporates different angles, including the sort and seriousness of the punishment, the systems for deciding the sentence, and the methods of reasoning that guide these choices. Sentences can change from fines, local area administration, and probation to detainment, life imprisonment, or the death penalty, given the offense's seriousness and the jurisdiction's legal system. The sentencing arrangement is dynamic and develops with cultural changes, lawful points of reference, and authoritative changes. The NCLAA addresses a huge change in sentencing strategy, reflecting current qualities and tending to the lack of the past overall set of laws. This change plans to make a more adjusted, fair, and successful justice framework that better addresses society's issues.

The NCLAA introduces comprehensive changes to the sentencing process, focusing on enhancing judicial discretion while ensuring consistency and fairness in sentencing decisions. It consolidates new rules and rules that address different parts of the criminal way of behaving and its ramifications, intending to give a more comprehensive way to deal with justice. One of

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1. Phd Scholar, P G Department of Law, Sambalpur University, Burla, Odisha, India
  2. Bhupinder Singh, *Criminal Justice System and Governance In India*, JOURNAL OF INTERNATIONAL CRIMINAL LAW, (Last visited 27 July 2024, 10:30AM), [https://www.jicl.ir/article\\_144696.html#\\_ftn1](https://www.jicl.ir/article_144696.html#_ftn1)

the essential targets of the NCLAA is to amend the irregularities and ambiguities that tormented the old regulation. Under the past legitimate system, sentencing frequently needed consistency, prompting aberrations in disciplines for similar offenses. This irregularity not only subverted public trust in the justice framework but additionally brought up issues about the decency and justice of legal choices. The new act resolves these issues by presenting more clear rules for judges, advancing a more normalized way to deal with sentencing. It accentuates the significance of thinking about the singular conditions of each case, including the offender's experience, the idea of the crime, and the effect on the people in question. This approach means adjusting the requirement for discipline with the potential for restoration, guaranteeing that sentences are simple and proper to the particular setting of each case.

Moreover, the NCLAA means a more extensive development towards supportive justice, underscoring the significance of tending to the mischief brought about by crimes and assisting guilty parties with reintegrating into society. This strategy recognizes that customary corrective methodologies may not generally be the best in forestalling rehash offenses or supporting victim. By consolidating supportive justice standards, the new sentencing strategy intends to cultivate recuperating and compromise, helping the two victim and guilty parties. The NCLAA additionally handles present-day challenges, including the ascent of cybercrime, organized crime, and other complex offenses. The new measures are intended to give the legal framework the vital instruments to battle these arising dangers. By refreshing the lawful structure, the NCLAA guarantees that the justice framework stays important and equipped for tending to new sorts of criminal ways of behaving.

## INFLUENCE OF SENTENCING REFORMS

Sentencing changes assume a pivotal part in making a law enforcement framework that is fair, effective, and receptive to cultural requirements. The NCLAA achieves significant changes to sentencing approaches, intending to further develop justice conveyance, diminish recidivism, and the restorative justice concept. These changes broadly affect society, the recovery of guilty parties, and the mix of helpful justice ideas. Understanding these sentencing arrangement changes is fundamental because of multiple factors. In the first place, they impact how justice is managed and the encounters of people inside the general set of laws. Second, changes in sentencing arrangements can make wide friendly impacts, influencing crime percentages, jail populaces, and public view of justice. Third, investigating these changes gives bits of knowledge into the changing idea of lawful standards and societal needs<sup>3</sup>.

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3. Henham, R. *Sentencing Policy, Social Values and Discretionary Justice*. OXFORD JOURNAL OF LEGAL STUDIES, 1093–1117 (2022)

The effect of sentencing changes on society is huge. Sentencing reflects cultural qualities and standards, influencing public trust and trust in the justice framework. The NCLAA looks to lay out a more straightforward and steady sentencing structure, which is fundamental for maintaining the authenticity of the general set of laws. Clear and fair sentencing rules guarantee uniform organization of justice, diminishing differences that might result from legal attentiveness. Changed sentencing arrangements additionally work on the proficiency of justice conveyance. By giving adjudicators organized rules, the NCLAA limits changeability in sentencing results, guaranteeing comparable offenses get practically identical disciplines. This consistency smoothen out legal cycles as well as upgrades the public view of decency and fairness under the watchful eye of the law. Moreover, a distinct sentencing strategy hinders crime, as potential guilty parties are made mindful of the outcomes of their activities.

One of the basic objectives of sentencing changes under the NCLAA is to address recidivism and advance the recovery of offenders. Customary correctional methodologies frequently neglect to lessen reoffending rates, prompting a pattern of crime and discipline. The NCLAA perceives the requirement for a more rehabilitative methodology, zeroing in on the underlying drivers of criminal ways of behaving and offering offenders potential open doors for change. Recovery programs are incorporated into the sentencing system, giving guilty parties admittance to schooling, professional preparation, and mental help. These drives mean to outfit people with the abilities and assets expected to effectively reintegrate into society. By tending to elements, for example, substance misuse, absence of training, and psychological well-being issues, the NCLAA looks to decrease the probability of reoffending, eventually improving public security. The accentuation on restoration likewise mirrors a shift towards a more sympathetic and valuable way to deal with justice. As opposed to exclusively rebuffing guilty parties, the NCLAA perceives their true capacity for change and development. This viewpoint lines up with current criminological speculations that promote for helpful and rehabilitative justice as an additional successful method for accomplishing long-haul crime reduction<sup>4</sup>.

The NCLAA likewise puts serious areas of strength on victim' freedoms, recognizing their focal job in the justice cycle. Conventional sentencing practices frequently neglect the necessities and encounters of the victim, zeroing in fundamentally on the offender. The changed strategy tries to redress this lopsidedness by consolidating standards of helpful justice, which focus on fixing the mischief brought about by criminal ways of behaving. Supportive justice drives under the NCLAA include dynamic cooperation of victims in the sentencing system. Victim are given a voice, empowering them to communicate the effect of the crime and their

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4. William Arbour, G. L., *Prison Rehabilitation Programs and Recidivism: Evidence from Variations*, THE JOURNAL OF HUMAN RESOURCES, 2-27 (2024).



requirements for compensation and conclusion. This participatory methodology enables victims as well as cultivates a feeling of responsibility and obligation in offenders<sup>5</sup>.

## JUXTAPOSITION OF ANTIQUATED AND UPDATED CRIMINAL LAW

The juxtaposition of out of date and refreshed criminal regulation in India features massive changes in legitimate standards and the organization of equity. Old-fashioned regulations frequently reflect frontier period points of view and cruel corrective measures. For example, Section 377 of the Indian penal Code (IPC), which condemned consensual gay demonstrations, was a remainder of English frontier rule and exemplified obsolete moral guidelines. The landmark judgment in *Navtej Singh Johar v. Union of India*<sup>6</sup>, decriminalized homosexuality, reflecting contemporary values of equality and human rights<sup>7</sup>. Likewise, the draconian Section 497 of the IPC, which condemned adultery, was struck down in *Joseph Shine v. Union of India*<sup>8</sup>, perceiving the independence and fairness of ladies in present day India <sup>9</sup>.

Interestingly, refreshed criminal laws consolidate standards of restorative justice and proportionality, zeroing in on recovery as opposed to simple discipline. The Juvenile Justice (Care and Protection of Children) Act, 2015<sup>10</sup>, replaced the earlier Juvenile Justice Act, 2000, presenting more moderate measures for managing juvenile offenders. The Supreme Court's ruling in *Kartar Singh v. State of Punjab*<sup>11</sup>, featured the requirement for a fair way to deal with counter-psychological oppression regulations, stressing human rights protections even about national safety concerns <sup>12</sup>.

Besides, refreshed regulations address contemporary difficulties like cybercrime and sexual harassment. The Information Technology Act, 2000, and its alterations address the developing idea of crimes in the computerized age. The Criminal Law (Amendment) Act, 2013, passed because of the Nirbhaya case, fundamentally fortified regulations against sexual viciousness, presenting harsher punishments and more extensive meanings of sexual offenses <sup>13</sup>. These

5. Khamari, C. P., Unveiling Inequality: Understanding and Addressing Sentencing Disparities. INTERNATIONAL JOURNAL OF RESEARCH AND ANALYTICAL REVIEWS, 368-374. (2024)
6. Navtej Singh Johar v. Union of India (2018) 10 SCC 1
7. *Id.*
8. Joseph Shine v. Union of India (2019) 3 SCC 39
9. *Id.*
10. The Juvenile Justice (Care and Protection of Children) Act, 2015, No. 2, Acts of Parliament (2016)
11. Kartar Singh v. State of Punjab, (1994) 3 SCC 569
12. Supra note 11.
13. The Criminal Law (Amendment) Act, 2013, No. 13, Acts of Parliament 2013, (India)



changes represent the shift towards a more fair and responsive legitimate structure that lines up with current societal values and human rights principles.

The NCLAA, addresses a huge redesign of India's law criminal justice system, zeroing in on modernizing and smoothing out sentencing practices to reflect contemporary cultural qualities and international human rights guidelines. These changes address a few basic parts of sentencing, expecting to make a more balanced, fair, and powerful justice framework. One of the remarkable changes under the BNS is the fuse of restorative justice standards. Conventional reformatory measures are enhanced with choices, for example, community service, probation, and mediation. This shift means to lessen recidivism by tending to the underlying drivers of criminal way of behaving and advancing the reintegration of criminals into society. The BNS perceives that restoration and reconciliation are fundamental parts of an exhaustive criminal justice system, guaranteeing that equity serves as a hindrance as well as a method for cultural recuperating. One of the vital parts of these changes is the accentuation of proportionality and individualized sentencing. The BNS gives organized rules to guarantee that sentences are comparable with the seriousness of the crime and the conditions of the accused, in this manner decreasing legal circumspection and irregularities in sentencing. This approach reflects the standards laid out in *Bachan Singh v. State of Punjab*<sup>14</sup>, where the High Court stressed the significance of adjusting disturbing and relieving factors in capital punishment cases<sup>15</sup>.

The BNS likewise acquaints more organized sentencing rules to ensure consistency and decency in legal choices. These rules assist with lessening the inconsistencies emerging from legal circumspection, guaranteeing that comparable offenses get tantamount disciplines. This consistency improves the consistency of sentencing results, adding to public trust in the justice system. Moreover, the BNS tends to contemporary difficulties like cybercrime, economic offenses, and organized crime. The new arrangements outfit the legal framework with the important apparatuses to handle these complex and advancing dangers. Upgraded punishments for such crimes mirror the reality with which these offenses are respected, guaranteeing that the legitimate structure stays significant and hearty despite new types of criminal behavior.

Another critical change is the accentuation of victim rights and backing. The BNS acquaints measures with guarantee that victims get opportune and satisfactory compensation and backing all through the legal interaction. This victim-centric driven approach highlights the significance of adjusting the balances of justice, perceiving the mischief endured by victims, and giving them the vital assets to recuperate and modify their lives. By and large, the sentencing changes under the Bharatiya Nyaya Sanhita, 2023, address extensive work to modernize India's criminal

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14. *Bachan Singh v. State of Punjab* (1980) 2 SCC 684

15. *Id.*

justice system. By coordinating restorative justice, improving consistency in sentencing, tending to contemporary criminal threats, and focusing on victims' freedoms, the BNS expects to make a more impartial and powerful legitimate system that addresses the issues of present-day Indian society.

## **RECOMMENDATIONS AND SUGGESTIONS FOR EFFECTIVE IMPLEMENTATION**

Viable execution of the new sentencing policy under the Criminal Amendment Act requires a diverse methodology, joining authoritative clearness, legal preparation, and local area commitment. Some of the Key recommendations are as follows: -

### **Training and Education**

Exhaustive preparation programs for judges, legal counselors, and post-trial supervisors are fundamental to guarantee an intensive comprehension of the new sentencing strategy. Progressing training and backing will assist with tending to worries about consistency and inclination<sup>16</sup>.

### **Monitoring and Evaluation**

Establishing robust mechanisms for monitoring and evaluating the implementation of the new policy is crucial. Regular reviews and assessments can identify areas for improvement and ensure that the reforms achieve their intended goals.

### **Judicial Exchange Programs**

Laying out judicial exchange programs with different locales that have carried out comparable changes can give important growth opportunities. Judges can acquire bits of knowledge into compelling systems and likely entanglements, upgrading their capacity to effectively execute the NCLAA<sup>17</sup>.

### **Public Engagement**

Drawing in with general society to make sense of the reasoning and advantages of the new sentencing strategy is essential. Straightforwardness and powerful correspondence can fabricate public certainty and backing for the changes<sup>18</sup>.

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16. Judicial Education and Training, JOURNAL OF THE INTERNATIONAL ORGANIZATION FOR JUDICIAL TRAINING, (2024).

17. INTERNATIONAL JUDICIAL EXCHANGE PROGRAMS: BENEFITS AND IMPLEMENTATION, GLOBAL JUDICIAL INSTITUTE, 2020.

18. PUBLIC AWARENESS CAMPAIGNS: STRATEGIES FOR SUCCESS, INDIAN INSTITUTE OF PUBLIC COMMUNICATION, 2018.

## Resource Allocation

Sufficient assets should be apportioned to help the execution of option sentencing choices, for example, rehabilitation programs and community service. Guaranteeing that these choices are viable and open is vital to lessening dependence on detainment<sup>19</sup>.

## CONCLUSION

From the above discussion, deliberations, and debate, the researcher thinks that the New Criminal Law Amendment Act addresses a huge forward-moving step in transforming sentencing policy. By tending to the impediments of the old regulation and underscoring a more adjusted and adaptable methodology, the new policy can convey all the more powerful results. Notwithstanding, understanding this potential requires cautious execution, continuous assessment, and a pledge to address emerging challenges. With the right support and resources, the new sentencing policy can add to a more evenhanded and successful law enforcement framework.

In this manner, it tends to be presumed that, the new Criminal Law Amendment Act denotes a critical step towards reforming the justice system, especially in sentencing policy. This authoritative update tries to adjust justice balances by guaranteeing that sentences are fair and proportionate as well as intelligent of contemporary cultural qualities and the requirement for recovery. By tending to irregularities and improving straightforwardness in sentencing, the Act expects to reestablish public trust in the justice framework. Key arrangements incorporate stricter punishments for heinous crimes, alternative sentencing options for minor offenses, and greater discretion for judges to consider mitigating factors. This nuanced approach recognizes the intricacies of criminal way of behaving and advances individualized sentencing, which can prompt more powerful restoration and decreased recidivism. Additionally, the Act underlines the significance of casualty privileges, guaranteeing that their voices are heard and their requirements are tended to all through the. By integrating restorative justice principles, the new sentencing policy fosters a more holistic and compassionate approach to justice. Overall, the Criminal Law Amendment Act addresses a dynamic shift towards a more evenhanded and simply lawful structure, focusing on both responsibility and the potential for individual change.

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19. WORKSHOPS FOR JUDICIAL CAPACITY BUILDING: BEST PRACTICES, NATIONAL JUDICIAL ACADEMY, INDIA.

## **TRANSFORMATIVE CONSTITUTIONALISM: FROM PASSIVE TO ACTIVE JUDICIARY**

Sahil Singh<sup>1</sup>

Dipto Dasgupta<sup>2</sup>

### **INTRODUCTION**

Constitution of India, being the supreme law of the land, holds a lot of importance in the Indian legal system. It is the supreme source of strength for all the three organs of the government. All the laws within the legal system derive their validity from the Constitution. The doctrine through which the Constitution itself acts a limitation and check on the power of the government is known as Constitutionalism.

It is worthy to note that the Constituent Assembly consumed two years, eleven months and eighteen days to frame the Indian Constitution. It was adopted in the year 1950. Since then, there have been so many evolving, diverging and transformative interpretations of the various provisions of the Constitution. The idea of the transformative constitutionalism therefore deposes a new form of constitutional interpretation and application that calls for an active Judiciary that has a central role to play in changing society.

The origin of transformative constitutionalism can be traced to South Africa. In 2006, Justice of South Africa's High Court said that in this definition, the roles of the judges, other officials and the institutions in the transformative constitutionalism movement are highlighted. Judges need to ensure that the constitution is fulfilled in a way that enhances the standard of living of every citizen and does away with the vice of truncating the potential of every person where they are the custodians of the supreme values of the human being such as dignity, equality, and liberty.<sup>3</sup> Further in India also, transformative Constitutionalism has been discussed in the cases

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1. 3<sup>rd</sup> year Student, Alliance School of Law, Alliance University, Bengaluru

2. 3<sup>rd</sup> year Student, Alliance School of Law, Alliance University, Bengaluru

3. BAR AND BENCH, <https://www.barandbench.com/columns/constitution-day-2019-note-on-transformative-constitutionalism>, (Last visited on 17 July 2024)

of National Legal Services Authority vs. Union of India<sup>4</sup>, Navtej Singh Johar v. Union of India<sup>5</sup>, Joseph Shine v. Union of India<sup>6</sup> and Indian Young Lawyers Association vs The State Of Kerala<sup>7</sup>.

Precedently, the Indian Judiciary was very rigid and conservative in its interpretation of the Constitution. For instance, in the case of A.K. Gopalan v. State of Madras<sup>8</sup>, the Supreme Court refused to widen the scope of Article 21 and interpreted it in a conservative approach. The post emergency era (1975) is known to be the turning point of the conservative interpretation by the introduction of PILs (Public Interest Litigation).

Therefore, transformative constitutionalism requires a judiciary that not only declares the law but also makes all out efforts to ensure that constitutional promises translate into practical and measurable social change. This kind of approach calls for a judiciary that is not a mere spectator to its constitutional mandate, but an active one that wants to bring positive change through the elimination of discriminations and social injustices.

Henceforth, this research aims to critically analyse the course of transformative constitutionalism through a series of cases, the factors which were responsible and the significance of the shift in the role of judiciary in the interpretation of constitution.

## **EVOLUTION OF THE CONCEPT OF TRANSFORMATIVE CONSTITUTIONALISM WITH RESPECT TO INDIAN JUDICIARY FROM 1950 TO PRESENT**

Justice AM Khanwilkar in Navtej Singh Johar judgement opined that constitutionalism is therefore about transforming society for the better; and it is this vision that forms the basis of an emancipative transformative constitutionalism.

On 26<sup>th</sup> January 1950, the Constitution of India was adopted. Since its adoption, there have been so many divergent, evolving and transforming interpretations. Judiciary has played a pivotal role in this regard. From being a passive and rigid interpreter to being an active judiciary, it has evolved a long way. We shall discuss the course of transformative Constitutionalism with various landmark judgements over the course of time in respect of Indian Judiciary.

### **Origin of Transformative Constitutionalism**

In today's society, transformational constitutionalism is not a new concept. It began with an article by a US researcher Prof. Karl Klare published in the South African journal of legal

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4. National Legal Services Authority vs. Union of India, AIR 2014 SC 1863

5. Navtej Singh Johar v. Union of India, 2018 INSC 790

6. Joseph Shine v. Union of India, (2019) 3 SCC 39

7. Indian Young Lawyers Association vs The State of Kerala, (2019) 11 SCC 1

8. A.K. Gopalan v. State of Madras, AIR 1950 SC 27

culture and Transformative Constitutionalism in 1998. Its meaning has evolved in this new age not only in South Africa but also on an international level. The constitution of India does not have an explicit word of the transformative constitutionalism, but the Supreme Court of India has recognized the transformative role of the constitution in some decision such as the Navtej Singh Johar<sup>9</sup> case and the 2014 NALSA judgement<sup>10</sup>. The judiciary too has stood its ground to accept that the constitution is instrumental in leading the nation to a better future.<sup>11</sup>

### **Early Years (1950-1970) – The Constitution coming into force**

The Constitution of India, being adopted in 1950, laid down the principles and provision of democracy, fundamental rights, and the rule of law. Indeed, during the initial stages, the judiciary's consideration was limited to rigid and narrower interpretation of the Constitution. Judicial activism was witnessed during this period characterized by the judiciary's struggle to assert its independence as well as the principle of judicial supremacy.

In *A. K. Gopalan v. State of Madras*<sup>12</sup>, this case was among the first to feel the impact of Legitimacy and to try the waters of Judicial interpretation. As for the nature of the rights under Part III of the Constitution, the Supreme Court observed that the right was different from the other right under Part III and hence they cannot be regarded as formed a single whole. The courts' powers became curtailed in the process as this narrow interpretation also restricted the judiciary from utilising the constitution for the purpose of social and political change.

In *Champakam Dorairajan v. State of Madras*<sup>13</sup>, the court quashed the system of caste-based reservations in matter of admissions to educational institutions, thereby failing to deliver what may be described as 'substantive' type equality. It caused the first modification to the constitution and placed inclusion of the Article 15(4) which permits affirmative action, thus, denotes an example of judicial legislation bringing constitutional change.

In *Golaknath v. Punjab State*<sup>14</sup> case, the Supreme Court of India dealing with the constitutionality of the 17th Amendment of the Constitution introduced the concept of prospective overruling. Also, the court held that Parliament cannot curtail some of the rights or alter any provision of Part III of the Constitution.

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9. Navtej Singh Johar v. Union of India, 2018 INSC 790

10. National Legal Services Authority vs. Union of India, AIR 2014 SC 1863

11. Mohammad Mustafa Hasan & Aysha Sasmin, *Transformative Constitutionalism*, TSCLD, (Last accessed, 23 July 2024, 12:00 PM), <https://www.tsclld.com/transformative-constitutionalism-significance-and-role-of-judiciary>

12. A.K. Gopalan v. State of Madras, AIR 1950 SC 27,54

13. Champakam Dorairajan v. State of Madras, AIR 1951 SC 226

14. Golaknath v. State of Punjab, 1967 AIR 1643

### **The Activist Phase (1970-1980): Increase in Rights and Powers of The Judiciary**

The period between 1970 and 1980 can be regarded as the period of transition to judicial activism when the court started assigning more extensive meaning to the constitution and including social and economic rights and justice.<sup>15</sup> This was due to the socio-political circumstances such as during the emergency period concentrating the minds of the people to the role of judicial check on the executive arm of government.

In *Kesavananda Bharati v. State of Kerala*<sup>16</sup>, the 13 Judge Bench of Supreme Court in a 7:6 verdict propounded ‘basic structure doctrine’. It was premised on the idea that though the Parliament could amend the Constitution it cannot change the basic structure. It is this doctrine that has helped maintain the spirit of the constitution in as much as is democrat and egalitarian.

In *Maneka Gandhi v. Union of India*<sup>17</sup>, the Supreme Court changed the began the thinking of what Article 21 means as Right to Life and Personal Liberty into several fundamental rights which are crucial for the dignity of man and transformed the Fundamental Rights into include the socio-economic Fundamental Rights.

### **The Public Interest Litigation (PIL) Era (1980-2000): Liberalization of Locus Standi**

Owing to the efforts of Justice P.N. Bhagwati and Justice Krishna Iyer, PILs (Public Interest Litigation) came into operation in 1980s where the judiciary liberalized the classical standing to sue rules and the public can sue on behalf of another who cannot sue. This in effect opened up justice and allowed the judiciary to handle other social ailments.

*S. P. Gupta v. Union of India*<sup>18</sup> is considered to be the birth control pill movement in India or Indian PIL movement. The Supreme Court ruled that absolutely every person who is in a position to do so in good faith may appeal to the Court, to ensure the observance of the constitutional rights chiefly of persons belong to the weak category.

In *Bandhua Mukti Morcha v. Union of India*<sup>19</sup>, the court considered bonded labour as slavery and stated the government to take measures to do away with it, wherein the SC intervened and ensured the implementation of socio-economic rights.

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15. S. Sriharikarthik, An analysis of transformative Constitutionalism and the role of Judiciary in India, Vol. 3, IJIRL, pp. 1, pp. 1-8 (2023)

16. Keshavananda Bharti v. State of Kerala, AIR 1973 SC 1461

17. Maneka Gandhi v. Union of India, 1978 AIR 597

18. S. P. Gupta v. Union of India, 1981 Supp (1) SCC 87

19. Bandhua Mukti Morcha v. Union of India, 1984 AIR 802



In *Vishaka v. State of Rajasthan*<sup>20</sup>, due to the absence of legislation regarding sexual harassment of women in workplace, the Supreme Court of India issued certain directions to be adopted till a legislation of this nature was passed showing that the judiciary is not passive in the issue of gender justice.

### **The Rights-Based Approach (2000-Present): Strengthening Democracy**

The 21st century, has however recorded a further embellishment of transformative constitutionalism where the judiciary has assuming a central role in the realization and enhancement of socio-economic rights. This period has been defined by the rights, defining the state's responsibility in realizing positive rights.

In *National Legal Services Authority (NALSA) v. Union of India*<sup>21</sup>, the Hon'ble Supreme Court of India held that transgender persons have rights to self-identity, and it directed the Government to provide scheduled caste status to them for purpose of educationally and socially detecting backward classes for the purpose of providing affirmative action.

In *Justice K. S. Puttaswamy v. Union of India*<sup>22</sup>, the Supreme court stated that right to privacy fell under the protected rights in the constitution under Article 21. This judgment was significant in regarding the dynamic nature of the fundamental rights and how the judiciary struggles to protect personal freedoms in the digital era.

In *Navtej Singh Johar v. Union of India*<sup>23</sup>, Section 377 of the Indian Penal Code, that criminalized consensual homosexual acts was partially struck down by the Supreme Court. This judgment was a major milestone for the achievement of equality and non-discrimination of homosexuality of the gays, lesbians, bisexuals, transgenders, and queer persons.

In the case of *Association for Democratic Reforms & Anr v. Union of India & Ors*<sup>24</sup>, the Apex court held that the Electoral Bond Scheme resulted in the denial of the voters' right to knowledge enshrined in Article 19(1)(a) and is hence unconstitutional<sup>25</sup>.

**In conclusion**, the process of the development of transformative constitutionalism can be seen as the constant interplay between the judicial and socio-political processes in India. Starting with the quest for the establishment of the judicial supremacy in the initial years of

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20. Vishaka v. State of Rajasthan, AIR 1997 SC 3011

21. National Legal Services Authority vs. Union of India, AIR 2014 SC 1863

22. Justice K.S. Puttaswamy (Retd.) v. Union of India, AIR 2017 SC 4161

23. Navtej Singh Johar v. Union of India, 2018 INSC 790

24. Association for Democratic Reforms & Anr v. Union of India & Ors. (2024 INSC 113)

25. Siddharth R. Gupta, Analysis and Anatomy of Electoral Bond Judgment, SCC Online, 2024 SCC OnLine Blog Exp 17

construction of Indian Constitution to the role it has played in the evolution of right to education, right to information and public interest litigation to the recent striking down of electoral bond scheme to enhance democracy in India through judicial interpretation, the Indian judiciary has perhaps had the most profound impact on construction of India's Constitution. Therefore, so long as India emerges with new social and economic questions, the judiciary's embrace of transformative constitutionalism to give the Constitution respect as a document alive in the quest for social justice and equality, will be consequential.

### **IMPLICATIONS OF ACTIVE JUDICIARY ON THE SEPARATION OF POWERS OF THREE ORGANS OF THE GOVERNMENT**

In India, the judiciary plays a critical role in transformative constitutionalism, as it is in charge of interpreting the constitution in a manner that promotes social justice and addresses historical injustices. However, this does not mean that the courts are free to disregard their jurisdiction or the doctrine of separation of powers while interpreting the constitution. The role of the judiciary to interpret the law in such a way that it adheres to the constitutional goals to bring in a new modern society<sup>26</sup>.

The doctrine of separation of powers is followed in India, i.e. three major powers of the government are performed by three separate organs. The separations of the power and authorities between the Judicial and the Legislative branch aims to avoid concentration of power and also safeguard the rights of the people of the country<sup>27</sup>.

However there have been several instances where there have been clashes between the organs of the government and the separation of powers have been challenged due to a more active role played by the Judiciary

#### **Major implications of such clashes:**

In India there has been a history of conflicts between the judiciary and the other organs of the government. One of the major reasons of such clashes is the active role of the judiciary where it has been observed that the courts have occasionally taken on the duties of the legislature, disguising their actions as giving guidelines and formulation of principles. Another major reason

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26. Dr. Priya Jain, Dr. Vir Vikram Bahadur Singh, Dr. Pranav Singh, Dr. Sadhana Trivedi, Dr. Indrajeet Kaur, Deeksha Taneja and Kaneez Fatima, *Transformative Constitutionalism in India*, 13 RES MILITARIS SOCIAL SCIENCE JOURNAL, pp.835, pp. 832-839 (2023)

27. Tobias Oberdieck and Enrico Moss, *Principle of separation of powers between the legislature and judiciary: Distribution of state power several state bodies for this purpose limitation of power*, 8 INTERNATIONAL JOURNAL OF PUBLIC ADMINISTRATION MANAGEMENT AND ECONOMIC DEVELOPMENT.

being the tool of judicial review.<sup>28</sup> According to encyclopaedia Britannica, “Judicial review is the power of court to examine the actions of Legislative, Executive and Administrative Arms of the government and to determine whether such actions are consistent with the constitution

One such instance being the 42<sup>nd</sup> amendment act enacted by the parliament during the period of National emergency in India (1975-1977). The amendment brought several changes to the constitution. However, the Supreme Court held that 42<sup>nd</sup> Amendment is inconsistent with the basic structure of the constitution, especially Articles 368(4) and 365(5), as it curtailed the power of the judicial review of the courts. Hence, they were struck down by the court as unconstitutional and in violation of the basic structure of the constitution in the case of *Minerva Mills vs Union of India*<sup>29</sup>. The court reaffirmed the doctrine of basic structure and ruled that the Parliament could not amend the Constitution in a manner that destroyed its basic structure and undermined its essential features.

There are several implications of an active Judiciary on the separation of powers resulting conflicts between the judiciary and other branches of the government. Some of the impacts are:

1. **Judicial overreach:** As the Judiciary plays a crucial role in transformative constitutionalism, it is tasked with interpreting the constitution in a manner that promotes social justice and addresses injustices. Sometimes in performance of its duties the active role of the judiciary can lead to accusations of judicial overreach, where it is perceived that the courts are encroaching upon the domains of the legislature and executive. It can undermine the authority of the other branches of the government and display them as incompetent.
2. **Hindrance to effective governance:** Due to the active role of the judiciary, there will be conflicts between the organs of the government, which may be prolonged and as a result can become a hindrance in effective governance and delay implementation of several policies. It will also serve as a distraction to the policy makers from addressing the ongoing social and economic challenges as their attention will be diverted towards the conflicts.
3. **Interpretation of laws:** As the court has the power of judicial review, it can also lead to conflicts between the judiciary and other branches as sometimes the courts interpret statutes and provisions in a way that is different from the way how the legislative or executive branches intend it to be interpreted. These differences can lead to confusions and debates over the proper interpretation, scope and application of the laws concerned.

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28. 8 Kumarappan M, *History of Conflict Between the Legislature and the Judiciary*, 5 INTERNATIONAL JOURNAL FOR MULTIDISCIPLINARY RESEARCH.

29. *Minerva Mills vs Union of India*, AIR 1980 SC 1789.

4. ***Public backlash and loss of trust:*** due to the active role of the judiciary, it can provoke public backlash, especially if the decisions of the court are viewed as biased or controversial. It can cause public mistrust as a result of which the public will start raising questions on the reliability and effectiveness of the entire system.
5. ***Collaborative governance:*** In some instances, the judiciary's engagement in transformative constitutionalism can foster a collaborative approach to governance, where the judiciary, legislature, and executive work together to address complex social issues.
6. ***System of checks and balances:*** The separation of powers among the organs of the government relies on the system of checks and balances. Therefore an active role assumed by the judiciary can lead to proper decision making and the judiciary will serve as a check on the powers of the legislature and executive, ensuring that the laws and actions are consistent with the constitution. This system is essential for maintaining the rule of law and preventing abuse of power.

As the judiciary plays a crucial role in upholding the rule of law and advancing transformative constitutionalism, its active role can sometimes have certain implications on the separation of power between the organs of the government and create tension amongst them.

## CONCLUSION AND SUGGESTIONS

1. ***Strengthening Judicial Accountability Mechanisms:*** The sphere of legal regulation should contain the mechanism of judiciary branch accountability. This could involve establishing agencies such as jurists tribunals which are charged with the responsibility of assessing the decisions made by the courts and checking whether or not they reflect the constitution and the principles of the rule of law in a bid to either reign in or urge the activism or lack of it among the courts.
2. ***Promoting Public Awareness and Engagement:*** We can encourage the members of the different communities on transformative constitutionalism and its relevance to the society at large. This can be learnt by conducting educational and sensitisation activities, workshops, and popularised society activities that will pull people into realising their rights and the judiciary responsibility of ensuring the protection of the said rights. This gives connotation of a more enlightened public hence a higher involvement within the political system.
3. ***Encouraging Collaborative Governance:*** The social problems should be addressed with cooperation of the branches of government particularly judiciary, democracy and the executive branch. This could mean establishing inter-governmental relations in

terms of committees or task forces drawn from all the levels of government to discuss and co-ordinate the policies on transformative constitutionalism on social justice and equality.

4. ***Integrating Transformative Principles into Legal Education:*** Great graduates can get the knowledge of social justice, equality as well as human rights from their law schools and consequently, they are prepared to start transforming the constitutionalism in their professional individual careers.
5. ***Conducting Impact Assessments of Judicial Decisions:*** This could entail a sequential pattern of research inquiries that looks at ways in which the societally decreed changes affect the fate of oppressed populations and justice. It can be useful for the assessment of the effectiveness of the judicial measures and the chosen procedures and includes the suggestions for the subsequent legal operations.

Thus, the concept of the transformative constitutionalism in India raises questions about change in the judiciary and its function from simple interpreting of the constitution to the shaping of it. This research has thus highlighted how transformative constitutionalism have enhanced the mandate as well as the engagement of judiciary in the protection and realization of such rights as well as social justice for the creation of a society that is just. Moreover, the new judgements such as Navtej Singh Johar vs. Union of India present how the judiciary is so sensitive and vigorous in addressing the issues of endangered groups. Nevertheless, this active participation raises several degrees of an array of issues in connection with the doctrine of Judicial Activism and separation of powers between the branches of the government.

Needless to say, the judiciary as the chief architect of democracy and human rights through transformative constitutionalism may act in ways that it intervenes may cross over legislative-executive territories. In this paper, the relationship between the three arms of government is examined, although it brings out the ideas of sovereignty each arm has, explaining the need for checks and balances to ensure provision of rights. In other words, the transformation in the meaning of the constitutionalism in India has been a result of the broader fight against injustice. Against this background, the judiciary should always remain sensitive to ensure that there is a balance between the constitutional changes that are viewed as a constitution agenda on one hand and the doctrine of separation of powers on the other so that the Constitution always remains the supreme political instrument for all people.

## BEYOND THE LAW: THE STRUGGLES OF WOMEN WORKERS UNDER INDIA'S MATERNITY BENEFIT ACT

Bhavya.S<sup>1</sup>

### INTRODUCTION

The Maternity benefit act, 1961<sup>2</sup> is a legislation in India which aimed at protecting the employment and ensuring welfare of women during their maternity period. Women workers are entitled to “maternity benefit act” which is fully paid wages during the absence of the work and to take care of her child. The Act covers all establishments with 10 or more workers, including factories, mines, plantations, government offices, shops, and other entities. The Maternity (Amendment) Bill 2017, which the Lok Sabha approved on March 9, 2017, amends the Maternity Benefit Act, 1961. The Rajya Sabha subsequently approved the aforementioned Bill on August 11, 2016. Moreover, on March 27, 2017, the President of India gave his approval. The Maternity Benefit (Amendment) Act, 2017 (the “Amendment Act”) came into force on April 1, 2017, while Section 111 A, which deals with crèche facilities, became effective on July 1<sup>3</sup>.

One of the maternity benefits that women receive is the encouragement of self-care and childcare throughout their pregnancy. For women who wish to have a family, this is one of the most important acts. Women will be able to better balance their personal and professional lives thanks to this action. Additionally, the Maternity Benefit Act would provide benefits and offer comfort to new parents<sup>4</sup>.

The Maternity Benefit Act's primary objectives are to control women's work in specific enterprises for a specified period before and after childbirth and to provide them with maternity benefits<sup>5</sup>. A woman is entitled to paid maternity leave under the Act, which is 26 weeks for the

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1. BBA.LLB(Hons) 4<sup>th</sup> Year, Alliance school of law, Alliance University, Bangalore.
  2. Maternity Benefit Act of 1961, No.53 acts of Parliament 1961 (India).
  3. S.Aswath, *The Study on Realities of Women workers under Maternity Benefit Act*, 6, INTERNATIONAL JOURNAL OF LAW MANAGEMENT AND HUMANITIES 1920, 1921(2024).
  4. Archismaam Tyagi and Mehu Mohan, *Position of Maternity benefits- A comparative Analysis of Maternity benefit act,1961 and social security code 2020*, MANUPATRA (Aug.10,2022), <https://articles.manupatra.com/article-details/position-of-maternity-benefits-a-comparative-analysis-of-the-maternity-benefits-act-1961-and-the-social-security-code-2020>.
  5. Richa Jhanwar, *The Need for Maternity Benefits for Women Employee*, LAWTOPOUS (Nov. 16,2014, 2:30 PM), <https://www.lawctopus.com/academike/the-need-for-maternity-bene->



first two 12 weeks for the subsequent child. Before the expected delivery date, up to eight weeks of leave may be taken at this time. A woman is entitled to six weeks of paid leave following a miscarriage or medically assisted pregnancy termination. The Act states that to be eligible for maternity benefits, a woman must have worked for a company for at least 80 days in the 12 months before the date of her anticipated delivery. The Act provides nursing breaks, protection from termination during maternity leave, and a medical incentive if the employer does not provide free healthcare in addition to paid leave. It also ensures that a woman's maternity leave won't be used as an excuse for discrimination or unfair treatment.

The 2017 amendment supports the possibility of working from home beyond the maternity leave term, contingent on the nature of the employment and mutual consent between the employer and the employee. However, the reality of women workers, especially in the unorganized sector, often contradicts the promises made in the paper, making the efficiency of the legislation a contentious matter. In India, the majority of working women work in the unorganized sector, where maternity benefit regulations and labour rules are either non-existent or poorly enforced. Many of these women are only able to obtain the benefits to which they are entitled, and many of them are not even aware that there are regulations in place<sup>6</sup>.

Moreover, the extended maternity leave may lead to discrimination in hiring practices because the small and medium organisations are not hiring the women who are in the age of getting pregnant. The reason behind this is these organisations are considering it as a financial burden. Law compliance has thereby improved in the unorganized sector, while difficulties still exist. The administrative cost of these regulations, especially for small enterprises, sometimes results in inadequate compliance. Other issues include being unaware of work-from-home opportunities and childcare services, among other things.

In conclusion, the Maternity Benefit Act represents a significant advancement in safeguarding the rights of Indian women workers. The actual picture of these rules' execution is complex. The obstacles that women encounter, particularly in the unorganized sector, underscore the need for more stringent enforcement protocols, heightened consciousness, and employer-friendly initiatives to guarantee that the legislation's intended advantages are entirely realized.

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fits-for-women-employee/.

6. Nandhakumar.M., *The Actual Situation Of Female Employees Under The 1961 Maternity Benefits Act*, IV INDIAN JOURNAL OF INTEGRATED RESEARCH IN LAW 239, 240-245(2024).



## LEVEL OF AWARENESS AND THE OBSTACLES FACED BY THE WOMEN WORKERS IN ACCESSING MATERNITY BENEFITS, HIGHLIGHTING HOW THESE DIFFICULTIES VARY ACROSS DIFFERENT SECTORS

In India, the Maternity Benefit Act of 1961, which was revised in 2017, is a crucial part of the legislation that safeguards the rights of expectant mothers and new mothers in the workplace. Despite the significance of the Act, women workers' awareness of their rights under it varies widely, often depending on factors like locality, industry, and educational attainment. This section looks into the awareness levels of female workers, supported by case studies and graphical analysis. Depending on the sector and demographic category, Indian women workers' awareness of their rights under the 1961 Maternity Benefit Act (MBA) and its 2017 update differs significantly. It takes a close look at several factors to completely comprehend this information, and the challenges women face while trying to obtain benefits, which includes the kind of job (formal vs. informal), geographic region, level of education and company policies.

### Formal sector

In the formal sector, the Maternity Benefit Act (MBA) is frequently more recognized, especially among employees in bigger corporations and in metropolitan regions. Numerous factors might contribute to this, such as the presence of unions or employee organizations and organized human resources (HR) departments that inform staff members of their legal rights<sup>7</sup>. These businesses often provide their staff members training sessions and details on perks, such as maternity leave. Moreover, larger companies are more likely to abide by legal duties due to regulatory inspection, which increases awareness even more. Even within this business, disparities persist. Employees in small and medium-sized enterprises (SMEs) or in lower-tier roles may not have as much access to resources due to limited HR support and limited access to resources.

The Maternity Benefit Act is comparatively well-known in the IT industry, where women are frequently more educated and employed in formal environments A.V.V. Giri *National Labour Institute research* <sup>8</sup>examined how the 2017 Maternity Benefit (Amendment) Act influenced the IT/ITES sector. According to the survey, the vast majority of female workers in this industry were aware of their rights regarding maternity leave.

7. Madhu Gupta, *Pregnancy discrimination in workplace: Empirical study*, 4 INTERNATIONAL JOURNAL OF ADVANCED RESEARCH IN COMMERCE, MANAGEMENT & SOCIAL SCIENCE (IJARCMSS), pp135, 136 2021 <https://www.inspirajournals.com/uploads/Issues/415805664.pdf>.

8. Dr. Shashi Bala, *Impact of maternity benefit act, 2017 in the IT/ITES industries*, No. 132/2019, ISBN: 978-93-82902-60-7, 2019, [https://vvnli.gov.in/sites/default/files/132-2019\\_-\\_NLI%20Research%20Studies%20Series%20.pdf](https://vvnli.gov.in/sites/default/files/132-2019_-_NLI%20Research%20Studies%20Series%20.pdf).

In Bangalore, 200 female IT workers participated in a poll, and the results showed that 85% of them understood they could take maternity leave, and 70% were aware that they could take 26 weeks of paid leave. Only 40 percent, meanwhile, were aware of other advantages including the ability to work from home and nursing breaks.

### **Challenges faced in organised sector**

- **Compliance and Implementation Issues**

Even while the Maternity Benefit Act is generally well-known in structured industries like IT, finance, and large-scale manufacturing, there are still obstacles to the efficient administration of maternity benefits<sup>9</sup>. While some companies may fulfil the bare minimum required by law, they might fail to give further supporting measures like flexible work schedules or paid leave off. This may lead to a contradiction between the law and real-world assistance. Even in the organised sector some women are unaware of their rights and benefits which leads to underutilisation of benefits.

- **Workplace Discrimination**

Even with the legal provisions in the place, still the workplace discrimination exists on the pregnant women or those who are in the maternity leave. Usually, women face the workplace discrimination in the way of hiring and promotion as a employers might be reluctant to bear the cost of maternity benefit<sup>10</sup>.

- **Inadequate Facilities**

A lot of places of employment don't have special areas for nursing or expressing milk, which is important for new mothers. Women could find it difficult to manage their requirements for breastfeeding and employment without such facilities. Moreover,<sup>11</sup> many of the workplace does not have the creche facilities which the working women could not balance the work and childcare.

- **Job Security**

For many women, maintaining employment stability both before and after maternity leave is crucial. Reluctance to utilize maternity benefits to the fullest extent may stem from worries about job stability. When they return from maternity leave, women can worry about

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9. MS. Shivi Saxena & Dr. Poonam Madan, *challenges affecting the organised retail sector in India- a case study of Vishal mega mart*, e-ISSN: 2278-487X, p-ISSN: 2319-7668. Volume 18, Issue 10. Ver. VI IOSR JOURNAL OF BUSINESS AND MANAGEMENT (IOSR-JBM), pp 28-33, <https://www.iosrjournals.org/iosr-jbm/papers/Vol18-issue10/Version-6/C1810062833.pdf>.

10. *Id.*

11. *Id.*

losing their employment or facing discrimination. They could be discouraged from using their entire maternity leave benefit by this worry. Although paid maternity leave is mandated by the Maternity Benefit Act, some women may feel pressured to take unpaid leave or may not get benefits right once, which might have an impact on their finances.

In the case of *Mini Vs life Insurance corporation of India*<sup>12</sup>, the issue was the petitioner was a contractual employee and was denied of the maternity leave. The court ruled that maternity leave is essential for the women's dignity and should be provided irrespective of the employment. Another case of *Pooja Jignesh Joshi Vs. state of Maharashtra and Ors*<sup>13</sup>., in this case the petitioner who had a child through the surrogacy was denied maternity leave. The high court ruled that denying the maternity leave to a mother through surrogacy is discriminatory and violates the rights and right to motherhood under article 21 of the Indian constitution.

### **Informal Sector**

In India<sup>14</sup>, the informal sector, where a large number of women work, has significantly lower levels of awareness. Because they sometimes do not have formal employment contracts, workers in this industry may not even be aware that they are entitled to maternity benefits. Many of the women working in the informal sector are employed in small-scale industries, household work, or agriculture, where there is no discussion of legal rights. These employees frequently rely on informal knowledge from friends and family or local networks, which isn't necessarily reliable or complete. In addition to restricted access to education and legal resources, the lack of knowledge makes it difficult for women to protect their rights.

The awareness level also varies according to the socio-economic factor. Which means the women who are educated and well accessed with social medias and internets are very well aware about the maternity benefit act and other provisional rights but the lower socio-economic women and who are uneducated and in rural area are often not informed about the benefits and their rights and the lack in awareness.

Research conducted in<sup>15</sup> rural Maharashtra, however, with a focus on women employed in agriculture and small-scale enterprises, presented a quite different image. Out of the 300 women who participated in the poll, only 15% were aware of the Maternity Benefit Act and 5% knew that they were entitled to paid leave during pregnancy. Because they lack formal job

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12. Mini Vs life Insurance corporation of India, 2018 (1) KLT530.

13. Pooja Jignesh Joshi Vs. state of Maharashtra and Ors, MANU/MH/2480/2019.

14. Arzoo Singh, *Critical analysis of maternity benefit act, 1961*, 2 INTERNATIONAL JOURNAL OF ADVANCED LEGAL RESEARCH, (2021).

15. Ibid

contracts, the majority of women in this industry rely on unofficial networks for information, making them at risk of exploitation.

### **Challenges faced by in Unorganised sector**

- **Lack of Awareness**

The lack of awareness of women in the unorganized sector on their rights under the MBA is an important hurdle. Because of their restricted access to information and instructional materials, a large number of workers are unaware that maternity benefits are legally required<sup>16</sup>. Like for Example, Women employed in small-scale industrial facilities or as agricultural labourers in rural areas are frequently unaware of their entitlement to maternity leave and benefits. Even when they are legally entitled to these benefits, they are unlikely to seek or ask for them due to this lack of understanding.

- **Daily wages Employment**

Many of the workers in the unorganised sector are employed by daily wages with no guarantee of consistent employment this job insecurity makes it difficult for the women to claim the maternity benefits. Like for example When a construction worker gets pregnant, she can be reluctant about asking for maternity leave because she worries about losing her job and possibly losing her income if her employer dismisses her or replaces her.

- **Inadequate Legal Enforcement**

The lack of adequate management and monitoring frequently results in inadequate enforcement of maternity benefits laws in the unorganized sector. This flaw allows employers to avoid regulatory requirements without suffering serious consequences. Due to inadequate enforcement of labour laws, employers may choose not to offer maternity benefits in industries such as domestic employment or small-scale agriculture, depriving women of the help they are legally entitled to and also <sup>17</sup>lack of formal contract because many of the unorganised workers do not have the formal contract this makes it difficult to prove the employment and claim the benefits.

- **Socio-Economic Barriers:**

Socioeconomic issues that increase the challenges came across by women in the unorganized sector include poor income and limited access to healthcare. These obstacles may make it more

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16. Ibid

17. Ark Singh, *the unorganised labour industry in India: a persistent challenges and opportunity for reforms*, INBA Viewpoint, Nov.3,2023, <https://inbaviewpoint.org/the-unorganized-labour-industry-in-india-a-persistent-challenge-and-an-opportunity-for-reform/>.

difficult for them to obtain essential medical treatment and take time off for maternity leave. An illustration of this would be a street seller who could feel pressured to continue working even if she has to take maternity leave because she cannot afford the medical costs associated with her pregnancy and delivery.

The situation of bonded laborers in the unorganised sector was brought to light in the *Bandhua Mukti Morcha v. Union of India* case<sup>18</sup>. The Indian Supreme Court underlined that the government must guarantee the welfare of workers in the unorganised sector, including their access to maternity benefits and health care.

In the case *Olega Tellis Vs Bombay Municipal Corporation*<sup>19</sup>, this case addressed the rights of pavement dwellers and slum dwellers, many of whom work in an unorganised sector. The supreme court recognised the right to livelihood as a fundamental right, which includes access to maternity benefits for women workers.

There is a large variation in the degree of knowledge that female employees have regarding the Maternity Benefit Act, with those employed in the formal sector often knowing more than those in the informal sector. To get maternity benefits, women must overcome several obstacles, such as procedural hurdles, employer non-compliance, and lack of information. The majority of women workers in India are employed in the informal sector, where these difficulties are amplified. This emphasizes the need for focused initiatives to raise awareness, enforce laws, and provide support systems in all sectors.

## **THE MATERNITY BENEFIT ACT COMPARED TO SIMILAR LEGISLATION IN OTHER COUNTRIES IN TERMS OF SCOPE, BENEFITS, AND ENFORCEMENT**

The Indian Maternity Benefit Act (MBA), enacted in 1961 and revised in 2017, offers a framework for maternity leave and benefits for female employees. This significant piece of legislation grants women the right to a “maternity benefit,” which is a fully paid leave of absence from work to care for their unborn child, as well as the protection of their employment during pregnancy. Let us compare this law’s scope, benefits, and application to legislation of a similar nature in other countries.

### **Scope of maternity leave**

#### **India**

**Eligibility:** The majority of the candidates for the Maternity Benefit Act are women employed in the organized sector. To be eligible for compensation, women had to have worked

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18. Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161.

19. Olega Tellis Vs Bombay Municipal Corporation, 1986 AIR 180.

for a minimum of 80 days in the 12 months before the expected delivery date. This provision excludes a large proportion of women from the informal sector, where official job records and regular work histories are less common.

**Duration:** For the first two children, the MBA offers up to 26 weeks (about six months) of paid maternity leave. The leave is shortened to 12 weeks with the third child. Although this is meant to assist women during their pregnancy, families that want to have multiple kids may find it restrictive and also 12 weeks for the adoptive and surrogacy mothers.

**Additional Benefits:** The Act provides for the provision of a childcare facility for businesses employing fifty or more people. The Act also requires paid leave if a woman has a miscarriage or other pregnancy-related medical issues.

### **Sweden**

**Eligibility:** All parents, regardless of work position, are eligible for Swedish maternity leave benefits, which are widely applicable. The eligibility is broad and includes both self-employed and employed persons.

**Duration:** Each kid in Sweden is entitled to 480 days of paid parental leave, of which 390 days are paid at a rate equivalent to around 80% of the wage and the final 90 days are paid at a flat rate. To encourage shared responsibility, parents might split up this leave.

**Additional Benefits:** The scheme offers low-income family's extra benefits as well as job safety while on leave. Parents can take leave until the child turns 8. Additionally, there are flexible leave alternatives that help parents efficiently manage work and daycare.

### **Australia**

**Eligibility:** Primary caregivers who fulfil residency and employment conditions, such as a minimum duration of continuous employment, are eligible for Australian Paid Parental Leave.

**Duration:** 18 weeks of paid leave at the standard federal salary are offered under this system. Though it is somewhat shorter than in some other European nations, this offers financial assistance in the early postpartum phase.

**Additional Benefits:** Fathers and partners who use the system can additionally get two weeks of Dad and Partner Pay. This seeks to assist with caring duties and strengthening family relationships.

**Benefits**

| COUNTRY | PAYMENT                                                                      | HEALTH BENEFITS                                                                            |
|---------|------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------|
| INDIA   | Full salary for the duration of the leave                                    | Medical bonus if no pre-natal confinement and post-natal care is provided by the employer. |
| NORWAY  | Full salary for 49 weeks or 80% of the salary for 59 weeks                   | Additional benefit for prenatal and post-natal care.                                       |
| JAPAN   | 60% of the salary for 14 weeks (6 weeks before and 8 weeks after childbirth) | Comprehensive health coverage for prenatal and postnatal care.                             |

In India the act is enforced by the ministry of labour and employment. Non-compliance can lead to fines and imprisonment. The MBA is difficult to enforce, especially in the unorganized sector where compliance is frequently low. For women in the organized sector who have worked for at least 80 days in the previous 12 months, the Act requires 26 weeks of paid maternity leave; however, many women in the informal sector, such as domestic and agricultural workers, are not eligible for these benefits. There is little regulatory control, and many small businesses and informal employers might not follow the Act's requirements.

Whereas, in Germany the strict enforcement by the federal ministry of family affairs, senior citizens, women and youth. Generally, well enforced but in small scale industries struggle with the compliance. In Unites States, the family and medical leave act provides 12 weeks of unpaid leave, enforced by the department of labour. The challenges faced in the US is that lack of paid leave and limited coverage as it only applies to the company which has more than 50 or more employees.

When <sup>20</sup>compared to other nations, India's Maternity Benefit Act offers significant advantages, but it is not as well-enforced or comprehensive, particularly when it comes to the unorganized sector. More comprehensive and flexible leave policies are available in nations like Sweden and Norway, which support gender equality and improve mother and child health. Additionally<sup>21</sup>, these nations have stronger enforcement systems, which guarantee greater compliance and assistance for working parents.

20. Santhiya K & Mahalakshmi S, *maternity benefit in India: a comparative analysis with select-ed countries*, ISSN: 2319-7064, INTERNATIONAL JOURNAL OF SCIENCE AND RESEARCH, (2022) <https://www.ijsr.net/archive/v12i5/SR23520205435.pdf>.

21. Gretchen Livingston & Deja Thomas, *Among 41 countries only US lack in paid parental leave*, PEW RESEARCH CENTRE, Dec 16, 2019, <https://www.pewresearch.org/short-reads/2019/12/16/u-s-lacks-mandated-paid-parental-leave/>.



## **CONCLUSION, RECOMMENDATIONS AND SUGGESTIONS**

1. **Strengthen Enforcement Mechanisms:** To ensure that the Maternity Benefit Act (MBA) is as effective as possible, enforcement must be strengthened, particularly in the unorganized sector. To achieve this, the labour inspectorates' capacities should be strengthened, compliance audits should be carried out more frequently, and the penalty for non-compliance should be raised. A robust monitoring system that makes sure all companies adhere to the Act's standards would help bridge the gap between legal entitlements and actual payments.

2. **Expand Coverage:** The MBA program now solely serves women who work for organized labour. Expanding the Act to include workers in the unorganized sector, such as domestic assistants and agricultural labourers, is essential. This can entail developing a special initiative or modifying existing legislation to ensure that all female workers have access to maternity leave.

3. **Improve Education and Awareness:** Women in the workforce need to learn more about their rights to maternity leave. This may be accomplished with the support of partnerships with non-governmental groups and labour unions, as well as targeted education campaigns and community outreach programs. If women have access to clear, accessible information in a number of languages and forms, it will be simpler to ensure that they are aware of their rights and how to assert them.

4. **Enhance Support for Small Businesses:** Many small and medium-sized enterprises (SMEs) struggle financially as a result of the expense of providing maternity benefits. The government could give tax credits or other subsidies for SMEs in order to reduce these costs and encourage adherence to the MBA. We can ensure that small businesses can meet their duties without undue difficulty by providing them with financial help and resources.

5. **Regular Review and Adaptation:** The Maternity Benefit Act should be reviewed and modified often to reflect changing global best practices and socioeconomic realities. Engaging stakeholders in the review process, including employers, workers, and legal experts, can facilitate the identification of any shortcomings and possible avenues for improvement.

6. **Support Gender Equality Initiatives:** Placing more of an emphasis on gender equality in the workplace may complement maternity benefits. A more welcoming atmosphere may result from initiatives that support parents in balancing their responsibilities to their families and their jobs, such as flexible work hours, paternity leave, and workplace support for parents.

In conclusion, there are still a lot of gaps, especially in the informal sector, even if the Maternity Benefit Act of 1961 and its 2017 modify provides essential protections for women in the organized sector. The effectiveness of the Act is compromised by issues including low

knowledge, inadequate enforcement, and employer non-compliance. Other nations offer maternity benefits that are more strictly implemented and comprehensive when compared to global norms. To guarantee that all female employees, irrespective of their industry, may completely use and reap the advantages of maternity benefits, addressing these concerns calls for more regulatory supervision, better awareness initiatives, and broader coverage.

## BEYOND NEUTRALITY: GENDER BIAS IN VOYEURISM

Vrinda Saxena<sup>1</sup>

Aadhya Sakhuja<sup>2</sup>

### INTRODUCTION

Has the Bhartiya Nyaya Sanhita, 2023<sup>3</sup> finally succeeded in breaking down the century-old barrier of gender discrimination? The expectations for a more gender-neutral approach has not been met by the newly enacted legislation. One such area of crime where gender neutrality was anticipated is voyeurism this is a crime that can be committed against anybody, regardless of gender. Gender should not be the decisive element in whether this crime may be committed against them or not. There have been a handful of crimes on record and numerous unreported when a male was the victim of the offence of voyeurism. This is evident based on the incidents that this offence is not committed only against a single gender.

The criminal offense of voyeurism is a paraphilia in which people gain sexual pleasure from watching people naked or being engaged in intimate behaviours without their consent. Such paraphilia is not limited to a specific gender, it is a desire that can be experienced by anybody. Since it is not a gender-based desire, mere assumption that victim can only be a female is inappropriate and discriminatory towards males. Despite being adopted just a decade ago, the offence is not particularly congenial in accordance with the needs of the technologically advanced and broad-minded society.

If the offence is gender-neutral, why is the legislation concentrating on only one gender? There have been several amendments aimed at attaining gender neutrality. However, in terms of sexual assaults, why is there already a prejudice towards one gender? Voyeurism is a delicate issue that has adverse implications not only on a person's physical identity but also for their mental health. Given that the offence has such severe consequences, how can the Indian legal justice system leave such a major loophole?

Despite the principle of equality being the basis of the Indian Constitution, crimes like voyeurism do not follow a gender-neutral approach and exclusively seek males as predators

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  3. The Bhartiya Nyaya Sanhita, Act No. 45 of 2023

rather than victims. Because the crime of voyeurism is not recognized if it is done against a male, the incidents of such against men either remain unreported or unattended if reported in a rare chance. This research paper centers primarily on the criminal offence of voyeurism and questions its gender biasness and the lack of protection for male victims from this offence. Also, this article focusses on demonstrating that the clause violates the Rule of Law, which is a fundamental component of the Indian Constitution. And an analysis is developed on how the century-old stereotype has not only impacted minds, but also legislation. Through this, we want to achieve a relevant adjustment in the provision or an addition that takes a more gender-neutral approach.

### **HOW DOES THE CURRENT STATUTORY PROVISIONS FOR VOYEURISM PROVIDES PROTECTION TO MALE VICTIMS, AND TO WHAT EXTENT DOES IT DEMONSTRATE GENDER NEUTRALITY?**

Voyeurism is an offence added to the Indian Penal Code (IPC)<sup>3</sup> in 2013 in response to the Delhi Gang Rape case<sup>4</sup> of 2012. Following the violent occurrence, more sexual offences like voyeurism were added. These offences were introduced in the IPC to empower women and severely punish sexual offenders. At that point of time, female protection from such heinous sexual offences was essential. However, when these provisions were included a decade back, obvious gender bias emerged. That prejudice towards one gender has now evolved into a loophole which is yet to be rectified. The Bhartiya Nyaya Sanhita, which just replaced the century-old Indian Penal Code, was expected to eliminate gender bias in sexual offence provisions. However, BNS has not adopted a gender-neutral approach, resulting in evident bias against the male population.

Voyeurism is described under section 76<sup>5</sup> of Bhartiya Nyaya Sanhita (BNS), 2023 as anyone who captures or watches a woman engaging in a private act in a place expected to provide privacy, exposes her genitals or engages in a sexual act not typically done in public or disseminates such images, is punishable by imprisonment and fines. The offence of Voyeurism, part of Chapter V of Offences against woman and children solely focusses on female victims as stated. This section is centric towards a particular gender leaving the other in background. Voyeurism is a paraphilic disorder that is not specific to one gender. Any individual, regardless of gender, may experience such unhealthy desires and be tempted to violate another person's privacy during intimate activities.

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3. Indian Penal Code, Act No. 45 of 1860, Act of Parliament (India).

4. Mukesh & Anr. V. State (NCT of Delhi & Ors.), (2017) 6 SCC1

5. The Bhartiya Nyaya Sanhita, 2023, § 76, Act No. 45 of 2023

*In a 2021 article, research was conducted to analyse sex differences resulting in men exhibiting more interest than women in Voyeurism, an item of Paraphilia Scale<sup>6</sup>. According to the study, women have fewer voyeuristic desires, but this does not reduce the chance of males being victims of voyeuristic offences. Males can be victim of Voyeurism because of females and Homosexual males having these Voyeuristic tendencies.*

After understanding that the disorder is not restricted to one gender, the fact that prevalent laws utterly ignore the likelihood of men being violated demonstrates strong bias and discrimination. As section 76 states, whomever watches or captures indicates that the offender's gender is irrelevant, yet the offence can only be committed against females. The never-ending assumption that men are not victims of sexual offences has become the underlying source of gender biases. And as long as such bias against one gender is evident the laws will remain discriminatory.

In a hypothetical scenario, a heterosexual couple engaged in sexual activity were observed by a man. In this case, the male perpetrator commits the crime against the couple. According to the statutes, the victim is only the female, and she can seek redress for the offence committed against her; however, her partner, who took part in that intimate action and whose privacy was invaded, cannot approach the judicial system since he has no recourse. This example demonstrates how an offence committed against two persons who are not the same gender will be regarded differently in the eyes of the law.

Electronic voyeurism broadens the scope of this offence because, in today's technologically advanced society, this is a very common violation. To prevent the violation of people by electronic Voyeurism section 66E was added by the Information Technology Amendment Act, 2008<sup>7</sup>. The Section 66E<sup>8</sup> of Information Technology Act talks about the punishment for violation of privacy and states that anyone who captures, publishes, or transmits an image of a person's private area without their consent, under circumstances violating their privacy, may face imprisonment, a fine, or both. This section was included because of the increasing use of

technology and growing sexually explicit content on the internet. It was necessary to regulate because cyberspace can easily be misused by people.

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6. Andrew George Thomas, *Sex Differences in Voyeuristic and Exhibitionistic Interests: Exploring the Mediating Roles of Sociosexuality and Sexual Compulsivity from an Evolutionary Perspective*, Archives of Sexual Behaviour (2021), 6 July 2021, <https://link.springer.com/article/10.1007/s10508-021-01991-0>

7. The Information Technology Amendment Act, 2008, No. 10 of 2009

8. The Information Technology Act, 2000, § 66E, Act No. 21 of 2000

Lawmakers have not made Electronic Voyeurism a gender-based offence because it became apparent how severely this crime violates one's personal space. However, the offline aspect of Voyeurism does not provide protection for males. When it comes to sexual offence protection, men have historically taken a second seat. The long-held belief that men are predators and not those who may be injured by sexual assaults is highly disrespectful and demonstrates society's evident prejudice. Tilting the laws in one direction while keeping the other in the shadows has been going on for decades, and as society evolves, a more gender-neutral approach to sexual offences is becoming necessary.

*In one case reported in 2023, an elderly man committed suicide when a video surfaced online showing him in a compromising situation with a college girl. Darshana, the girl in the video, is accused of entrapping the man and having sexual intercourse with him, which she then videotaped and published to a pornographic website. This case demonstrates how a girl invaded the senior man's privacy*<sup>9</sup>. This is a case of Online Voyeurism, for which proper laws are provided, still the person committed suicide because he was not able to face the shame.

A number of similar incidents occur virtually every day and go unreported since our society's laws are structured in this way. Men being victims of sexual assaults is a stigma that has yet to be addressed, and despite several modifications, the laws remain biased, discriminating against the male population and preventing them from exercising their fundamental rights to equality, privacy, and life.

Voyeurism is an offence that, despite not physically harming a person, violates their fundamental rights, mental well-being, and bodily identity. Citizens are granted fundamental rights, which they can exercise and prevent others from infringing them. However, in this case, the offence is as serious as voyeurism, which, although not physically harming somebody, causes a mental anguish. Not considering it an offence against men undermines their right to equality<sup>10</sup>, which is provided to all citizens. Because it is not deemed an infraction, the number of incidents reported is nearly non-existent. This should be altered, and men should also be regarded as potential victims of sexual crimes.

Not only Right to equality but a very crucial right to privacy<sup>11</sup> is also being violated when Voyeurism is being committed against males and no remedy is available for them. Privacy is an important aspect of someone's personal space and lives, not respecting it or considering it to be

9. Bikash Chetry, *Assam: Elderly man dies by suicide after video of him in compromising position with college girl surfaces online*, INDIA TODAY NORTHEAST, (Last accessed 23 July, 2024 12:00 PM) <https://www.indiatodayne.in/assam/story/assamelderly-man-dies-by-suicide-after-video-of-him-in-compromising-position-with-college-girl-surfaces-online554044-2023-05-06>

10. INDIA CONST. art 14

11. INDIA CONST. art 21

a necessity for males shows the clear tilt of lawmakers away from males and their protection. The freedom to privately conduct intimate action should be a person's right, which is being violated flagrantly in this case since lawmakers do not even consider the prospect of it being infringed upon. Males should be worried even in their private area when doing something as simple as changing clothes because if Voyeurism is committed against them, there will be no remedy and they must accept it.

Justice D. Y. Chandrachud in Justice K.S. Puttaswamy and Ors. Vs. Union of India (UOI)<sup>12</sup> and Ors. has said that:

“Hence privacy is a postulate of human dignity itself. Thoughts and behavioural patterns which are intimate to an individual are entitled to a zone of privacy where one is free of social expectations. In that zone of privacy, an individual is not judged by others. Privacy is the constitutional core of human dignity. Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life.”

Right to privacy which includes private acts of person, and gives that privacy to involve in personal intimate activities should protect its citizens when such right is being violated.

Right to privacy is an extension of the right to life<sup>14</sup>. The right to life and dignity is a fundamental human right that everyone should be free to exercise. Voyeurism, with its gender prejudice, also infringes men's right to life. After realising how serious this offence is and how severely it harms someone's mental health, identity, and fundamental rights as humans. A law should be introduced which protect males from sexual offences and are as effective as those provided to females. Only if Gender neutral laws against sexual offences are introduces, then we can move ahead as a more gender-neutral society eliminating biases.

Rule of law is considered as a part of the basic structure of the constitution and, hence, it cannot be abrogated or destroyed even by the Parliament. In the landmark judgement of *Kesavananda Bharati v. State of Kerala*(1973)<sup>13</sup> Rule of Law has been acknowledged as a part of the basic structure of the Indian Constitution. The principle of rule of law has 3 principles given by A. V. Dicey which are – Supremacy of the Law, Equality before the Law and Predominance of the Legal Spirit. These principles are followed by the Indian Constitution as it recognizes the rights of the citizens and that the courts should help in enforcing them. The

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12. Justice K.S. Puttaswamy and Ors. Vs. Union of India (UOI) and Ors, 2018 INSC 880 <sup>14</sup> INDIA CONST. art 21

13. Kesavananda Bharati v State of Kerala, (1973) 4 SCC 225



rule of law is at the heart of the Indian Constitution, and Section 76<sup>14</sup> of the BNS violates this idea. “Equality before Law” is a Rule of Law concept and in the Offence of Voyeurism it has been violated by failure to provide equal justice to both men and women.

Mental health, which is so vital in this modern society, should not be jeopardized because a law cannot safeguard almost half of its population comprising of men. Lawmakers can enact legislation that assist male victims of crimes such as voyeurism in reporting them. If suitable law is enacted to make voyeurism an offence if done against males, many men will be motivated to come out and report about these incidents.

### **HOW DO SOCIAL AND CULTURAL BARRIERS RESTRICT EFFECTIVE ENFORCEMENT TOWARDS THE OFFENCE OF VOYEURISM?**

The offence of voyeurism is a criminal offence and more of an ill psychological state where a person feels self-pleasure by seeing others get indulged in sexual or intimate acts. The laws providing protection for such an offence are given in Bhartiya Nyaya Sanhita, 2023<sup>15</sup> and Information Technology Act, 2000<sup>16</sup> but the provisions of BNS are tilted towards the females being gender biased unlike the IT Act with limited scope of only punishing the cybercrimes under voyeurism only providing protection to the females from the offence of voyeurism completely neglecting the possibility of male being on the victim side may it be due to the societal perspective.

Despite being the advancements in the mindsets of the people, certain stereotypes persist. Since the society has existed, it has been a patriarchal one so it has become a common ground that males are the only ones committing such crime. The society and culture of India always portrays male as the dominating, strong, leading authoritative body while women as the weak and suppressed. That is why even though our fundamentals of legal system talk about following the principles of equality, yet in such a recent and significant law gender neutrality approach is nowhere followed.

Justice Susheel Bala Dagar in State (Govt. of NCT of Delhi) vs. Shailesh Kumar <sup>17</sup> stated that:

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14. The Bhartiya Nyaya Sanhita, 2023, § 76, Act No. 45 of 2023

15. The Bhartiya Nyaya Sanhita, Act No. 45 of 2023

16. The Information Technology Act, Act No. 21 of 2000

17. State (Govt. of NCT of Delhi) vs. Shailesh Kumar, 2019:DH-C:2335-DB <sup>20</sup> INDIA CONST. art 21

*“Voyeurism is a ridiculous type of enjoyment for men whereas it causes mental trauma to woman. Such acts infringe the right to privacy of woman and she feels unsafe in the places which are generally meant to be safe for woman.”*

In a society where men are consistently viewed as the wrongdoers, how can they ever feel truly safe? The statement “voyeurism is a ridiculous type of entertainment for men” unfairly categorizes and generalizes men as perpetrators rather than potential victims. The very system meant to ensure justice should not be creating such biases but should treat everyone equally. However, the focus on women’s safety, while neglecting men’s, reveals a bias in our justice system. This disparity highlights an underlying prejudice against men, leaving their protection and well-being overlooked and undermined by the legal framework.

The societal perspective to always blame men always takes away considering the men as the one who are wronged and due to the toxic masculinity cultural perspectives, men are prevented from speaking out for the wrongs against them and very few voices are raised when it comes to providing justice to male victims as over time it has become a perspective that if something wrong has happened, the man will always be at the fault. Being such a crucial law still not being gender neutral clearly depicts such typical attitude of the society. On one hand, it is always about aligning with the principles of equal and just treatment to everyone despite gender or any differences as mentioned even in A.14<sup>20</sup> of the Indian Constitution, the fundamental rights, but such things are only taken in consideration when it is about females and the S.76<sup>18</sup> of BNS, 2023 the modified version of IPC is straight on depiction of this fact. A number of instances of males being a victim to voyeurism have been brought into light but still the law chose to gender biased providing no protection to males.

There exists an immediate need to govern such gaps in the legal system making it effective getting over such barriers of societal and cultural norms. Completing ignoring the fact that men can be on the vulnerable side at times based on the traditional gender norms undermines the seriousness of such a major offence and the alignment of basic legal provisions with the fundamental principles of law as prescribed in the Constitution.

The cultural misconceptions about masculinity and victimhood, is not only a big question to the legal system but a clear indication of it falling behind in ensuring fair and just treatment to all. It simply depicts how the legal system is getting ill influenced by such perspectives completely ignoring the fact of considering males as to be the one suffering that not only is unjust but got greater consequences.

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18. The Bhartiya Nyaya Sanhita, 2023, § 76, Act No. 45 of 2023

Voyeurism is a kind of offence with major after effects especially on the mind of the person giving lifelong trauma and in such an important matter, completely leaving out the thought of males to be the one suffering is a very wrong approach. Due to the less reporting of such incidents against male victims is no excuse to not making the law to safeguard male victims. The reason for less reporting can be the case that the males are being the victims but not able to speak up due to the hesitation arising out of social stigmas which are just getting a boost due to such laggings in the legal system.

As per the data of 2021, the stats on the reports against the voyeurism offence shows the data of offence commission against women but there is no proper report or data for such offence commission against men. Though it is not the case that men are not a victim to it as thanks to the technological advancement, a number of men have come up and raised their voices against the happening of such events against their stories on social media. However, the absence of any law protecting men against it and lack of the reports at the part of men is a clear depiction of the failing of the legal system in protecting men. It shows the amount of social pressure on the men that does not even let them speak of such ill doings against them. The law not generalizing the fact that men can also be wronged and they can also need protection from such kind of paraphilia is a major concern as not only does it shows the toxic stereotypes of the society but also does it shows the weakened roots of the legal justice system which is not that just.

Due to the raised voices of men on social media, the IT Act, 2000 has followed a gender-neutral approach but the BNS, 2023 still fails to do so. Even if the provision of BNS of voyeurism is based on the assumption that men cannot be a victim when it comes to such sexual offences but a crucial law with such a presumption shows nothing but a deviation in the legal system from the basic principles of fairness and equality.

If less voices are raised does not mean it can be ignored. Even if a single man is being a victim to any such crime, there is a need for a proper law to govern him, a proper remedy for him against such crime and thus moving over the societal and cultural barriers, the law needs to be amended towards a more gender neutral one ensuring both men and women are getting equal protection from the law normalizing it for the society to accept men on the victim part and encouraging men to come up as the victim.

The Bhartiya Nyaya Sanhita, 2023, is therefore brought in to address the rising concerns about voyeurism; yet, the act's gender-biased clauses trample on the fundamental principles of equality entrenched in the Indian Constitution. Unlike the Information Technology Act of 2000, which criminalises internet voyeurism and provides gender-neutral safeguards, the BNS does not protect males against voyeurism. This judicial lapse can be attributed to long-standing social and cultural stereotypes of males as perpetrators rather than victims. The stories of male

victims highlight the need for a legislative framework that recognizes the rights and dignity of all people, regardless of gender. The amendments in the BNS should apply a gender-neutral approach; otherwise, fairness and justice under the present law cannot be ensured.

## CONCLUSION AND SUGGESTIONS

In this research paper, we came to realize that the fundamental reason for the lack of laws against voyeurism and sexual offences is the conventional stigma of males as predators rather than victims. This idea of males not being victims of sexual offences has persisted in society for a long time, necessitating the need to break free from this stereotype and treat all persons as one, as well as implement changes that reflect our mindset.

In this study, we argue that because current laws against sexual offences are all geared towards women, the “male-victim” perspective has not been considered. However, in order to improve the situation and move forward with a more gender-neutral approach, we need particular legislation against sexual offences for men. There is a need for a special law prohibiting voyeurism that protects everyone equally, regardless of gender.

Also, Section 76 of the Bhartiya Nyaya Sanhita should be amended so that the gender of either the victim or the predator is not a problem. Gender should no longer be used to determine whether a person may receive a remedy after being violated by such a terrible violation.

Since this offence of Voyeurism is Violative of Fundamental right to equity, life and privacy. The violations due to this provision shows gaps in the legal justice system and how it is not able to provide justice to each and every individual equally. This offence should be dealt with same seriousness as any other offence.

When analyzing voyeurism from an Indian legal viewpoint, it is clear that there is a gender prejudice that makes males vulnerable to such crimes, as claimed by Bhartiya Nyaya Sanhita. Although the law has taken measures to protect women against this crime, it is concerning that it does not include safeguards for males. This disparity leads to male victimization, perpetuates perceptions of male fragility, and leaves male victims without legal assistance.

This treatment, though perhaps instigated by the instant case, has further institutionalized gender bias in the Bhartiya Nyaya Sanhita and other Indian legislation pertaining to voyeurism, as they are embedded with a focus on the female victim while maintaining silence regarding male victimization. Since the act is premised on the protection of women—the most important consideration toward ensuring the safety and dignity of women—it invisibilizes the male victim and perpetuates the myth that men cannot be subjected to such crimes.

This disparity in legal protection itself calls for reform. The Information Technology Act is a great example of gender-neutral legislation, as it protects both men and women from the offence of cyber voyeurism. This model has to be emulated in Bhartiya Nyaya Sanhita so that a comprehensive and equal legal framework can be worked out.

A gender-neutral provision in the Bhartiya Nyaya Sanhita shall fill in the gaps so far existing in the system of law and thus provide for a more just and equitable society. The changes should grant explicit protection to every person from violation of the fundamental rights to privacy and dignity, irrespective of gender. Only if equipped with these changes can the legal system do better toward upholding the principles of justice, equality, and human dignity for all human beings.

**CHAPTER - 3**

**CLIMATE CHANGE AND GLOBAL  
SUSTAINABILITY HUMANITARIAN CRISES  
AND VULNERABLE POPULATIONS**





## **AN ANALYSIS OF COUNTER-TERROR INITIATIVES AGAINST JIHADI TERRORISM: IN THE INDIAN CONTEXT**

R.V. Keshav Prasath<sup>1</sup>

### **INTRODUCTION**

Terrorism has long been a part of human society, but of late, it has attained horrific proportions. There could be many causes for this rise of terrorism and any nation that has not sufficiently addressed these problems has made itself a potential target of terrorism and for its emergence as well. The Word Terrorism finds its origin in the Latin term “*terrere*.” It is a method adopted by an organised group which makes systematic use of violence against humanity, individuals, or groups to create coercion in society to achieve its aim. It could be characterised as a series of acts that seek not only to arouse the ruling government but also to send a message to the people that the present regime in power is not capable and trustworthy.

Though there exists no textbook definition of terrorism nor a consensus among scholars on the same, however, the Supreme Court of India has attempted to define the term ‘terrorism’ in the case of Mohd. Iqbal M. Sheikh vs State of Maharashtra, in the following words “...it may be possible to terrorism as use of violence when its most important result is not merely the physical and mental damage of the victim but the prolonged psychological effect it produces or has the potential of producing. on time society as a whole .... If the object of the activity is to disturb the harmony of time society or to terrorise people and society, to disturb the even tempo, tranquillity of the society, and a sense of fear and insecurity is created in the minds of a section of the society or society at large, then it will, undoubtedly be held to be a terrorist act...”<sup>2</sup>

India is a country that has been long plagued by cross-border terror as well as terrorist activities within the state boundaries. The Independence of India from colonial rule came after a difficult partition cost. The Nation has witnessed its Parliament being attacked, and its Prime Ministers being subject to assassination. Since Terrorist groups have generally viewed non-combatants as the softest prime targets for the fulfilment of their aims and its modus operandi being random, Civilians also become victims of terror attacks over the years. However, India’s Heterogeneous and Federal Character of Indian Polity complicates the structural requirements for counterterrorism.

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2. Mohd. Iqbal M. Shaikh & Ors vs The State of Maharashtra, (1998) 2 SCJ 402.

In India, the Terrorist and Disruptive Activities (Prevention) Act, of 1987 and the Prevention of Terrorism Act, of 2002 are the two legislative enactments that were brought into force to counter terror activities. Both these legislations had stringent characteristics affecting personal liberty and fundamental rights, which have been subject to controversy and were subsequently repealed. Though activities such as terrorism, insurgency, etc which result in the violation of Human Rights are to be dealt with an iron fist, interpretation of the same however has to be done in consonance with the Basic Rights. The presence of a proper law is one of the essential elements for an effective counter-terror strategy, but it should not be in such a way that such laws end up taking away basic Human Rights.

### **INDIAN ANTI-TERROR LAWS AGAINST TERRORISM: AN ANALYSIS**

In India, there has been a persistent fear of cross-border terrorism as well as internal terrorism which poses a challenge to the country's peace and ethos and its existence, there has been an influence on the anti-terror laws to subscribe to the extended criminal justice model. While these laws are passed by the Union Government, they are enforced by the states since the enforcement of law-and-order falls under the purview of the states. In this section, the discussion shall centre around the anti-terror legislation that was and is prevalent in India.

#### **The opportunistic interpretations under the Terrorist and Disruptive Activities (Prevention) Act (TADA), 1987**

This Act was passed against the backdrop of the increasing Sikh militancy in Punjab and the subsequent assassination of India's Prime Minister Indira Gandhi by Sikh Extremists in 1984. It is considered the first legislation enacted in India with a specific purpose of countering terrorism. Under Section 3(1) of TADA, a Terrorist Act was broadly defined as a committed by a person with the intent "(a) to intimidate the Government, (b) to strike terror, (c) to adversely affect the harmony among the people. In furtherance of this intent, if he does any act or thing by the use of bombs, dynamite or other explosive, inflammable substances or firearms lethal weapons or poisonous gases or any other substance of hazardous nature to cause death or injuries to, any person/s or create a loss or damage to or destruction of, property or disrupt any essential supplies or services to the community or detains any person and threatens to kill or injure such person."<sup>3</sup> Hence, this definition was broad enough to be applied to the insurgents.

This Act did contain the characters of intelligence and criminal justice. A suspected terrorist could be guilty and would be subject to an evidentiary burden to prove the innocence.<sup>4</sup> Further, anyone could be arrested by the state merely on suspicion of being a terrorist and could be held

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3. Terrorist and Disruptive Activities (Prevention) Act (TADA), 1987, § 3(1), No. 28, Acts of Parliament, 1987 (India)

4. *Id.*, § 21.

in detention for upto one year without any formal charges or trial.<sup>5</sup> Also, the advocacy and abetment of terrorist acts were criminalised, which was defined as stringent criticisms against the government or the speeches/ questions on the “territorial integrity of India,” also was inclusive in the purview of “disruptive activities” and the penalties for the crimes committed under TADA that results to death of a person is life imprisonment or death whereas if it did not result to death was a minimum of five years or extending upto life imprisonment.<sup>6</sup>

The Act has also led to the creation of Dedicated Courts that allow for in-camera proceedings closed to the public and have exclusive jurisdiction to try the violation of the provisions.<sup>7</sup> “As per this act, a confession made to the police officer, not below the rank of the Superintendent of Police, eyewitness identifications and the mere possession of arms or explosives similar to those used in terrorist activities or the presence of fingerprints of the accused at the crime scene or on the vehicle used to render the act or financing to the person accused or suspected of a terror act was enough to presume the guilt of a person.”<sup>8</sup>

However, the Act had just around four percent conviction rate. Though the Act was subject to amendments in 1989, 1991 and 1993, it lapsed in 1995 due to increased criticism of the Act since it not only undermined Article 20 and Article 21 of the Indian Constitution that allowed for the observance of principles of due process, free and fair trial and right to life, it further threatened Article 19 that allowed for the freedom of speech and expression as there could be an opportunistic opportunity by the ruling regimes against their political opponents. But TADA’s influence continues to exist since the government could charge retrospectively for the crimes committed during the enactment and the courts could allow unconfirmed witness statements recorded by the Police as evidence.

### **The rise and fall of the Prevention of Terrorism Act, 2002**

The POTA was hurriedly introduced in 2002 by the then NDA regime on the backdrop of the growing instances of terror attacks between 1999 and 2001 and hell broke loose when the Parliament of India was attacked on 13<sup>th</sup> December 2001 within three months after the 9/11 attacks. The Act was made applicable to the entire country including Jammu & Kashmir, which gave an edge over the existing Indian Penal Code, which was not applicable in Jammu & Kashmir.

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5. *Id*, § 20(4).

6. *Id*, § 3(2)(i)-(ii).

7. *Id*, § 11(1).

8. *Id*, §15, § 21, § 22.

Under Section 1(3) of the Act, “Every person was liable to be punished for every act of omission contrary to the provisions of the Act, of which he is held guilty in India.”<sup>9</sup> Like TADA, POTA also defines “terrorist act” which includes “any one of several enumerated acts of violence if committed with intent to strike terror in the people or if committed with an intent to threaten the unity, integrity, security and sovereignty of India or commission of any act resulting in the loss of human life or the defendant is a member of, or voluntarily aids or promotes the objects, of an association declared unlawful under the UAPA and in possession of unlicensed firearms, explosives or other instruments etc, capable of causing mass destruction.”<sup>10</sup>

The Act under Section 3 directly criminalised the “(1) commission of a terrorist act, (2) conspiring to attempt to commit, advocate, abet, advise, or incite, or knowingly facilitate the commission of a terrorist act or any act preparatory to a terrorist act, (3) voluntarily harbours or conceals or attempts to harbour any person knowing that such a person is a terrorist, (4) poses any proceeds of terrorism and (5) knowingly hold any property that has been derived or obtained from commission of any terrorist act.”<sup>11</sup>

There were no substantial differences between TADA and POTA since there existed multiple analogous provisions to the previous anti-terror legislation. The Act allowed a suspect to be detained for upto 180 days without a charge sheet being filed in the court.<sup>12</sup>

The Act also allowed law enforcement agencies to preserve the identity of the witnesses,<sup>13</sup> and further, provided that a confession made to a “police officer, not below the rank of the Superintendent of Police, to be treated as an admission of guilt.”<sup>14</sup> Just like TADA, Multiple reports cropped up that the law was being grossly abused. On 7<sup>th</sup> October 2004, the UPA regime approved repealing the act by passing the Prevention of Terrorism (Repeal) Act, 2004.

### **Unlawful Activities (Prevention) Act (UAPA), 1967 and the unaddressed inefficiencies of the Indian anti-terror laws**

The UAPA was passed in 1967 “To prevent any individual or association from advocating or indulging in acts for secession of a part of the territory of India from the Union”.<sup>15</sup> This Act used the technicalities of both TADA and POTA to define a terrorist act including the use of

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9. The Prevention Of Terrorism Act, 2002, § 1(3). No. 15, Acts of Parliament, 2002 (India)

10. *Id*, §3(1).

11. *Id*, §3.

12. *Id*, §49.

13. *Id*, §30.

14. *Id*, §32.

15. Unlawful Activities (Prevention) Act (UAPA), 1967, § 2(d). No. 37, Acts of Parliament, 1967 (India)

nuclear and radioactive substances to kill people, raising funds for terrorist acts, organising terror camps, recruitment of terrorists, abetting and aiding in terrorist attacks and conspiracies.<sup>16</sup>

Post POTA Repealed, however, most of its provisions were induced into the UAPA act, having the essence of TADA and POTA being maintained, hence making UAPA imperative anti-terror legislation of India. It has only been further bolstered by subsequent amendments made since its inception in 1967. However, the civil rights concerns raised in the TADA and POTA which seemingly were addressed through their revocation have not been eliminated as a whole, since the amendments to UAPA have carried forward their provisions.

Hence, the anti-terror laws do not offer any clarity on India's Counter-Terror Strategies but have only created uncertainties since these legislations could define terrorist, their motives, and motives clearly and specifically, which could have prevented the multiple subjective interpretations and effective implementation of these laws by the executive agencies. Legislations like TADA and POTA have neither been effective in deterring terrorism nor there had been an effective conviction rate under these acts.

Until 30<sup>th</sup> June 1994, 76, 166 people were arrested under the TADA, of whom 18,708 i.e. 24.5 percent were discharged without any charges being framed against them. Trials were completed against 20,386 persons of which 19,543 were acquitted and only 843 were convicted which accounts for barely four percent of the conviction rate. However, it cannot be denied that strong anti-terror laws are required to deal with terrorism.

## **INDIA'S INSTITUTIONAL APPROACH TO COMBAT TERRORISM**

### **The challenge to combat terror finance in India**

The terror fund generation and its circulation from various sources to the final destination involves multiple complex processes and therefore controlling terror financing poses a difficult challenge. While constructing an approach to combat the flow of terror finance, the first step that is imperative for the same is to identify the source of the fund. There are three primary sources of terror finance. Firstly, the financial support received from the state agencies or structures with organized levels to generate funds and ensure its availability with all support. Secondly, self-funding involves revenue-generating activities ranging from petty crimes to well-planned organised crimes and the funds received from donations.<sup>17</sup>

The three major sources of terror finance were received by the Militants of Punjab and Jammu and Kashmir, whose flow of funds was through trans-border couriers, money sent

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16. *Id*, § 15.

17. Ramanand Garge, *Combating Financing of Terror: An Indian Perspective*, OCCASIONAL PAPER 1, 14-15, (2015).

through hawala transactions and illegal remittances from external supporters and sympathisers. Through these different routes, ISI was and continues to be involved in terror financing. To deal with this complex issue effectively, it becomes imperative to monitor both aspects closely i.e., the generation of funds and its distribution. Proper Capacity Building, effective enforcement of legal provisions, and establishment of financial regulatory and intelligence units all contribute significantly to components of combating terror financing.<sup>18</sup>

The Monitoring of Terror Activities in India received a major boost after the Kargil War. The Finance Intelligence Unit to combat the transnational movement of illicit funds was set up in November 2004 with the intent of receiving, processing, analysing, and disseminating all the intelligence received concerning suspect financial transactions. It is at the helm to strengthen and coordinate the efforts of national and international intelligence, investigation, and enforcement agencies in pursuing global efforts against money laundering and related crimes. It directly reports to the Economic Intelligence Council headed by the finance minister.<sup>19</sup>

### **Organisational structure of counterterrorism and military strikes**

India's Organisational Structure towards Counterterrorism has been incorporated in a large yet highly fragmented institutional set-up encompassing several central and state institutions with overlapping responsibilities. Though there exist so many tools to fight terrorism counter-terror efforts have been highly futile due to poor coordination, and inter-institutional rivalry, resulting in underfunding and understaffing of institutions.<sup>20</sup>

At the State Level, "the police forces of each of the states and union territories within India are tasked with the operational and intelligence fight against terrorism. However, these regular law and order forces, which are often undertrained, underequipped, and underfunded face the brunt of terrorist attacks on its onset. Fortunately, some states boast of highly equipped Anti-Terrorism Squads such as C-60 in Maharashtra that played a major role in the counter-strike initiatives during the Mumbai Attacks of 26/11."<sup>21</sup> At the National Level, India's Intelligence Bureau (IB), its chief domestic intelligence agency and the external intelligence agency, the Research & Analysis Wing (RAW), have been tasked with the collection of information on terrorism inside and outside the country respectively.

The 26/11 attacks however exposed a series of "Comprehensive failures in India's Security Establishment, which had clues of the execution of an attack of such a deadly nature but did

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18. *Id.*, at 16-17.

19. *Id.*, at 17-18.

20. Harsh V Pant & Ivan Lidarev, *Indian counterterrorism policy and the influence of the Global War on Terror*, 17 INDIA REVIEW 181, 187-88, (2018).

21. *Id.*, at 190.



not swiftly react to the same. The Attacks and the shambolic response of the agencies revealed the failure of the intelligence agencies and also the lack of coordination and weakness in the Indian Counterterror Mechanism prompted Delhi to think and push for reforms. Institutionally, the government decided to establish the National Investigation Agency (NIA) to investigate terrorism, a National Counter-Terrorism Centre (NCTC) to lead counterterror efforts and a National Intelligence Grid (NATGRID) to coordinate intelligence sharing. Of these three on paper, to date, only the NIA has come into existence.”<sup>22</sup> However, The NIA has reportedly been very slow in its progress and has been understaffed despite it being the primary national counter-terror institution conferred with powers of investigation and arrest.

To combat terrorist activities operationally, “India relies on several counterterrorist forces, apart from the State Police Agencies and state ATS which are primarily responsible for counterterrorism. To assist state police, the Union government could deploy paramilitary forces such as the Central Reserve Police (CRP), which plays an important counterinsurgency role in Kashmir, and the Border Security Force (BSF), which protects Indian Borders from Infiltration of Militants and smuggling of weapons.”<sup>23</sup> India can also deploy the National Security Guard, a commando special force specially devoted to counterterrorism and is deployed in exceptional circumstances as done during the 26/11 Mumbai attacks. Post the attacks of 26/11, NSG has regional hubs established at Kolkata, Hyderabad, Chennai, and Mumbai. Additionally, the Central Industrial Security Forces (CISF) that provides security for Airports and Critical Infrastructure could also be relied upon. It is only as a last resort that India deploys its Military to fight the terrorists, a role of counterterrorism it has been performing in Kashmir since 1990.

## CONCLUSION AND SUGGESTIONS

Despite the presence of counter-terror mechanisms in India, it has only been on paper and India’s Counterterrorism continues to suffer from fragmentation, lack of a long-term strategy and ineffective implementation. The root of the same includes tensions between the federal government and states, bureaucratic resistance, electoral politics that threaten politicians with backlash if counterterrorism is viewed as targeting minority groups and the practical difficulty of governments to stay committed to Counterterror reforms in the face of the other pressing challenges. There is a serious requirement for reforms in India’s Counterterrorism.

These glaring inefficiencies are visible on the back of the spate of terror attacks ranging from Reasi to Rajouri since 9<sup>th</sup> June 2024, which reflects a shift of modus operandi from the region of Kashmir to a relatively terror-free region of Jammu. In the last 32 months, over 48 soldiers attained Martyrdom in the Jammu Region in the terrorist attacks. Since its inception, Pakistan

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22. *Id*, at 190.

23. *Id*, at 191.



has been posing serious security challenges to India and there should be a very minimalistic engagement of bilateral ties such as economic, political, sports etc, and no sort of negotiations with the perpetrators of terrorism. For every Indian who has attained Martyrdom due to Jihadi Terrorism, there needs to be an immediate and coordinated muscular counterinsurgent operation against the Perpetrators on the lines of the Surgical Strike post the URI attacks in 2016.

Also, India could further flex its diplomatic muscle power to crack down on the sources of terror finance to the militant groups. India can strongly lobby with the International Community to push Pakistan into the Financial Action Task Force's (FATF) blacklist, which potentially could make an already drowning Pakistan push towards bankruptcy. It is pertinent to note that Pakistan has already been placed on **FATF's grey list** thrice in 2008, 2012 and 2018 respectively.

## ENLIGHTENING THE GREEN BENCH: UNCOVERING PUBLIC PERCEPTION AND AWARENESS OF ENVIRONMENTAL COURTS

Hitha<sup>1</sup>

Gurucharan V.E.<sup>2</sup>

### INTRODUCTION

Environmental degradation has become one of the most serious challenges of the 21st century that has compelled nations to undertake legal mechanisms for protecting and conserving the natural environment. In a country with rich biodiversity and varied ecosystems like India, there have been plenty of environmental challenges and to deal with such environmental challenges, India has set up a specialized court called the National Green Tribunal (NGT) also known as the Green Courts. These Courts deal exclusively with environment-related cases, ensuring that all disputes relating to the environment are disposed of expeditiously and effectively, by implementing environmental laws. However, their formation is still very much in the dark from the public and there lacks awareness about its role and effectiveness. The National Green Tribunal Act of 2010 has brought about Green Courts like the National Green Tribunal of India into functioning.

The National Green Tribunal (NGT) was primarily instituted to provide a speedy and effective remedy against environmental degradation, forest destruction, and others, as well as to enforce any legal right concerning the environment. The Tribunal is mandated to finalize applications or appeals within six months of the date of their filing, implying that justice should be rendered in respect of such matters without delay. Through the judgment in *MC Mehta vs. Union of India*<sup>3</sup> on Ganges River pollution, it was revealed how inadequate and quick decision-making by the existing courts had become about the complex environmental issues. The Constitution of India embodies concerns for environmental protection. Specifically, *Article 48*<sup>4</sup>, the Directive Principles of State Policy, obligates the authority of the state to protect and enhance the quality of the environment, and safeguard forests as well as wildlife. Apart from

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1. 3<sup>rd</sup> year, BBA LLB, Student, Alliance School of Law, Alliance University, Bengaluru.
  2. 3<sup>rd</sup> year, BBA LLB, Student, Alliance School of Law, Alliance University, Bengaluru.
  3. M.C Mehta v Union of India (1987) 4 SCC 463.
  4. INDIA CONST. art. 48A.

that, *Article 51A(g)*<sup>5</sup> of the Constitution of India, lays down a fundamental duty upon every citizen to protect and improve the natural environment.

Despite these constitutional provisions, procedural delays and a lack of specialized knowledge of the judiciary were the major hurdles in the execution and enforcement of environmental laws. Hence, there was a need for a specialist tribunal, and such was the NGT, established in 2010<sup>6</sup>. Despite the establishment of NGT, the public is still unaware of its role and functions. Many in the general populace remain ignorant about the existence of these specialized courts and their role in the mitigation of environmental matters. This has been caused by several factors, including limited publicity and exposure by the media, the government's failure to disseminate enough information, and the legalese found within the environmental legislation.

This problem is further compounded by the limited number of Green Courts within India. At present, there are only five principal benches of NGT, one of them is located in New Delhi and others are located at Bhopal, Pune, Kolkata, and Chennai. These serve a vast and heterogeneous country like India, and sometimes even accessibility becomes an issue for those who might have cases to deal with but are based far away in some remote or rural area. This limited geographical reach of the courts makes it very difficult for the affected people who must seek redressal for their environmental grievance, thus defeating the whole purpose of having a special tribunal for speedy and efficacious dispensation of environmental justice.

The research attempts to reach the core of public perception and awareness of the NGT, its accessibility, and the diversity of its expert panel. It also finds out the challenges within the NGT Act 2010 of legal and procedural factors such as limited benches, gender diversity, and procedural delays affecting environmental justice in India. The research is a mixed-method study that would assess public perception and awareness of the NGT. Combining both qualitative data and surveys conducted vis-à-vis various citizens of India; the approach aims at understanding the practicality of an environmental court in this respect. This will also involve a realization by using doctrinal methods and non-doctrinal methods to carry out an analysis of the legal regime, media coverage, and existing literature regarding the assessment of the functionality and accessibility of environmental courts. Environmental courts, especially the National Green Tribunal, play an important role in redressing India's escalating environmental problems. The awareness about such institutions remains, however, quite low. Low awareness about the NGT is concerning since it is a critical player in addressing matters related to environment protection and conservation with the potential of affecting millions of lives across the nation. Furthermore, even these few numbers of green courts are restricted to only five places, which

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5. INDIA CONST. art. 55A(g).

6. *Id.* at 1.

makes accessing these much-needed legal forums a pain. The perceived non-mobility of the “on-wheels” courts circumscribes their practical applicability outside major urban centers. The makeup of the expert panel itself raises questions on gender diversity, ageism, and integration of younger experts better equipped to take on today’s environmental concerns. Additionally, there is ambiguity regarding the definition of important environmental terminologies under the National Green Tribunal Act 2010, due to which effective decision-making processes are hindered and misinterpretations are found in the regulation of the environment. Apart from this, some high-profile cases related to quick adjudication also face continuous delays raising questions regarding the future and effectiveness of the National Green Tribunal.

## **BACKGROUND**

Environmental courts, known as green benches, are specialized courts that handle environmental disputes and enforcement of environmental laws. The coming into being of these courts is based on the increased realization of environmental degradation and the critical need for strong legal frameworks toward the mitigated management of ecological matters. The concept of environmental courts came with increasing complexities of environmental litigation and the need for expert adjudication. On 18 October 2010, under the National Green Tribunal Act, 2010, the National Green Tribunal came into existence in India for cases relating to the protection of the environment and the conservation of forests and other natural resources. Keeping in mind the inadequacies of the regular judiciary, who often found themselves inhibited by limitations while dealing with environmental cases requiring special expertise and time-bound action, lead to creation of NGT. This would not be the first instance of specialized environmental adjudication within India.

It was in 1996 that a specialized green bench for cases related to the environment was decided upon by the Supreme Court of India, and soon several High Courts followed the example. But with NGT, it even takes a more formal and institutional approach. The leading persons and agencies have undertaken the formation of NGT, wherein, a very important role was played by the Ministry of Environment, Forest and Climate Change. Valuable contributions towards the shaping of the framework and functional working of the institution came from the leading luminaries of the law and environmentalists like Justice Swatanter Kumar, Chairperson of NGT.

Many organizations have been at the forefront in demanding specialized environmental adjudication; some of these are the Centre for Science and Environment, the Environmental Law Research Society, and so on. It has had the participation of many leading experts and jurists who have left their imprint on its functioning. Another leading Chairperson, Justice Adarsh Kumar Goel, took effective steps towards consolidation of the Tribunal’s role in many

ways. Environmental lawyers like Ritwik Dutta, and organizations such as LIFE, played a very significant role in bringing critical environmental issues before NGT.

### **LOW PUBLIC AWARENESS AND UNDERSTANDING OF THE NATIONAL GREEN TRIBUNAL (NGT) AND OTHER ENVIRONMENTAL COURTS IN INDIA**

India has a plethora of environmental issues, yet its citizens do not have much information about them. While, because of this fact, the newly formed National Green Tribunal from 2010 is highly emphasizing over this issue, but very few come to know about it and its activities. There are multiple factors that contribute to this effect. First, there is a general lack of environmental awareness, especially in rural and poor parts of the country, where pressing economic needs may overshadow environmental concerns. Very little environmental education and access to information, in that order, is given. The very fact that the limited number of benches of NGT is centered mainly in urban centers goes to show that the institution is meant more for the elite and hence is aloof. Immobile NGT is perceived yet another demerit of accessibility.

Although “on-wheel” courts were introduced to bring justice closer to the people, the move so far is limited to urban centers such as Chennai and Delhi, thereby skipping more pressing environmental challenges existing in the rural and semi-urban areas. These places regularly face desperate issues such as deforestation and water pollution and remain, now, inaccessibly out of reach of the existing green benches from heightened public knowledge of the potential of the NGT. This group composition also raised concerns over the NGT itself. The predominance of older male experts in most of the benches only reinforces the perception that the NGT is disconnected from contemporary issues, particularly issues relating to women and the younger generations. There is a major disconnect between its decisions and the broader societal concerns, further decaying public engagement. The ambiguity in some of the leading environmental terms under the National Green Tribunal Act, 2010 further adds to the confusion among the public.

The obscurity of environmental law, coupled with vague or technical language, makes the information difficult for the public to understand the issues at hand and therefore breeds misunderstandings that impede compliance with the regulations. Its decisions are unclear, which reduces public trust and engagement with the NGT. Ineffectiveness concerning the delayed disposal of some of the high-profile cases has reduced the credibility of the NGT as well, as it is uncertain about the outcomes of such cases and is therefore not very receptive to public participation.

Besides, limited media coverage on the activities of the NGT, which mostly focuses on reporting major environmental catastrophes, doesn’t highlight a steady public appreciation of the importance of the tribunal. This sporadic reporting further contributes to the NGT’s low visibility and public awareness. The predominance of older male experts in these panels

may contribute to a perception that the NGT is out of touch with contemporary environmental issues, particularly those affecting women and younger generations<sup>7</sup>. The absence of younger experts who could bring new perspectives and innovative approaches to environmental challenges reinforces the notion that the NGT is a traditional institution, not fully equipped to address modern environmental problems. This lack of representation can lead to disconnection between the tribunal's decisions and the concerns of broader society, further diminishing public engagement and awareness.

The definition of key environmental terms in the Act 2010 is very vague, which goes ahead to further complicate the already complex public understanding of environmental law. Vagueness or technical language within the NGT legal proceedings might result in confusion, misinterpretation, and reduced public engagement with the NGT and its decisions. Delaying high-profile cases for a long period diminishes the credibility of NGT more by creating an image of ineffectiveness that deters public involvement. Moreover, the low media coverage of NGT, most of the time remaining centered on big environmental disasters rather than its continuous work of protection, functions as a helpless factor in the sustenance of public awareness and understanding regarding the tribunal's importance, hence its low visibility.

### **IMPACT OF NGT BENCHES' DISTRIBUTION AND EXPERT PANEL COMPOSITION ON ACCESS TO ENVIRONMENTAL JUSTICE AND TRIBUNAL EFFECTIVENESS**

The National Green Tribunal (NGT) of India was established with the intent of providing specialized, swift adjudication on matters related to environmental protection and conservation. Despite its ambitious mandate, several structural and operational challenges hinder the NGT's effectiveness. Among these, the limited number and geographical distribution of its benches, as well as the composition and diversity of its expert panel, play critical roles in affecting individuals' access to environmental justice. India is a vast country with a population of approximately 144 crores (1.44 billion)<sup>8</sup> spread across diverse geographic, economic, and cultural landscapes. The environmental challenges facing India are equally vast and varied, ranging from air and water pollution to deforestation and climate change.

Despite this, the NGT operates with only five benches located in New Delhi, Bhopal, Pune, Kolkata, and Chennai<sup>9</sup>. This sparse distribution is inadequate for a country of India's size and population density. The concentration of NGT benches in major urban centers presents

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7. *Id*, at 19

8. PROFILE – POPULATION KNOW INDIA: NATIONAL PORTAL OF INDIA, <https://knowindia.india.gov.in/profile/population.php> (Accessed: 09 August 2024).

9. *Id*, at 19.

significant barriers for individuals residing in remote or rural areas. Many regions, particularly those facing acute environmental degradation, are located far from these urban centers. The lack of proximity to an NGT bench means that individuals and communities must incur considerable expenses and time to travel long distances, often repeatedly, to access justice. This poses a significant deterrent, especially for marginalized communities, who are already resource-constrained.

The limited number of NGT benches leads to an overwhelmed caseload, causing delays in justice and undermining the tribunal's purpose of providing prompt remedies. These delays enable ongoing environmental degradation. Centralized benches risk detachment from local realities, where regional knowledge is crucial for effective decision-making. Additionally, the NGT, under the 2010 Act, consists of a chairperson, judicial members, and expert members, which may not always reflect on local nuances. The role of expert members is very vital, as they are supposed to bring in specialized knowledge in environmental science and technology in the deliberations<sup>10</sup>. However, the existing composition has exposed several limitations. According to the NGT Act, an expert member shall have a master's degree and a doctorate in science or technology with at least 15 years of experience in the field of the environment<sup>11</sup>.

Despite this stipulation, there has been a trend to appoint retired judges as expert members<sup>12</sup>. Although judicial expertise is required, that does not translate to scientific or technological expertise over environmental matters, limiting the tribunal's capacity to effectively assess complex environmental data and develop informed judgments. The over-representation of elderly, retired experts in the NGT stifles fresh approaches to modern environmental challenges. The absence of young experts, who are at the forefront of current scientific breakthroughs and modern strategies, limits opportunities for innovative solutions and dynamic problem-solving. Additionally, the lack of gender diversity within the NGT's expert committee means that valuable perspectives, particularly those of women, are underrepresented. Women are uniquely positioned stakeholders in environmental issues and bring vital insights that are informed by different life experiences that are extremely important in the solving of complex challenges.

These geographical and expert limitations within the NGT bear dangerous implications for environmental justice in India. The limited access to NGT benches, delays, and so on, deters many communities from approaching courts for redressal and allows continuous environmental damage and social injustices. Decisions made without diversified expertise are not as effective against the complexity of environmental problems. Such logistical and financial barriers,

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10. *Id*, at 19.

11. The National Green Tribunal Act, 2010 § No. 19, Acts of Parliament, 1949 (India).

12. *Id*, at 24.



because of limited coverage of the NGT, deter many from seeking judicial redress, allowing the polluters to act with impunity and contributing to ecological degradation. The absence of young, diverse, scientific experts risks diminishing the NGT's ability to deliver pioneering judgments that would read into the best environmental science and technologies.

This erodes India's capability to take on newer environmental challenges and meet international environmental standards. The NGT benches' scarcity and bad geographical spread—when combined with the lack of diversity on its expert panel—pull down the tribunal's efficacy, emphasizing the need for an accessible, diverse, and scientifically robust platform that can aid environmental justice in India.

### **LEGAL AND PROCEDURAL CHALLENGES OF THE NATIONAL GREEN TRIBUNAL ACT 2010: AMBIGUITIES, DELAYS, AND THEIR IMPACT ON ENVIRONMENTAL REGULATION ENFORCEMENT**

The NGT Act, 2010 was brought into being for ensuring effective and speedy disposal of cases related to protection and conservation of forests and natural resources. However, there are some legal and procedural difficulties inherent in this Act that make optimum functioning difficult, thus affecting its final decision-making and enforcement capabilities. These range from ambiguities, in legal definitions, to procedural delays and enforcement limitations, which singly and collectively present formidable challenges to the effective functioning of the tribunal. One of the basic legal challenges to the NGT Act is that most of the crucial environment-related terms or concepts therein are vague. Most of these are undefined, such as “substantial questions relating to the environment” or “significant adverse impact.” This would hence lead to different interpretations and implementations of the law, making the decisions uncertain and consequently biased. This ambiguity sometimes also complicates the process of identifying the cases to be brought before the NGT, which considerably impairs its comprehensive concern for the environment.

Through various landmark judgments like *Almitra H. Patel v. Union of India*<sup>13</sup>, where the tribunal introduced a complete ban on open burning of waste on land, the *Save Mon Federation v. Union of India*<sup>14</sup>, where NGT suspended a 6,400 crore project hydro project to save the habitat of birds, or the 2015 order, banning all diesel vehicles over 10 years old in the Delhi-NCR area, NGT zestfully strived in the right direction to fulfill the required expectations and goals. Other successes of the tribunal include the temporary ban that was put on plastic bags of less than 50 microns of thickness in Delhi as it was posing inconveniences of animal deaths, clogging sewers and affecting the environment, and the 2017 violation imposed on the art of

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13. Almitra H. Patel v. Union of India (2000) (3) SCC 575

14. Save Mon Federation v. Union of India, Arising out of Appeal No. 39 of 2012

the living festival on Yamuna Food Plains with a penalty amount of 5 crores. Though this green court has to a large extent, been able to dispose of the bulk of the matters brought before it by the book with utmost diligence and ingenuity, there are still numerous challenges, some of which are attributed to the tribunal itself while others are sourced from external factors<sup>15</sup>.

The NGT Act is also mired with procedural complexities that impart delays to the process of adjudication. While it enunciates in the statute that every case before the tribunal needs to be disposed of within six months, in practice, many cases suffer from prolonged delays. Some of the causes, *inter alia*, are a heavy caseload, inadequate benches to tackle such a huge volume of cases, and procedural bottlenecks inherent in the judicial process. While delays in adjudication defeat the very purpose of the tribunal's aim of rendering speedy justice, in most cases, this permits continued environmental degradation and denies timely remedies to affected persons. The second category of challenges relates to enforcement. While the NGT has the power to pass any orders or directions to enforce any environmental law in terms of implementation, it would be dependent on using existing mechanisms and agencies of enforcement. Given the resource constraints of most such agencies and their inefficiency because of bureaucratic red tape, it becomes very difficult for them to ensure proper implementation of NGT directives. This can lead to a yawning chasm between tribunal judgments and their execution on the ground, bringing down their authority and effectiveness.

Another procedural challenge pertains to the limited access of the NGT to people and communities, especially those living in rural and remotely located areas. A centralized structure with five benches only in major urban centers itself creates geographical and logistical barriers to access. This also reduces the choices the affected parties must redress and may shift the tribunal's focus to issues emerging in urban areas at the expense of probably very substantial environmental concerns in rural areas. Also, the NGT Act does not deal properly with the issue relating to the representation of affected communities in its proceedings. It therefore means that very many communities, particularly the marginalized ones, may lack the capacity, resources, or even the know-how to effectively participate in the processes of this tribunal. Inevitably, this may mean a lack of representation of persons most affected by environmental issues and hence decisions that may not fully show the interests and needs of stakeholders. The composition and selection criteria of the expert panel is another factor that affects how the tribunal makes its decisions.

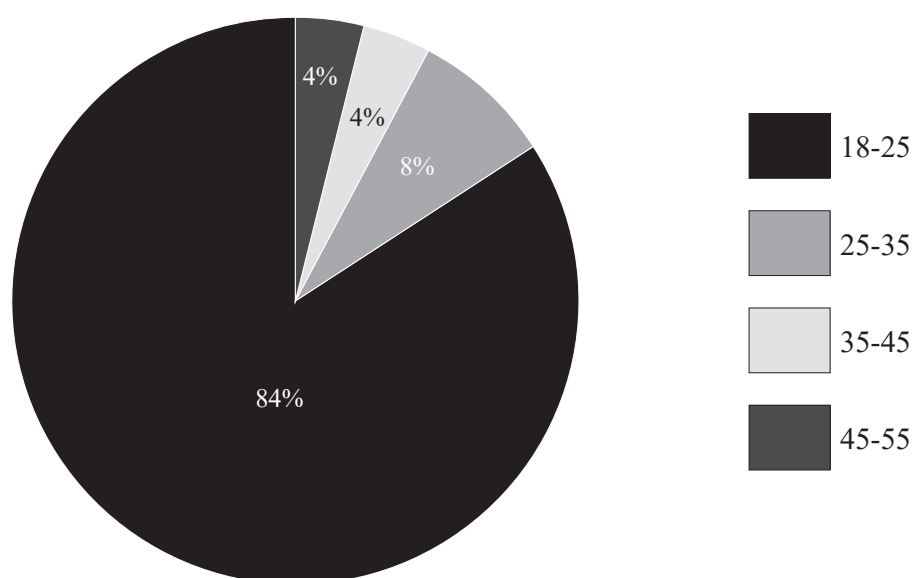
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15. Gaur, V. (2023) The deficiencies in the National Green Tribunal that call for immediate redressal, Legal Bites, <https://www.legalbites.in/topics/articles/deficiencies-in-the-national-green-tribunal-that-call-for-immediate-redressal-891600> (Accessed: 10 August 2024).

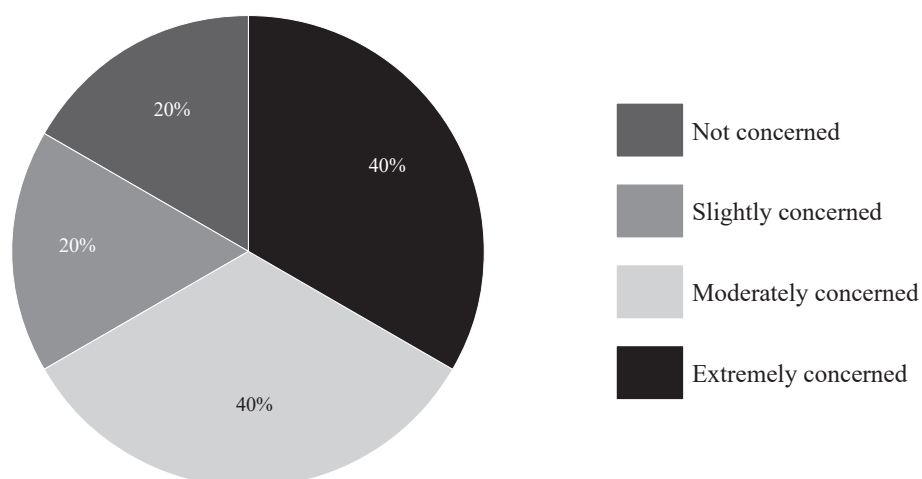
While the inclusion of expert members with substantial experience in environmental science or technology is compulsory under the Act, in practice there is still a lack of diversity, and most often a preference for the appointment of retired judges rather than scientists or environmentalists. This deters the capacity of this tribunal to address highly complex scientific and technical issues and may further lead to compromised judgment. These legal and procedural challenges synergize to very seriously impinge on the possibility of fulfillment of the mandate by the NGT. Vagaries in the Act, coupled with procedure-induced delays and difficulties in enforcement, have reduced the effectiveness of this tribunal in ensuring protection of environmental rights and regulation enforcement. Unless intrinsic challenges are dealt with, the NGT's role as a board institution in the landscape of environmental governance for India remains mired and affects its capacity to deliver timely and effective justice in environmental matters.

## RESULTS AND ANALYSIS OF SURVEY

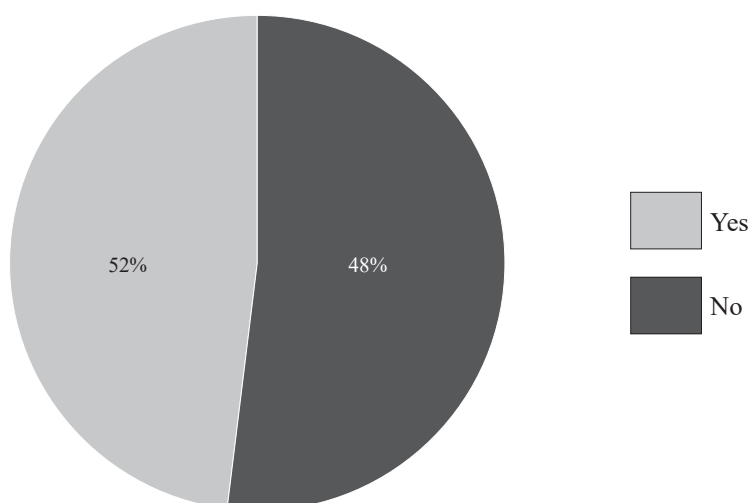
### 1. Age Group:



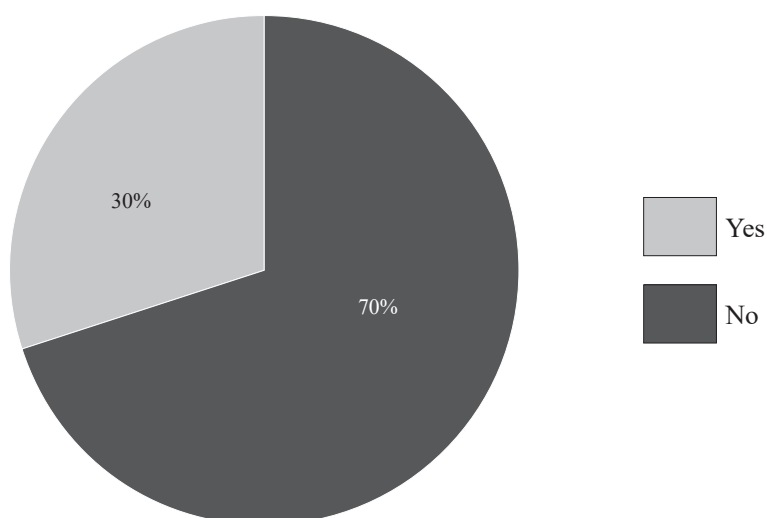
## 2. How serious do you think environmental problems are in India?

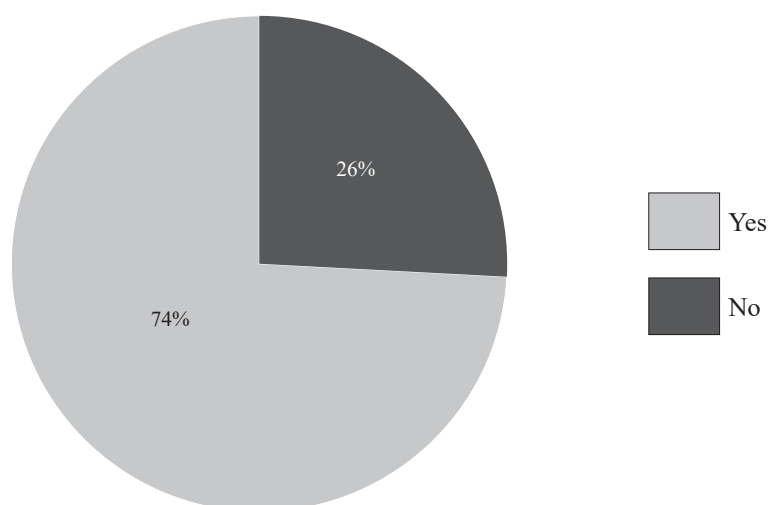
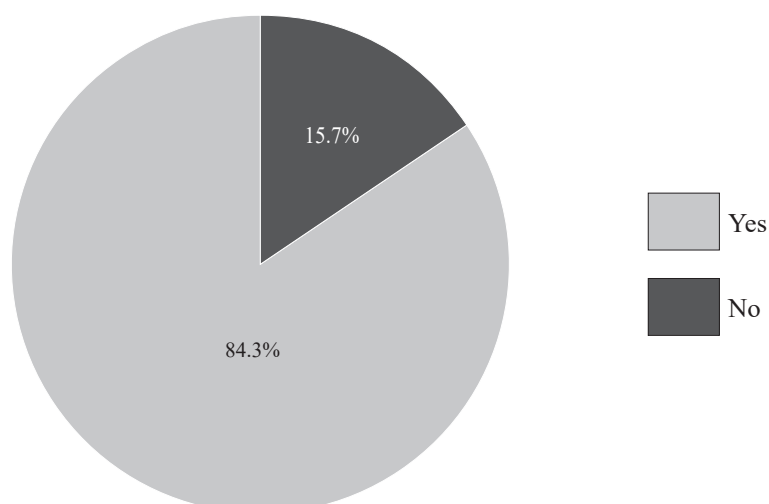


## 3. Are you aware of Green Courts in India?



## 4. Do you know the location of the Green Court bench?



**5. Do you know that there are only five green benches all over India?****6. Do you feel that more green benches should be provided by the government of India?****7. How would you spread greater awareness among the public regarding the National Green Tribunal and environmental courts?**

One must adopt a multi-pronged approach to raise public awareness about NGT and the environmental courts. There could be educational programs by way of workshops and seminars in schools, colleges, and workplaces to make citizens aware of the role of these courts and why they are important. Media engagement will be important; such awareness can considerably be raised by building an environment where news outlets report on cases and decisions of the environmental courts. Awareness programs should also be carried out on social media platforms, especially those used by the younger generation. The NGOs and local communities can get help through outreach programs, interactive sessions, and community events. The government should also have more green court benches in almost every state across India. Strict regulatory actions, clear educational materials, and integration of environmental law in school curricula

will aid in a deeper understanding and interest in environmental issues. These are likely to increase public participation in environmental governance and hence enhance environmental protection and legal redress. This way, the knowledge gap is going to be bridged and citizens empowered toward active responsibility in issues of environmental justice.

### **Analysis**

The results of the survey on the awareness about green courts, particularly in India, turned out to be shocking. Targeting a demography that is expected to have decent knowledge concerning frameworks, results showed that very few people are aware of NGT and other environmental courts. This lack of awareness tends to point out that there is a huge, even gross, deficit in environmental education. More emphasis on environmental law is due within the curriculum so that future lawyers could be better equipped to engage and advocate environmental justice.

### **CONCLUSION AND SUGGESTIONS**

The NGT assumes prime importance in the dispensation of environment-related justice in India, as it is ordained to deal with complex environmental issues by its very specialist mandate. However, the research underlines some major limitations that finally cut down its effectiveness and outreach. Chiefly among them is the lack of awareness among the public about the NGT's role and functions. Many more citizens are not aware of the role of the tribunal or how the services of the tribunal could be used to seek redressal in environmental problems. This curbs the effective propagation of the tribunal among the public and effectively dilutes its importance also.

First, the NGT has a restriction on the ground that it is location-centric. With only a few benches of the tribunal, most of them located in cities of large agglomerations, it is hard for rural and remotely located people to access the same kind of justice; indeed, logistical and financial hardships of long-distance travel would prove to be major barriers toward seeking redressal for most of the affected people. Another problem is with the composition of NGT expert panels. The lack of gender and age diversity impairs the effectiveness of the Tribunal and its perception in the eyes of the public, as does the overall effectiveness of a more representative and diverse panel than it might otherwise have. Legal and procedural inefficiencies further compound these problems.

Ambiguities in the NGT Act and delays in case resolution created a backlog, frustrated stakeholders and stretched the resources of the tribunal. While the NGT is an institution for environmental justice, it has been besieged with challenges to public awareness, geographical accessibility, diversity, and procedural effectiveness, reducing its potential to function at its best. The way ahead on all these issues lies in enhanced outreach, geographical spread, diversification, and process simplification for an effective National Green Tribunal with a more

inclusive and impactful approach towards environmental justice in India. Environmental justice requires that the public is well informed: the environmental issue is reported to and commented on by prestigious media and coverage on TV channels and social media.

The reasons for such an information vacuum include the low level of reporting by the media, poor effort at dissemination on the government's part, and incomprehensible legal terminology within the environmental regulations. Geographically, too, NGT is grossly challenged because of its meagre distribution. With only five principal benches, based in big cities—New Delhi, Bhopal, Pune, Kolkata, and Chennai—therefore, access for people living in rural or remotely situated areas is a challenge, undermining the very objective of the tribunal to render an equal environment justice. The second limitation of NGT is part of the composition of the expert panels. The core experts are mostly elderly men; hence, the presence of the other gender and age is not balanced in the tribunal. Under-representation of this nature is an example of an operational failure that constrains the ability of this Tribunal to be effective and responsive in discussing modern environmental concerns. The NGT Act 2010 is also ailing from legal and procedural complications. Ambiguity of some major definitions and frequent procedural delays keep the finalization of cases uncertain and inefficient which ultimately hampers the dispensation of justice related to the environment timely. The suggestions are:

### **Increases Awareness**

Only intensive media campaigns can remove large gaps in public knowledge about NGT. The role and function of the NGT should be spread amongst the public at large through maximum media campaigns of all types such as television, radio, social media, and print media. Environmental law and functions of NGT could be included in all levels of educational curriculum to raise awareness from a very young age. This can be encouraged in schools, colleges, and universities to propel knowledge of environmental rights and the process of seeking justice for the students. This must be further supported by community outreach programs through workshops, seminars, open public meetings, and a host of other activities directly with the local population so that knowledge regarding NGT, and environmental rights may be shared.

### **Expansion in Geographical Reach**

The NGT needs geographical expansion to increase accessibility to environmental justice. It can also help ensure justice does not remain confined to big urban centers, rather the facility is available across states. Mobile or temporary benches visiting rural and backward regions of the country periodically may allow cases where personal appearance is required, thereby also making the tribunal more accessible to people in inaccessible regions. Also, the more the use of remote virtual hearing capabilities, those not able to move to the NGT benches will have their hearings from any region, and this will reduce the logistical and financial difficulties in any quest for justice.



**Promote Diversity**

It would mean that NGT and the public perception of its work would perform more effectively with the increase in the number of expert panels. Be that as it may, a change in the makeup of appointment criteria for the expert panels to incorporate a wider array of professionals, such as young people and people from diverse scientific backgrounds, will indeed enhance the jurisdictional competencies of the tribunal further in handling a very wide spectrum of environmental issues. Apart from this, the process by which appointments to such positions get selected needs to be opened and made representative through public consultations and stakeholder inputs. This would have a panel with a diversity of perspectives and expertise.

**Improve Process**

The procedural inefficiencies of the NGT are to be streamlined to make it more effective. The legal terminologies in the National Green Tribunal Act remain vague, which results in procedural inefficiency in case management and delays in disposal. Setting down and bringing transparent limits for time bounds of case dispositions with the help of modern techniques of case management may hasten the workings of the tribunal. Continuous training programs for NGT staff and members could enhance their efficiency and adaptability to changing environmental issues and existing legal practices. These Courts can be conferred with *Suo motu* powers for better and speedy disposal of cases.

**Improved Monitoring and Evaluation**

The crux of the argument for the same is that periodic reviews of the performance and impact of NGT shall help identify deficiencies and usher in accountability. Such reviews would also help in redressing any grievances and improving the effectiveness of the tribunal through a good feedback mechanism capable of responding effectively toward public and stakeholder input. This is besides furtherance of another purpose: continuous improvements and fine-tuning in the workings of the tribunal.

**Inter-Agency Coordination and Cooperation**

Improved coordination between the NGT and other environmental regulatory agencies will further facilitate the sharing of information and resources. Under such circumstances, it would be possible to consider a matter properly in a holistic way for the protection of the environment, and the tribunal would be better placed to work effectively on complex issues. The partnerships with NGOs and community-based groups can also enhance its ability to reach out to various environmental justice programs and use their infrastructure and expertise to spread the message of NGT. Increase funding and resources

Owing to the expansion in operations and infrastructure, there arises an imperative demand for an augmentation in the budgetary allocation for NGT. With sufficient funding, the

tribunal will be able to upgrade its facilities, expand human resources, and develop better case management systems. This would, therefore, greatly increase the capacity and arm the Tribunal with the necessary wherewithal for effectively discharging its mandate.

## STRENGTHENING LEGAL MECHANISMS TOWARDS THE PROTECTION OF ONE-HORNED RHINOS OF ASSAM IN HABITAT FROM INVASIVE ALIEN SPECIES

Dr. Gyanashree Dutta<sup>1</sup>

### INTRODUCTION

Assam, a state in the North-Eastern India, is a source of the rare, highly endangered one-horned rhinoceros species (*Rhinoceros Unicornis*), most commonly known as the Great Indian rhinoceros.<sup>2</sup> Assam consists of one of the most spectacular natural habitats that need to be preserved, but the huge threat from the spread of invasive alien species today, has tremendously hampered the conservation activities targeted at saving the one-horned rhinos. Assam's one-horned rhinos are considered to be the "keystone species" due to their significant impact on the dynamics and structure of the ecosystem. The one-horned rhinoceros, which is herbivorous in nature, protects the wetlands and grasslands of Assam, which are the vital habitats for many other plant and animal species. But the delicate ecosystem of such rhino habitats is under threat from invasive alien species, thus endangering not only the rhinos' existence, but also threatening the conservation efforts made to safeguard the one-horned rhinos of Assam.<sup>3</sup>

Some of the invasive animals, plants, and illnesses that have an impact on rhino habitats exist in several forms. For instance, the *mikania micrantha* species which is native to North, Central, and South America, invade and replace the natural plants in grassland and marshy areas, thereby altering the distinct features of the vegetation in Assam.<sup>4</sup> Two alien species, feral dogs and wild boars, are a threat to rhinos because they break the natural connection between the predator and its prey. Furthermore, diseases from invasive species, of which many parasitic infections are included, are quite harmful to the rhino population.<sup>5</sup> According to a research done by famous botanist Ishwar Chandra Baruah (senior scientist at Assam Agricultural University

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1. Assistant Professor, Alliance School of Law, Alliance University, Bengaluru.
  2. BIBHUTI P LAHKAR, ANUKUL NATH AND SONALI GHOSH, PROCEEDINGS OF THE INTERNATIONAL CONFERENCE INVASIVE ALIEN SPECIES MANAGEMENT 188 (NATIONAL TRUST FOR NATURE CONSERVATION, 2014).
  3. Ewel, J.J., O'Dowd, D.J., Bergelsen, J., Daehler, C.C., D'Antonio, C.M. and Gomez, L.D., *Deliberate introductions of species: Research needs*, 49 BIOSCIENCE 619, 626 (1999).
  4. Anwaruddin Choudhury, *The Status of Endangered Species in Northeast India*, 103 JOUR' OF THE BOM' NAT' HIS'Y SOC' 157 (2006).
  5. *Id.*

of Jorhat) and his team, the spread of Mimosa (an invasive species) is at an alarming rate, which showed up in a study conducted from 2011 to 2013.<sup>6</sup> Furthermore, the researchers' team found out that native plants which the one-horned rhinos used to feed on, got drastically declined due to Mimosa, as it indirectly or directly contributed to the decrease in the number of rhino population. Other than Mimosa which has been spreading fast, a range of other invasive species are also there. For instance, siam weed with 9.4 to 15.1 plants per square meter is destroying the grasslands of the Manas National Park and seriously disrupting the food chain of the one-horned rhinos.<sup>7</sup> Moreover, botanists associated with Assam Agricultural University in Assam recently reported that there is a 28% rise in the population of invasive plants in Kaziranga forest areas from 2013 to 2023.<sup>8</sup> As a result, some native plant species which act as food for some animals have become extinct, and have been destroyed, ultimately endangering the habitat of one-horned rhinos.<sup>9</sup>

As such, the research involves assessment of the current legal regime with regard to the flaws and how to improve it further towards protection efforts for the one-horned rhinos from invasion by alien species. International treaties and national laws are considered, bringing out different perspectives on legal strategies that can be used to protect one-horned rhinos and their habitats from the invasion of alien species. Thirdly, the research will also highlight the various legal regimes in Assam and India and will also focus on the strategies to address the legal issue of invasive alien species in rhino habitat conservation. Some of the protected sites within Assam that form core habitats for one-horned rhinos are Kaziranga National Park, Garumara National Park, Manas National Park, Orang National Park, Bardia National Park, and Pobitora Wildlife Sanctuary.

## RESEARCH PROBLEM

The lack of management strategies and legislative protections against invasive alien species is quite a serious threat to the one-horned rhino conservation and preservation in its native environment in Assam. Ineffective regulatory frameworks and management procedures that cannot control the invasion of such species can have quite negative effects on the rhino population - an aspect that threatens not just the long-term survival but also the ecological balance of the surrounding environment.

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6. DOWNTOEARTH, <https://www.downtoearth.org.in/news/wildlife-biodiversity/no-food-in-forests-weeds-like-mimosa-siam-are-taking-over-assam-s-biodiversity-94057> (last visited Jul. 6, 2024).

7. *Id.*

8. *Id.*

9. B.C. Hazarika and P. K. Saikia, A study on the behaviour of Great Indian One-horned Rhino (*Rhinoceros unicornis* Linn.) in the Rajiv Gandhi Orang National Park, Assam, India, 1 NEBIO 62, 67 (2010).

The problem of invasive alien species has not been specifically dealt with anywhere, even when there exist a myriad number of legislations like the Biodiversity Act of 2002, the Wildlife (Protection) Act of 1972, the Forest Conservation Act of 1980, the Environment Protection Act of 1986, etc. Article 8(h) of the 1992 Convention on Biological Diversity or CBD<sup>10</sup> restricts the invasive alien species to those that “remove, control, or prevent the introduction of alien species that pose a hazard to ecosystems, habitats, or species”. It should, however, be noted that Article 8(h) of the CBD fails to define what “invasive” actually means. Accordingly, the research identifies the various gaps in the legal management towards the protection of the one-horned rhinos of Assam from such exotic species.<sup>11</sup>

### **INVASIVE ALIEN SPECIES: ITS MEANING**

Invasive alien species or IAS refer to non-native species that are deliberately or unintentionally introduced and cause harm to native species, ecosystems, and human activity. They are also referred to as introduced species, non-native species, exotic species. These species jeopardize generally the ecological processes, human health, national economies, biodiversity, and the availability of resources, wherein each one of these has a significant effect on the socio-economic development of the nation.<sup>12</sup> Invasive species can be microorganisms, animals, plants, and insects. Many invasive species have a high rate of reproduction since they out-compete the native species in their habitat, food, and water. IAS are capable of making a huge and profound impact. Physically, they are capable of changing their surroundings and, at the same time, changing the cycling of nutrients. They can also, through hybridization, reduce the native species’ genetic diversity and produce genetic pollution. Such species are able to reproduce very fast and disperse over a wide area, thus disturbing the composition of native or natural ecosystems.

### **PATHS FOR INVASIVE ALIEN SPECIES AFFECTING THE ONE-HORNED RHINOS OF ASSAM**

Invasive alien species are considered to be a serious threat in Assam. According to the Red List prepared by the IUCN,<sup>13</sup> one-horned rhinoceros are now listed as a vulnerable species against its earlier status as an endangered species. The most important factor underlying the declined

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10. CBD, <https://www.cbd.int/doc/legal/cbd-en.pdf> (last visited Jul. 27, 2024).

11. WORD WILDLIFE FUND, [https://wwfin.awsassets.panda.org/downloads/the\\_greater\\_one\\_horned\\_rhino\\_past\\_present\\_and\\_future.pdf](https://wwfin.awsassets.panda.org/downloads/the_greater_one_horned_rhino_past_present_and_future.pdf) (last visited Jul. 29, 2024).

12. Ricciardi A., Steiner, W.W.M., Mack R.N. and Simerloff. D, Towards a global information system for invasive species, 50 BIOSCIENCE 239, 240 (2000).

13. INSIGHTSONINDIA, <https://www.insightsonindia.com/2021/04/14/indian-rhino-vision-2020-irv-2020/> (last visited Aug. 01, 2024).

population of the one-horned rhinos in Assam in the grassland habitats is the exasperating increase in the growth of a few invasive alien plants such as *Mimosa diplotricha*, Congress grass, *Ipomoea*, *Lantana camara*, Water hyacinth, *Chromolaena odorata*, *Mikania micrantha*, etc.<sup>14</sup>

Though Assam is striving towards progress in the conservation and management of the greater one-horned rhinoceros, poaching cases are only occasionally reported. Another factor is invasive alien species in the grasslands of Assam, where adequate funds and incentives have not been provided to the conservation efforts. Due to this, there is a severe decline in the rhino habitats of Assam.

The following are some major routes through which invasive alien species threatens the one-horned rhinos:

1) Biological invasion: Also called bio-invasion or biological invasion, it occurs when non-native organisms are introduced into ecosystems outside of their natural range and are able to form self-sustaining populations. These novel species could include insects, plants, animals, microbes, or other kinds of life. Global biological invasion is a serious and costly environmental issue. The increasing worldwide population and enhanced global mobility have led to a significant increase in the frequency and scope of non-native species invasions. The invasion by invasive species can thus be related to human interference in forest areas. In the event of an increase in frequency, intensity, geographic patterns, or degree of disturbance, the alien species will probably assimilate more quickly.<sup>15</sup>

2) Ornamental plants: Most of these invasive species were native to South America and were gradually introduced into the Indian subcontinent as ornamental plants or fodder crops. Many of the invasive species were first introduced for ornamental purposes because they were beautiful, could grow in diverse climates, or had some other preferred characteristics. The global ornamental plant trade consists of the importation and exportation of plants for aesthetic purposes. Ornamental plants like *Lantana camara* (native of Mexico, Africa, and Central and South America), Alligator weed (native of North America), etc. can become invasive through several mechanisms like vegetative spread, hybridization with closely related native species, or

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14. BIBHUTI P LAHKAR, ANUKUL NATH AND SONALI GHOSH, PROCEEDINGS OF THE INTERNATIONAL CONFERENCE INVASIVE ALIEN SPECIES MANAGEMENT 188 (NATIONAL TRUST FOR NATURE CONSERVATION, 2014).

15. Bibhuti P. Lahkar, Bibhab Kumar Talukdar and Pranjit Sarma, Invasive species in grassland habitat: an ecological threat to the greater one-horned rhino (*Rhinoceros unicornis*), 49 PACHYDERM 33, 35 (2011).

seed distribution. Several of these plants can establish themselves in the wild and out-compete native vegetation when left neglected.<sup>16</sup>

3) Recreational activities, tourism, and trade: Recreational activities, commerce, tourism, and all other activities that involve humans have dramatically increased within the past decades with the rapid rise of globalization and industrialization. International trade and shipping can inadvertently introduce invasive species. They can also be moved as stowaways in imported shipments of food and lumber and even in vehicles. At times, they might hitchhike on cargo, ships, or shipping containers. It is also possible for the exotic species to be unknowingly introduced into the habitats by visitors and tourists. They can carry them on their clothes, shoes, or even equipment and unconsciously release seeds, spores, or eggs into the surroundings.

4) Development of Infrastructure: Invasive species are easily spread through roads, buildings, and other such construction. During these processes, there is a frequent transportation of building materials, equipments, and automobiles all of which potentially carry invasive species into previously uninhabited areas.

5) Natural dispersal: Invasive organisms can also naturally spread over great distances. The wind, water currents, or animals like birds and mammals that might inadvertently carry seeds or propagules can all carry them.<sup>17</sup>

6) Biological control agents: This can lead to undesired effects from biological control agents such as insects or diseases when they are deliberately released for the purpose of managing certain pests. Invasive control agents can become exotic and pose a threat to the survival of native species such as one-horned rhinos.

7) Wildlife trade: The trade in wildlife is one of the biggest routes of introduction and dispersal of IAS. Live plants and animals, as well as their derivatives, are moved across borders for multiple uses, including pets, food, medicines, ornaments, and even for entertainment purposes. While most traded species are not invasive, some may have a high potential to become so, if they are released or involuntarily end up in unfavorable surroundings.<sup>18</sup> The commerce in wildlife also comprises of:

- a. Illegal trade of Exotic pets: Such trade causes the invasion of non-native organisms into the rhino habitat, which may establish wild populations when released or escaped and alter the balance of nearby ecosystems.

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16. *Id.*

17. *Id.*

18. Annika Mozer and Stefan Prost, *An introduction to illegal wildlife trade and its effects on biodiversity and society*, 3 *Foren' Sci' Int Anim' and Env'* 100064, 100071 (2023).



b. Bush meat trade: Illegal wildlife trading for human consumption can enhance the chances of invasive species. During trade, invasive animals may be mistakenly or purposely transferred, which could result in their establishment in new places.

8) Climate change: This would be yet another potential indirect implication on the spread of invasive species. Climate change may create ideal conditions for development and propagation of invasive species in habitats in which they had little or no ability to thrive before. The changes in temperature, precipitation patterns, and other climatic variables that result from global warming can directly or indirectly affect the distribution and behavior of invasive species and the vulnerability of native ecosystems to invaders.

### THE INTERNATIONAL SCENARIO

There is an extremely robust international legal regime behind the control and management of invasive alien species and protection of the one-horned rhinos of Assam from such invasion.<sup>19</sup> The key global Conventions and agreements that throw light on IAS are:

1) 1992 Convention on Biological Diversity (CBD): This is an extensive international agreement on the use and conservation of biodiversity in a sustainable way. It, therefore, calls for control to be exercised over invasive alien species and their introductions to be halted. The CBD promotes cooperation among countries in developing plans and strategies to manage invasive species through risk assessment, early warning systems, and capacity building.<sup>20</sup>

2) CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora): This regulates trade in endangered species, including rhino protection. Even though the focus of CITES is on trade in wildlife, it handles invasive species indirectly by regulating the movement of those species that might at one time be considered invasive. Beyond the facilitation of cooperation between countries in preventing the introduction and spread of invasive species through trade and commerce, CITES also identifies species for which trade is regulated.

3) Regional and Bilateral Agreements: Regional agreements, such as those forming part of the United Nations Environment Programme (UNEP) or other regional organizations, are usually concerned with the management of invasive species and biodiversity protection. Similarly, in the event of transboundary species migration, bilateral agreements helps countries collaborate and share information to combat invasive species. These international legal instruments provide guidance and tactics to nations in the formulation and execution of their domestic legislation

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19. Lucy Vigne and Esmond Bradley Martin, *The Greater One-Horned Rhino of Assam is Threatened by Poachers*, 18 *Pachyderm* 28, 29 (1994).

20. John R. Bobka, *Defining Unduly: Resolving Inherent Textual Ambiguity in the IMO's Ballast Water Management Convention*, 60 *Will' & Mar' Law Rev* 267, 268 (2018).

and policies pertaining to the control of invasive species. Adherence to and implementation of these treaties would assist countries, and particularly India, in its endeavour to conserve the one-horned rhinos from exotic invasive species. The transboundary dimensions of invasive species entail the conduct of affairs in coordination and international cooperation, to make sure that all the conservation efforts result in fruition.

## **NATIONAL LEGAL FRAMEWORK IN INDIA**

India's national legal system has several rules and regulations entrenched to protect the one-horned rhinos from Invasive Alien Species. Such restrictions are made to protect biodiversity, wildlife habitats, and to avoid the incursion and proliferation of non-native species. The major core elements of India's national legal system are identified below:

1) The Wildlife Protection Act, 1972<sup>21</sup>: This is the basic law concerned with the preservation and protection of fauna in general, specifically protecting the one-horned rhinoceros. Some relevant provisions are as follows:

- a. Section 9: Prohibition on killing and poaching animal species, including rhinos.
- b. Section 39: Authority to declare areas as closed for the protection of species, national parks, or sanctuaries.
- c. Section 50: Importing any exotic animal into the country without permission is illegal.
- d. Section 51 provides for powers to legislate on the buying, selling, and transport of animals.
- e. Offences under the Act are given in Section 55 and relate to the selling of animals without a permit and failure to comply with provisions relating to sanctuaries.

2) Biological Diversity Act, 2002: The Biological Diversity Act has the following three fundamental objectives: fair sharing of benefits arising out of the use of India's biodiversity, its wise use, and conservation of such benefits<sup>22</sup>. The important provisions of the Act are:

- a. Section 8: Access to biological resources and associated traditional knowledge shall be subject to restrictions.
- b. Section 9 focuses on evaluating the impact of the introduction of non-indigenous species on the total biodiversity and enumerates procedures for gaining approval for their introduction.

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21. Wildlife (Protection) Act, 1972, NO. 53, Acts of Parliament, 1972 (India).

22. Biological Diversity Act, 2002, NO. 18, Acts of Parliament, 2002 (India).

- c. Section 19: Provision for the establishment of local level biodiversity management committees to take measures for the conservation of biodiversity and its sustainable use.

3) 1980 Forest (Conservation) Act: The Forest (Conservation) Act makes provisions for industrial and non-forestry uses of the forest land, mainly for infrastructure development.<sup>23</sup> Some of the significant provisions of this Act are:

- a. Section 2: It defines the lands which have been diverted and forested.
- b. Article 2-A: It stipulates that forest land shall not be subjected to uses other than forestry, with the proper authorization.
- c. Section 2-B: Outlines the laws and policies governing the issuance of permits for the use of forest areas.

4) Environment (Protection) Act, 1986: It has laid down some rules and regulations regarding protection and improvement of environment.<sup>24</sup> Its relevant provisions are as follows:

- a. Section 6: Capacity to act in and stop environmental pollution.
- b. Section 15: It deals with how hazardous products should be regulated.
- c. Section 17: This section considers offences under the Act and their penalties.

## STATE-LEVEL LAWS AND REGULATIONS OF ASSAM

There are a number of state-level acts and rules that apply to management over invasive alien species in Assam, especially regarding rhinoceros' conservation, such as the Assam Forest Regulation of 1891, Assam Forest Protection Amendment Act of 1989, Assam Wildlife Protection Act of 1972, Assam Biodiversity Rules of 2010, etc. The national legal framework coordinates state-level policies and recommendations in order to save the one-horned rhinos of Assam and their habitats from invasion by alien species.

The proper authorities in Assam must connect with the local populations, raise awareness of these regulations to the stakeholder population, and implement them with diligence to manage these exotics and to save the rhinos.

**Shortcomings of the State Laws and Regulations of Assam:** While drawing attention to the numerous inadequacies or lacunae in the State laws and regulations of Assam, the below-mentioned points need to be kept in mind:

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23. Forest (Conservation) Act, 1980, NO. 69, Acts of Parliament, 1980 (India).

24. Environment (Protection) Act, 1986, NO. 29, Acts of Parliament, 1986 (India).

1) The Problem of Enforcement: It is about the degree of ability that the authorities have in effective monitoring and management of rhino and invasive species conservation-related activities, which in some cases might be constrained by inadequate personnel, resources, or infrastructure. Inadequate enforcement can diminish the effectiveness of the legal system.

2) Ineffective Coordination: Proper coordination among the various departments and agencies concerned with the management of invasive species and the conservation of rhinos in Assam are sometimes not maintained properly, which can result in a gap in efforts and lead to fragmented enforcement of rules.

3) Public Awareness and Participation: The public is an integral part of the effectiveness of any conservation program. The local population and other stakeholders might not be made fully aware of the need for invasive species control measures and rhino protection. This may lead to the implementation of laws and regulations being less successful because of low public participation in decision-making and conservation measures.

4) Inadequate Penalties and Deterrents: The State-level laws and regulations do not have appropriate penalties and deterrents to deter a person from committing crimes relating to rhino conservation and IAS.

5) Limited Attention Given to Invasive Species Management: There can be state-level legislation and regulations, but there is a weak framework for the protection of protected areas and animals; some may lack directives or solutions that directly address the management of invasive species. If regulated approaches for such species are not given sufficient attention, effective management will be constrained, and such can also limit the possibilities of preventing the introduction and spread of invasive species in the environment.<sup>25</sup>

6) Inadequate coverage of invasive species: Due to the likelihood of non-exhaustive listing of invasive species to be covered under State-level regulations, there could be lacunae in mitigating some risks of such species. The list of the regulated or the controlled invasive species shall be periodically reviewed based on new scientific discoveries and the emerging threats from it.

## **RHINO PRESERVATION FROM THE INVASIVE SPECIES PLANT CALLED WATER HYACINTH IN THE KAZIRANGA NATIONAL PARK**

The Kaziranga National Park in Assam, India, is home to the one-horned rhinos, which are at the risk of extinction. An invasive plant, called the water hyacinth (native to South

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25. Annika Mozer and Stefan Prost, *An introduction to illegal wildlife trade and its effects on biodiversity and society*, 3 Foren' Sci' Int Anim' and Env' 100064, 100071 (2023).

America), have posed serious problems for the park throughout the years.<sup>26</sup> The rhino habitat and biodiversity have suffered a lot because of the water hyacinth's quick spread throughout the water bodies of the park, and this had a huge negative impact on the environment. In this regard, the State Government of Assam had taken many initiatives like:

1) Action plan formulation: The State Government and the Kaziranga park officials worked out a comprehensive action plan that takes into account the ecological considerations and the protection of rhinos for the eradication and control of the water hyacinth.

2) Inter-agency coordination: The State Government stressed the need for proper coordination among several agencies, namely, the forest department, wildlife department, and department of water resources, which are involved in managing the park. It urged them to cooperate with one another to tackle the problem of water hyacinth.

3) Financial Allocation: The State Government of Assam made sufficient financial allocations for the implementation of the action plan and acquisition of the required resources, since it was aware of the cost involving the eradication of IAS.

4) Proper Assessments and Monitoring: The State Government has to be updated periodically on the invasion of water hyacinths. By doing this, accountability and transparency in conservation efforts were put into practice. Due to the involvement of the State, invasive species became more of an issue, and relevant authorities were forced to act quickly in addressing them. Thus, it gave precedence to the need to take measures for fighting invasive species to ensure the protection and conversation of the one-horned rhinoceros in Assam, which remains threatened today.<sup>27</sup>

## CONCLUSION, SUGGESTIONS AND RECOMMENDATIONS

An effective invasive alien species management program needs to be initiated for the one-horned rhinos of Assam. There is an imminent need to probe into national and international legal regimes concerning inadequacies and challenges for the management, eradication, and prevention of invasive species. Long-term survival of one-horned rhino populations and their habitats would need the collaboration of parties, stakeholders, legislators, enforcement, compliance mechanisms, and international cooperation. In this context, Assam can apply pertinent legal management strategies to ensure biodiversity and the regional ecological balance by saving the endangered one-horned rhinos from the threats of invasive alien species.

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26. WORD WILDLIFE FUND, <https://www.wwfindia.org/?16141/> (last visited Aug. 05, 2024).

27. Bibhuti P. Lahkar, Bibhab Kumar Talukdar and Pranjit Sarma, Invasive species in grassland habitat: an ecological threat to the greater one-horned rhino (*Rhinoceros unicornis*), 49 PACHYDERM 33, 35 (2011).

Although the Forest Department of the Government of Assam has undertaken projects, like the Aaranyak's Project, Indian Rhino Vision 2.0, there are no strong laws and regulations regarding the protection of rhinos from this invasive alien species that are present within the grasslands of national parks and wildlife sanctuaries of Assam. Therefore, management, control, and conservation of these species are urgent needs.

If such exotic species get multiplied over the grasslands of Assam, it will drastically bring down the population of rhinos with devastating consequences on the State's tourism industry and economic and social structure. This can lead to the establishment of early warning mechanisms that will ensure prompt action to take necessary measures on identified invasive species to prevent their establishment and spread. No doubt, India's legal framework provides a plethora of laws and regulations like the Forest Conservation Act of 1980, the Biodiversity Act and Rules of 2002, the Wildlife Protection Act of 1972, and the Environment Protection Act of 1986, which basically provides a foundation to deal with invasive species; however, to effectively address the management of invasive species, these regulations have to be tightened and changed at the earliest.

Invasive alien species management has to include prevention and control measures necessarily. Introduction of such species in rhino habitats can be prevented by strict regulations and quarantine procedures. Eradication and control methods, along with habitat restoration projects, should be used to mitigate established invasive species' influence on the rhino population and its ecology.

Controlling invasive species is based on international cooperation and coordinated actions of several agencies, especially for transboundary organisms likely to cross borders of any country. In this context, it is important to work together towards the protection of rhinos from invasive species by working together with neighboring countries. An integrated weed management system shall go a long way in reducing the spread of invasive alien species in the habitats of Assam. An efficient legal administration requires a robust institutional base, spanning from the government authorities at all levels down to local communities, NGOs, and research universities, to take action on invasive species. Besides increasing the capacity of enforcement authorities through programs, strengthening of procedures for enforcement and compliance is also necessary. In this regard, Public-Private Partnerships (PPPs) with national and international organisations are also very important.

Therefore, public awareness and educational campaigns are essential in engaging people to feel a sense of duty to protect the rhinos against such invasive species. While there are multitudes of regulations that protect the environment, none of them address the challenge of invasive alien species. This would, of course, be possible only if the State of Assam brought

into effect at the earliest a stringent, comprehensive, and all-encompassing national law. It is because of this that a robust legal management plan is the need of the hour to keep Assam's one-horned rhinos out of reach from invasive alien species in their native environments.

Keeping in mind that the one-horned rhinos are a pride of Assam, safeguarding them from the harmful and deleterious impacts caused by the invasive alien species is the need of the hour, which will ultimately help in protecting biodiversity at large.



## **HARNESSING LEGAL INNOVATION FOR SUSTAINABLE FUTURES: CLIMATE CHANGE, ENVIRONMENT, AND SUSTAINABILITY**

Ashwin P<sup>1</sup>

Deepak Venkateswar S<sup>2</sup>

### **INTRODUCTION**

Legal innovation in the sectors of climate change, environmental protection, and sustainability has assumed great importance in the backdrop of the world reeling under consequential ecological challenges. Traditional legal frameworks mostly fail while facing the multiplex and speedily changing issues related to climate change and environmental humiliation. The legal systems have been developing new approaches that favor sustainability, reduce environmental harm, and protect ecosystems. Some of the key innovations include the new field of climate litigation, through which people, groups of people, and even States seek legal counsel to ensure civic authority and States themselves act in a more environmentally sensitive way. The second major innovation relates to environmental rights, such as personhood status for rivers and forests, so that they are represented in court. Conformance to ESG standards is changing business practices in the commercial world. The following section describes some of the legal mechanisms that secure greater transparency, accountability, and adherence to sustainable business practices. At the international level, agreements like the Paris Agreement drive countries to put in place better climate policies, including necessary legal structures that facilitate and track important climate actions. It is important that such legal innovations shut out environmental disaster and ensure a sustainable future by making possible more effective management and enforcement in the face of continued ecological challenges.

### **OVERVIEW: CLIMATE CHANGE**

Climate change demands significant, everlasting changes in the Earth's climate, largely handled by human activities. The principal cause is the emission of greenhouse gases, such as carbon dioxide and methane, from burning fossil fuels, deforestation, and industrial processes. These gases confine heat in the atmosphere, leading to a rise in global temperatures, a phenomenon known as global warming.

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### Major reaction of climate change

1. **Rising Temperatures:** Global temperatures are frequently increasing, evolve in more recurrent and serious heat waves.
2. **Liquefying Ice and Rising Sea Levels:** Polar ice caps and glaciers are melting, leading to rising sea levels that intimidate coastal areas.<sup>3</sup>
3. **Aggravated Weather Events:** Climate change is linked to more frequent and severe weather events, such as hurricanes, floods, and droughts.
4. **Ocean Acidification:** As oceans captivate more carbon dioxide, they become more acidic, which hurt marine life.
5. **Biodiversity Loss:** Changing climates and habitats deposit many species at risk of extinction.

### ENVIRONMENTAL ISSUES

In addition to climate change, there are various environmental issues that pressurise the health and sustainability of the planet:

1. **Deforestation:** Extensive clearing of forests, particularly in tropical regions, consequence in habitat loss, reduces biodiversity, and expands carbon emissions.
2. **Pollution:** Air, water, and soil pollution from manufacturing ventures, agriculture, and waste disposal have severe effect on health and the environment.
3. **Resource Consumption:** The stock of natural resources, such as fossil fuels, minerals, and freshwater, is leading to insufficiency and environmental destruction.
4. **Biodiversity Refuse:** Habitat demolition, pollution, and climate change are causing a tremendous decrease in species diversity.
5. **Waste Management:** The growing aggregation of waste, especially plastic pollution produces significant warnings to ecosystems and human health.

### GLOBAL FEEDBACK

World agreements like the Paris Agreement focus to control global warming by less greenhouse gas emissions. Countries are increasingly applying plans to uplift renewable energy, conservation, and sustainable development. Public awareness and mass movements are also playing an important role in pushing for steady environmental defence and climate

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3. National Oceanic and Atmospheric Administration (NOAA), *Sea Level Rise Report*, (2022).

action. In conclusion, global climate change and environmental issues are composite and deeply convolute problems that demand instant support efforts at all levels from individuals to authority to warrant a sustainable future for the planet.<sup>4</sup>

## **SENSE OF LEGAL INNOVATION**

Legal innovation is important in forming the foundation and developing environmental threats that create noteworthy endanger to the nature's health and sustainability. As ecological challenges like climate change, pollution, deforestation, and biodiversity loss become more complicated, it establishes legal approaches that are usually short-term. Legal innovation requires generating and executing new laws, policies, and legal instruments that are complimenting to gear positive outcomes.

## **CONTRIBUTION OF LEGAL INNOVATION**

### **1. Climate Litigation**

The growth of climate litigation is a fundamental instance of legal innovation. Individuals, groups of communities, and corporations are progressively exiting the courts to control the directorate and corporations responsible for their environmental exploitation. This configuration of legal action has become a necessary tool for imposing eco-friendly laws, guiding policy changes, and a shoulder for action on climate issues.

### **2. Environmental Rights**

Inventive legal propositions have to the recognition of environmental rights, including the right to a healthy environment. In some cases, natural bodies such as rivers, forests, and ecosystems have been granted legal personhood, giving them the ability to be represented in court.

### **3. Commercial liability and ESG**

The legal innovation underway is leading to codifying the ESG criteria in actionable practice. That would make business concerns liable for their impact on the environment and motivate them to work in a sustainable manner. New laws and regulations are enacted that bind apparent and put liability in corporate jurisdiction.

### **4. Global Agreements on Nature**

Legal innovation thus plays a very important role in creating international agreements that enable global environmental challenges. International agreements, such as the Paris Agreement, set permanent goals for countries to decrease emissions and foster sustainability.

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4. United Nations Framework Convention on Climate Change (UNFCCC).

Such agreements always call for creative legal mechanisms to secure that the countries comply with their commitments.

### **5. Recent Legal Instrument and Approaches**

New legal tools are being expanded to label the distinct environmental challenges. For example, carbon pricing mechanisms, such as carbon taxes and cap-and-trade methods, offer an economic motive to lessen emissions. Other new inventive approaches include ecosystem-based administration and comprising original command into environmental governance.

### **6. Communal Arrangement and Justice**

Legal innovation will bring out the importance of public participation in environmental decision-making and ensuring accessibility to people for justice when they are affected by environmental abuse. In essence, this gives a chance for the communities to take an active role in protection of the environment and cause liability among people causing damage.

## **HISTORICAL LEGAL MEASURES AND INNOVATIONS**

These varied extents of legal development over the historical assemblage of legal measures and innovations have cast existing legal systems. These would include noted laws, legal conviction, judicial settlement, and legal academies that have progressed in time to decode and meet societal requirements and challenges.

## **EARLY ENVIRONMENTAL LAWS AND REGULATIONS**

- a. National Legislation
- b. Regional Agreements
- c. The Stockholm Declaration (1972)
- d. The Kyoto Protocol (1997)
- e. The Paris Agreement (2015)
- f. The European Union Emissions Trading System (EUETS)

### **A. National Legislation**

#### **1. Clean Air Act (USA, 1963)**

The **Clean Air Act of 1963** was a basic law in the U.S. against air pollution, constituting the first comprehensive federal action on air quality. It had as its core objectives to protect and safeguard the health of the general public from ever-increasing levels of pollution, as well as provided state and local governments with funds and technical assistance to establish and

develop their air pollution control programs. Besides, research into new technologies aimed at reducing emission was encouraged by the Act. Although the 1963 Act did not establish any national air quality standards, it provided a basis upon which other legislations followed, which then included the 1970 amendments that established meaningful emission limits and standards with enforcement authority. This Act represented a very vital step in the making of U.S. environmental policy because it introduced federal intervention into air quality management and led to more stringent environmental safeguards in later years.<sup>5</sup>

## **2. National Environmental Policy Act (NEPA, 1970)**

The **National Environmental Policy Act of 1970** is one of the cornerstones of U.S. environmental legislation and has fundamentally changed how a federal project is planned and implemented. NEPA requires federal agencies to evaluate the environmental consequences of their proposed actions through an EIS, or Environmental Impact Statement, and an EA, or Environmental Assessment. This provides for consideration of environmental factors in decision-making alongside the economic and social aspects. NEPA also emphasizes public participation by ensuring that the environmental impact findings are available to the public for review and comment, thus influencing government decisions. NEPA espouses the values of transparency, accountability, and interdisciplinary. It is a basic tool that has been of fundamental help in preventing environmental degradation and promoting sustainable development. The Act sets a global precedent for environmental legislation and has encouraged other nations to put in place similar frameworks- a foundational element in the global movement for environmental protection.<sup>6</sup>

## **B. Regional Agreements**

This has resulted in a tremendous enhancement of environmental quality leading to cleaner air, better standards of water, and better waste management. These directives have also provided for consistency in protection efforts across the member countries through harmonisation. Compliance drives green technology innovations, boosts the economy, and fosters the development of a green sector. Accordingly, this has helped to improve public health with the reduction in pollution levels and the top role of the EU in environmental policy that has improved standards worldwide. Costs of compliance and poor enforcement in member States remain some of the problems that face this drive. Maintaining a delicate balance between economic growth and environmental sustainability is still a major challenge, but if taken as a whole, the provisions and effects of the directives, will be very essential in enhancing a more renewable and healthier environment in Europe.

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5. U.S. Environmental Protection Agency (EPA), *Clean Air Act Overview*, (2023).

6. National Environmental Policy Act (NEPA) of 1970, 42 U.S.C. § 4321.

### **C. The Stockholm Declaration (1972)**

**The Stockholm Declaration** was taken at the 1972 United Nations Conference on the Human Environment in Stockholm, Sweden, at the initiative of the international community. This declaration laid the first milestone in the history of international environmental law and changed the orientation of nations towards environmental protection. It consists of 26 principles of environmental protection that shall be integrated with the goals of development. It laid the ground for it, establishing that people have a right to a healthy environment and sustainable development one that can meet current needs without compromising the capability of future generations to meet their own. Moreover, the document also emphasizes the need for global cooperation in solving the various environmental problems whose boundaries are mostly beyond that of a nation. Major outcome of the Conference is that the institutional framework of global environmental governance gained a major institution with the establishment of the UNEP - United Nations Environment Programme. The principles contained within the Stockholm Declaration therefore served as a guideline for future international agreements on the environment and exerted a strong influence on environmental policy and awareness throughout the world. It remains a cornerstone in the ongoing efforts to protect the global environment.<sup>7</sup>

### **D. The Kyoto Protocol (1997)<sup>8</sup>**

These are commitments by countries or entities to international agreements, binding them to reducing greenhouse gas emissions within a specified period. These targets are of great importance in fighting global climatic change because they hold parties liable for their reduction in emissions. Countries are committed, through agreements like the Kyoto Protocol, to keeping their emissions below some levels chosen as a base year. These are legally binding commitments; that is, each country must meet its targets or face penalties, or other consequences specified in the agreement. The general purpose of legally binding targets is to provide a clear, verifiable, and compulsory trajectory of global reductions. It is to inspire real policies that will prompt countries to set down concrete actions toward low-carbon economies while making sure that the commitment every country makes to combating climate change materially contributes toward global efforts.

### **E. The Paris Agreement (2015)**

The Paris Agreement, adopted on December 12, 2015, at the COP21 meeting in Paris, is a pivotal international treaty under the United Nations Framework Convention on Climate Change (UNFCCC). Its primary objective is to limit global warming to well below 2°C above

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7. Adopted on June 16, 1972, at the UN Conference on the Human Environment: The Stockholm Declaration.

8. Established legally binding emission reduction targets through the Kyoto Protocol in 1997.

pre-industrial levels, with an aspirational goal of restricting the temperature rise to 1.5°C to mitigate the severe impacts of climate change<sup>9</sup>.

## KEY ASPECTS

The agreement's core aim is to keep global temperature increases well below 2°C and to pursue efforts to limit the rise to 1.5°C, recognizing the critical difference in climate impacts between these thresholds. The European Union Emissions Trading System (EU ETS), at the heart of the agreement, is an aspiration to keep well below 2°C and pursue efforts to limit the rise to 1.5°C above pre-industrial levels, given the critical difference in climate impacts between these thresholds. Countries agree to elaborate and submit Nationally Determined Contributions (NDCs), outlining their respective specific plans and targets toward reducing GHG emissions. These are the NDCs that will be reviewed every five years, with an expectation of enhanced commitments over time by countries. A framework for transparency is therefore set in motion to have countries regularly report their emissions and progress toward NDCs. This framework will bring about accountability and allowance for global monitoring of climate actions. The Paris Agreement emphasizes that adaptation is a very key issue and expects enhancing resilience to climate change impacts in countries. It further calls for finance and technology transfer to enhance adaptive capacity for vulnerable countries. It encourages developed countries to offer financing to developing countries, with an initial target of \$100 billion a year by 2020, and encourages the scaling up of climate finance over time. A global stocktake every five years will assess collective progress toward the Agreement's long-term goals and inform future action and the enhancement of NDCs. The Paris Agreement is something of a grand evolution of global climate policy, moving from the Kyoto Protocol's binding emission targets to a more flexible framework under which countries set voluntary goals. Though of a voluntary nature, this has been able to attract nearly universal participation, making it a cornerstone for action on climate change globally.

The EU ETS operates on a cap-and-trade model, where a cap is set on the total greenhouse gas emissions allowed from certain sectors. This cap is progressively reduced to lower overall emissions over time. The cap-and-trade principle in the EU ETS refers to the fact that there is a cap on the total quantity of GHG emissions from sectors covered under the scheme. Over time, it gets reduced to bring down aggregate emissions. Companies in sectors covered by the scheme are allocated a number of allowances; each allowance allows them to emit a certain amount of CO<sub>2</sub> or other target gases. Allowances may be traded among companies. Companies can sell any excess allowances they have if they keep their actual emissions below the allowance. This

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9. UNFCCC, <https://unfccc.int/process-and-meetings/the-paris-agreement>, (last visited Aug. 1, 2024).



trading system offers an economic incentive to reduce emissions. The EU ETS covers the key sectors: power generation, heavy industry, and aviation, and it accounts for about 40% of the GHG emissions of the EU. Businesses must accurately measure and report their emissions and return allowances equal to those emissions. Non-compliance is fined. Finally, in order to better cope with possible market imbalances—for instance, a surplus of allowances- a Market Stability Reserve was introduced into the system. This step ensures better functioning of the system. The EU ETS is the key tool by which the EU will meet its climate targets, drive investment in low-carbon technologies, and cut emissions cost-effectively.

### **POLLUTER PAYS PRINCIPLE**

The **Polluter pays principle**<sup>10</sup> is a policy approach where the entity responsible for causing pollution bears the costs of managing and mitigating the environmental damage. This principle ensures that the expenses related to pollution control and clean-up are covered by the polluter, rather than society as a whole, promoting accountability and encouraging reductions in pollution. The polluter pays principle has several significant impacts on society.

### **ENVIRONMENTAL PROTECTION**

By holding polluters financially accountable, the principle of environmental protection incentivizes companies and individuals to reduce pollution, leading to a cleaner and healthier environment for society. It promotes the internalisation of environmental costs, ensuring that the true costs of production, including environmental damage, are reflected in the price of goods and services. This encourages more sustainable production and consumption patterns. The financial burden of pollution can drive innovation as companies seek cost-effective ways to reduce emissions and waste, leading to the development of cleaner technologies and processes. The principle ensures that those who benefit from activities that cause pollution are the ones who pay for its consequences, rather than placing the burden on society, particularly on those who are not responsible for the pollution. It raises awareness about the environmental impact of certain activities, encouraging individuals and businesses to make more environmentally conscious decisions. Governments may implement regulations or taxes based on this principle, which can lead to changes in industry practices and potentially higher costs for consumers, but also create greater environmental responsibility.

### **CLIMATE LITIGATION**

Climate litigation is the new environmental law body that applies legal practice in setting case law precedents in aid of efforts to mitigate climate change by public institutions, such as

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10. UNEP LAW AND ENVIRONMENT ASSISTANCE PLATFORM, <https://leap.unep.org/en/knowledge/glossary/polluter-pays-principle>, (last visited Aug. 1, 2024).

governments and companies. Activists and lawyers have increased efforts to use the national and international judicial systems to advance an effort in view of slow politics in climate change that delays mitigation. Since the early 2000s, the legal frameworks for combating climate change have increasingly been available through legislation, and an increasing body of court cases has developed an international body of law connecting climate action to legal challenges related to Environmental law, Constitutional law, Administrative law, Private law, Consumer Protection law, or Human Rights. Many of these successful cases and approaches focus on the youth climate movement and climate justice. One factor since 2015 is the increased use of human rights arguments in climate lawsuits, partially taking into account increasing jurisdictions and the United Nations including the right to a healthy environment.<sup>11</sup>

**a) *Juliana v. United States***

It is probably one of the most widely publicized climate change lawsuits ever filed, originally in 2015 by 21<sup>12</sup> young plaintiffs against the government of the United States. The youth charged the government with violating their constitutional rights to life, liberty, and property through acts or omissions concerning climate change. They further added that the government had still promoted and encouraged to a huge extent the use of fossil fuels, which exacerbated the climate crisis, robbing them of their future. Two main legal contentions based upon which the plaintiff's claim was made are:

1. **Constitutional Rights:** The plaintiffs argued that the government has been sufficiently unresponsive to the problem of climate change and is thereby violating their Fifth Amendment rights against deprivation of life, liberty, and property without due process of the law.
2. **Public Trust Doctrine:** They then appealed to the public trust doctrine, specifically in relation to atmosphere protection, as under government trusteeship for use by the very public in question. It's still a landmark, one of the first few in 2016 to claim a safe climate as a fundamental right under state and federal constitutions. A federal judge ruled in 2016 that the case could go forward, agreeing the plaintiffs had established a legally sufficient claim. The Ninth Circuit Court of Appeals dismissed the case on procedural grounds in January 2020. The court, albeit enlightened by the dangers posed by climate change through the plaintiffs' testimony, held that to mandate the provisioning of a comprehensive climate action plan, as the plaintiffs had demanded, was *ultra vires*. Such decisions had to be left to the legislative and executive branches.

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11. Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 *Transnat'l Env'tl. L.* 37, 37-67 (2018)

12. 947 F.3d 1159: Volume 947 of the Federal Reporter, 3rd series, starting on page 1159.

Although the case was dismissed, *Juliana v. United States* had huge impacts on raising discourses relating to climate change. It underlined the possible role of courts in making decisions about climate issues and pushed similar lawsuits across the world. It brought out intergenerational justice concerning the rights of future generations being safeguarded against the adverse effects of climate change.

***b) Asghar Leghari v. Federation of Pakistan***

It was a 2015 Lahore High Court<sup>13</sup> case ruling that the government violated the National Climate Change Policy of 2012 and the Framework for Implementation of Climate Change Policy (2014-2030) by failing to achieve targets set by the policies. A Climate Change Commission was required to be established in order to help Pakistan meet its climate goals. It was said that the government was asked to implement the policy of 2012. A High Court Judge, Syed Mansoor Ali Shah, said that “climate change appears to be the most serious threat faced by Pakistan”. The court directed each department to nominate one person for policy implementation and that by December 31, 2015, each department must submit their “action points” to the commission. The judgment further established a Climate Change Commission, comprising of civil society, technical experts, and ministries to regularly track the implementation by the government.

***c) Milieudefensie v Royal Dutch Shell<sup>14</sup> (2021)***

It is a human rights law and tort law case heard by the District Court of The Hague in the Netherlands in 2021 related to efforts by several NGOs to curtail carbon dioxide emissions by multinationals. It was brought by the Dutch branch of Friends of the Earth and a group of other NGOs against the oil corporation Shell plc. In May 2021, a court ordered that by 2030, Shell must slash its carbon emissions from 2019 levels by 45%- the litigation pertained not only to direct emissions resulting from its operations but also to indirect ones from the selling of petroleum products. It is thought to be the first judgment in major climate change litigation against a corporation.

**CASE STUDIES OF CURRENT LEGAL APPROACHES TO CLIMATE CHANGE AND ENVIRONMENTAL SUSTAINABILITY**

With countries worldwide stepping on their pedals, we are at the edge of a historical shift from dominance by dirty fossil fuels toward greener sources of energy. We believe it is only going to get stronger, seeing economies eventually face larger physical damages arising from higher temperatures and more volatile weather. Most likely, nations will strongly accelerate the decarbonization of generation because CO<sub>2</sub> emissions have to drop by over 40 percent in just

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13. (2015) W.P. No. 25501/201

14. Case No. C/09/571932 / HA ZA 19-379

the next seven years, a rate that will be necessary for net zero in 2050. Net zero has turned into a new key theme of the new structure of the global economy because the attainment of it would involve an extremely radical transformation in the energy system and other critical sectors of economies.

### **Carbon Pricing in Canada**

The policy of carbon pricing by Canada has either been realized in the form of a regulatory fee or tax, which is then levied on fuels based on their carbon content at the level of Canadian provinces, territories, or the federal government. Provided that the provinces and territories of Canada comply with the minimum requirements set by the federal government, they could create their own system of carbon pricing. In other words, individual provinces and territories may have a higher tax than that federally mandated but not lower. All provinces and territories are living under some form of carbon pricing, either through an in-province program or one of two federal ones.<sup>15</sup> As of April 2023, the federal minimum tax is set at CA\$65 per ton of CO<sub>2</sub> equivalent, set to increase to CA\$170 in 2030. In the absence of a provincial system, or in provinces and territories whose carbon pricing system does not meet federal requirements, a regulatory fee is implemented by the federal Greenhouse Gas Pollution Pricing Act GHGPPA, which was passed in December 2018. In provinces where the fee is levied, 90% of the revenues are returned to tax. In simple words, carbon pricing in Canada has meant some of the ways by which GHG emissions are reduced by putting a price on carbon. That includes the federal carbon tax on fossil fuels and the Output-Based Pricing System for large industrial emitters. Provided the provinces can meet or go higher than the federal benchmark, provinces can have their system; examples include British Columbia and Quebec. It is also planned that, with time, it will increase annually to CAD 170 a ton in 2030.

### **Plastic ban in Kenya**

In the absence of adequate resource-efficient design, production, use, and sound management of plastics throughout their whole life cycle, there could be more plastic than fish in the sea by 2050, according to UN estimates, if not addressed through government and private sector responses. It is in this view that Kenya, for instance, is making a huge step. The country's Day of Environment will be marked with a ban on single-use plastic in protected natural areas from this year. A 5<sup>th</sup> June 2020 ban, based on the presidential directive on last year's World Environment Day, is to be enacted in National Parks, beaches, forests, and conservation areas. In effect, visitors will not be allowed to carry plastic water bottles, cups, disposable plates, cutlery, or straws into these protected places. The move follows that milestone action by Kenya in 2017 of imposing a nationwide ban on single-use plastic carrier bags. With the ban on

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15. Urban, Rylan. "Carbon Tax and Rebate in Canada 2024." [energyhub.org](https://energyhub.org), September 24, 2020. Retrieved September 26, 2020.)

single-use plastics in its parks and protected areas, Kenya is joining the rest of the world in setting an agenda for the sustainable management of wastes in conformity with this year's World Environment Day theme as stated by the UNEP Africa region director Juliette Biao. Only 3 years since Kenya introduced one of the world's best laws on single-use plastic bags, this newest measure offers suitable momentum as nothing exemplifies nature better than our wildlife, and biodiversity. The greater agenda for Kenya remains a total ban of single-use plastics in pristine landscapes that are home to iconic plant and animal species.

***Uganda foundation v. State of Netherlands***<sup>16</sup>

This is one of the climate change litigations that has been ruled on by the Supreme Court of the Netherlands, relating to government efforts toward reduction in carbon dioxide emissions. This case was taken out against the Dutch Government in 2013 by Uganda Foundation, alleging that it was putting at risk the human rights of Dutch citizens set by both national and European Union laws by not meeting a minimum goal of reduction in carbon dioxide emissions set up by scientists to avoid harmful climatic change. The Supreme Court, in its appeals, upheld the initial ruling in 2015, obliging the government to meet an emissions goal of reducing 25% from the 1990 levels by 2020, stating that it was necessary for the Dutch government to protect human rights by reducing the emission. This is the very first such tort case taken against a government challenging climate change aspects based on a human rights foundation; it is the first such successful climate justice case.

**New Zealand Zero Carbon Act**

Among the most significant reforms to New Zealand's legislative environment is that towards the establishment of a full statutory framework known as the Climate Change Response (Zero Carbon) Amendment Act 2019, which aims to address climate change by contributing to worldwide commitments under the Paris Agreement to limit the rise in global average temperature below 1.5° C from pre-industrial levels. It is founded on ambitious reduction targets for the achievement of net zero emissions of all greenhouse gases, except biogenic methane, by 2050, specific targets for biogenic methane reduction by 2050, and interim targets for 2030. Together, they provide unequivocal leadership in the lead-in to emissions reduction, which offers a structured way to monitor progress and guide policy interventions. Since the passage of the Zero Carbon Act, New Zealand has seen gross emissions stabilize since 2006, falling 0.7% in 2021, mainly in the agriculture sector. In New Zealand, the Zero Carbon Act is a step forward in terms of climate change governance. The Act is a mandatory positive move toward comprehensive action on climate change.<sup>17</sup>

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16. ECLI:NL:HR: (2019): (2006)

17. Climate Change Response (Zero Carbon) Amendment Act 2019, s 5 (N.Z.).

### **Jurisdiction disputes**

With climate policies, both on the national and international levels, failing to take place in most countries, there has been a swift new turn for the courts by those working to protect the environment. A spate of lawsuits has been launched in host jurisdictions seeking redress for the harmful effects of climate change through mitigation measures or adaptation to the damaging consequences, each taking different forms of legal action. Action has been taken against big v-emitting corporations and against governments for failure to take into account the climate change while making planning and developmental decisions. Notwithstanding this diversity, there is a number of challenges or issues that are common and incurred by all the plaintiffs mounting climate-based claims within the courts. Truth be told, these foci epitomize the complexities surrounding the issue of climate change and the challenges it brings upon conventional ways of managing law and governance approaches.

### **Justifiability**

Some rights-based climate cases, particularly those brought in the US and Canada have foundered on the question of justifiability. In *Juliana et al. vs. United States of America*<sup>18</sup> (2020), a rights-based challenge to government inaction on climate change in the US, the US Ninth Circuit Court of Appeal refused to order the government to formulate a comprehensive scheme to combat climate change on the basis that this would require a host of complex policy decisions which for better or worse must be entrusted to the wisdom of the legislative and executive branches. Similarly, in *Lho'imggin et al. vs. Her Majesty the Queen* (2020)<sup>19</sup>, a case filed under Section 91 of the Canadian Constitution and Sections 7 and 15 of Canada's Charter of Rights and Freedoms, the claimants asked the Federal Court of Canada to order the Canadian government to amend each of its environmental assessment statutes that apply to high greenhouse gas-emitting projects. Addressing the issue of policy complexity, the court noted that when the issue spans across various governments, it involves issues of economics and foreign policy, trade, and a host of other issues, and the courts must leave these decisions in the hands of others.

### **BALANCING ECONOMIC AND ENVIRONMENTAL INTEREST**

The dilemma of reconciling economic growth with environmental protection has been one of the thorniest issues in resorting to legal regimes to combat climate change. Recently, the landslide in Iuka district of Kerala has claimed nearly 50 lives and rendered several homeless, this follows from a continuing spell of heavy rains in Kerala. Due to climate change, such hazards are increasingly becoming very common in other parts of India. Moreover, the impact

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18. *Juliana v. United States*, 217 F Supp. 3d 1224 (D. Or. 2016).

19. (*Lho'imggin et al. vs Her Majesty the Queen* (2020), FC 1059).



of climate change is not limited to landslides, but it also results in devastating floods co-existing along with long dry spells and loss of biodiversity. However, the man-made changes and natural exploitation for economic growth are the major contributors to climate change and its effects. This is due to the underlying thought that development policies promote economic wellbeing, while environmental policies have been seen to be restricting it. Thus, for the sake of sustainable development, there is a need to balance economic development with environmental protection.

For example, the coal industry has been one of the loudest opponents of emissions regulations, fighting policies such as the Clean Power Plan that was expected to reduce carbon emissions from power plants. The industry, however, argues that this plan would cost the economy dearly in terms of jobs lost in regions dependent on coal and higher electricity prices for consumers. Arguments like this have been highly successful in judicial and political argumentation and usually end with mitigations or even rollbacks in environmental regulation. This means, all things considered, that there has to be a reconciliation of interests in both the economic and the environmental spheres for effective climate action. This involves more than just tough legal frameworks but also political will and public support for the transition to a more sustainable economy if the urgent threat of climate change is to be successfully countered with minimal disruptions to the economy.

## **FUTURE DIRECTIONS FOR LEGAL INNOVATION**

The legal industry has often been portrayed as conservative and slow to adapt to change. Yet, in the digital age, where disruption is the norm and innovation is the key to survival, this perception is gradually shifting. The need for legal innovation has become increasingly apparent, driven by evolving client demands, technological advancements, and global shifts in demographics and regulatory landscapes.

## **EMERGING TRENDS AND TECHNOLOGIES IN ENVIRONMENTAL LAW AGAINST CLIMATE CHANGE**

Climate change affects all countries, disrupting economies, threatening lives, and causing losses. Weather patterns are changing, sea levels are rising, and greenhouse gas emissions are at their highest. If unchecked, sea level temperatures will rise above three degrees this century, impacting the poor and vulnerable most. Seeking economic and scalable solutions can create a cleaner, more resilient economy. The pace of change accelerates as people turn to renewable energy and reduce emissions. Climate change is a global challenge requiring international cooperation. The Paris Agreement (2016) unites countries to limit temperature rise to less than two degrees Celsius. By April 2018, 175 countries ratified the agreement, and 10 developing countries submitted national response plans. Collective action is crucial to combat climate change and support a low-carbon economy.



In this regard, O. Narzullaev said: “The introduction of efficient technologies is of particular importance in the history of civilization. At the international level, population growth is necessary to meet the demand for natural resources and agricultural products, ensure the rational use of natural resources, achieve progress through the formation of a regulatory framework for the introduction of scientific achievements and innovative technologies in sustainable development<sup>20</sup>.”

## **BLOCK CHAIN**

According to **Paul Gambill, CEO of Nori**, “Blockchain is the key to democratizing access to carbon markets. By tokenizing carbon credits, we can create a system that is transparent, efficient, and accessible to everyone. This is a game-changer for the fight against climate change.”

“Blockchain technology”, a form of the distributed ledger technology, is a promising innovation that has the potential to realize the mentioned change technically. The four core attributes of blockchain, namely transparency, immutability, decentralization, and authentication, can address some of the challenges experienced in cooperative, intergovernmental actions and advance the implementation of measures aimed at tackling climate change and supporting sustainable development.<sup>21</sup>

## **IMPORTANCE OF INTEGRATING BLOCKCHAIN WITH CARBON ACCOUNTING**

The integration of blockchain technology into carbon accounting systems offers a promising avenue to address the transparency and accuracy challenges currently plaguing carbon reporting. By leveraging blockchain’s immutable ledger and real-time data recording capabilities, it becomes possible to create a transparent, tamper-proof system for tracking emissions and carbon credits. This integration not only enhances the reliability of carbon data but also fosters greater trust among stakeholders, thereby accelerating global efforts to combat climate change.

## **EMERGING TRENDS IN BLOCKCHAIN AND CARBON ACCOUNTING**

The future of blockchain technology in carbon accounting is promising, with several emerging trends and innovations that could further enhance its impact. One notable trend is the development of more energy-efficient consensus mechanisms, such as proof-of-stake and delegated proof-of-stake, which can reduce the environmental footprint of blockchain networks.

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20. (O. Narzullaev. Improving the legal regulation of the protection and use of biological resources in Uzbekistan. Monograph. - Tashkent: TSUL, 2020.- 232 p)

21. VrankenH., Sustainability of bitcoin and blockchains, Curr Opin Environ Sustain (2017).

Additionally, the integration of blockchain with other emerging technologies, such as the Internet of Things (IoT) and artificial intelligence (AI), holds significant potential. IoT devices can provide real-time data on emissions, while AI can analyze this data to identify trends and opportunities for emissions reduction. Combining these technologies with blockchain can create a powerful ecosystem for carbon management and transparency.

### **Artificial Intelligence**

Today, reforms related to the digitalization of environmental legal relations are largely limited to automation. Based on the experience of foreign countries, it is important to organize the next stage based on the concept of industry regulation through artificial intelligence. In this sense, there is a big difference between digitalization and artificial intelligence. For example, it is advisable that the relevant state bodies unite into a single system used in the process of environmental control within their competence, create a system for identifying cases of use and damage to natural resources, control and manage the entire process using artificial intelligence. Therefore, it is time to introduce artificial intelligence in the field of environmental protection, rational use of natural resources and environmental safety of the population, study its theoretical and legal aspects, develop a fundamental concept, conduct research.

### **Legal Merits of A.I in Environmental Law**

1. The introduction of modern and advanced information and communication technologies in the field of environmental protection and nature management in the digital economy will make it possible to constantly increase the transparency of the activities of the competent state bodies and organizations.
2. Digital reform should begin, first of all, with the introduction of the most modern methods and tools in the process of state environmental control in order to minimize the human factor in order to achieve quality and high efficiency.
3. It is important to use the capabilities of artificial intelligence in identifying and predicting risks in environmental insurance. World experience shows that each country in the field of environmental insurance is associated with the creation of its own national environmental insurance system and the use of artificial intelligence in the early detection of natural disasters and natural disasters, pays great attention to data protection.<sup>22</sup>
4. When conducting research in the field of environmental law, it is advisable to formulate scientific and theoretical ideas that predict the tendency for the penetration of artificial intelligence into the sphere of public relations. For example, the draft Environmental

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22. J., A. Vari, and R. Mechler. (2005).

Code, which has been discussed and planned for adoption in Uzbekistan over the past 3-4 years, should be finalized by assessing the impact of artificial intelligence on certain environmental legal relations. Because scientific and theoretical ideas need to be formed earlier, faster and on a larger scale than the legislative process. This is evidenced by the fact that this situation is considered a key priority in the scientific and theoretical concepts of leading foreign countries.

5. Based on the above considerations and the environmental policy of states, a new category of environmental legal theories has emerged. It is proposed to conditionally express this concept as “The concept of digitalization of environmental management”. The structure of this concept differs from other representations in its complexity and in the fact that its full development takes a long time.

### **Artificial Intelligence against Climate Change**

In recent years, the debate on climate change has intensified as extremely alarming scientific accounts such as the Intergovernmental Panel on Climate Change (IPCC) report on climate change have increased people’s environmental concerns and expectations. The AI technology is used in Japan’s top natural disasters to monitor deforestation in the Amazon and design more sustainable and intelligent urban areas in China. Artificial intelligence applications can also create more efficient buildings, improve electricity storage, and improve and renovate wind and solar energy in the grid when needed. In a small way, this can help households reduce energy consumption when they turn on lights automatically, when not in use, or even control the network requirements of electric vehicles to meet expectations.

A recent research study conducted by the well-known accounting firm Price Water House Coopers in partnership with Microsoft, a company that specializes in developing machine learning solutions for the climate change sector, has uncovered some intriguing findings. The study found that by 2030, implementing AI technology could potentially significantly reduce global greenhouse gas emissions, specifically by 4%. This is a noteworthy finding as it highlights the potential of AI in addressing one of the most pressing concerns of our time, climate change.

The proficiencies of AI, specifically its ability to process enormous amounts of unstructured data such as images, graphs, and maps, are pushing the boundaries of climate modeling and providing unparalleled opportunities to better understand the dynamics of sea-level rise and ice caps. Artificial intelligence allows us to better grasp the consequences of our actions on the world and create long- term alternatives to the current climate crisis. AI has the ability to significantly contribute to combating climate change and lowering GHG emissions.

## **POLICY RECOMMENDATION FOR ENHANCING LEGAL FRAMEWORKS**

Climate change impacts are likely to undermine planned development outcomes in a number of countries and pose significant challenges for the resilience of many livelihoods and ecosystems. Development planning responses play an important role in addressing these challenges, and integrating climate change resilience into these responses is fast emerging as a major policy agenda item.

Between November 2011 and October 2012, government staff from diverse backgrounds came together at a course facilitated by the International Institute for Environment and Development (IIED) at the International Centre for Climate Change and Development (ICCCAD) to share and reflect on the countries' contributions and needs around integrating climate change into development planning. Based on these discussions, they identified three building blocks for successful mainstreaming: an enabling environment, policies and planning, and projects and programs. Based on these three blocks there are three important steps toward climate change for future purpose, Climate Justice, International Cooperation and Climate education.

## **INTERNATIONAL COOPERATION: ADAPTATION AND MITIGATION RESPONSES**

Despite the 1992 UN Framework Convention on Climate Change <sup>23</sup> and the 1997 Kyoto Protocol, global GHG emissions continue to rise. A series of annual UNFCCC meetings have not made adequate progress, most notably, with the weak, non-binding 'accord' emerging from the Copenhagen Climate Summit in December 2009.

Sustainomics provides both a framework and practical tools for integrating climate change responses into sustainable development strategies. Indeed, the existence of such an approach should help to dispel the concern of many policymakers that tackling climate change might divert resources away from more immediate development problems such as poverty and hunger. The two specific ways that humans can respond to climate change are through Adaptation and Mitigation. Adaptation is aimed at reducing the vulnerability of human and natural systems to the impact of climate change stresses. Mitigation seeks to lower GHG emissions or even absorb GHGs to reduce radiative forcing of the atmosphere and the intensity of future climate change.

Present adaptation efforts need to improve. Natural organisms and ecosystems adapt autonomously, but many may not survive if the rate of change is too rapid. Humans carry out both preplanned and reactive adaptation. Proven adaptation methods like building dikes against sea level rise, and developing temperature- or drought-resistant crops, could be more widely

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23. Agenda 21. New York, USA: United Nations; (1992).

implemented. Many similar technical, managerial, policy, and behavioral measures need to be adopted in both public and private domains, to increase long-term adaptive capacity of communities. The most recent estimates of global adaptation costs range from \$25 to over \$100 billion per year, during the next two decades. Beyond that time frame, these costs could rise exponentially, especially if the assumed median warming is exceeded (2–3°C by 2100). This element is essential for a workable global impact on climate change: Industrial countries should mitigate and follow the future growth path towards carbon emission, by restructuring their development patterns to delink carbon emissions and economic growth, thereby making their development path more sustainable. The poorest countries and poorest groups must be provided an adaptation safety net, to reduce vulnerability to climate change impacts. Middle-income countries could adopt innovative policies to tunnel through, by learning from past experiences of the industrialized world. Developing countries should be encouraged to simultaneously continue to develop more sustainably, by following a growth path that is not only less carbon intensive but also reduces vulnerability to climate change impacts.

This approach accords with the ideas of equity and climate justice emerging from sustainomics. The great bulk of GHGs have been emitted by the rich countries, so they should lead the mitigation effort and also assist poorer countries in both adaptation and mitigation. The poor countries must focus on vulnerability and adaptation, as they will be most affected by climate change and need to increase energy use to alleviate poverty and promote development.

## **CLIMATE EDUCATION**

Education is a critical agent in addressing the issue of climate change. The UN Framework Convention on Climate Change (UNFCCC) assigns responsibility to Parties of the Convention to undertake educational and public awareness campaigns on climate change, and to ensure public participation in programs and information access on the issue. Education can encourage people to change their attitudes and behaviour; it also helps them to make informed decisions. In the classroom, young people can be taught the impact of global warming and learn how to adapt to climate change. Education empowers all people, but especially motivates the young to take action. Knowing the facts, helps eliminate the fear of an issue which is frequently colored by doom and gloom in the public arena. In this context, UNICEF has tapped into the minds and imaginations of children around the world to capture what it means to be a child growing up in the age of rapid climate change. Through its Climate Change Education for Sustainable Development programme, UNESCO aims to help people understand the impact of global warming today and increase “climate literacy” among young people. This programme and other innovative educational initiatives, including the Global Action Programme (GAP), Action for Climate Empowerment and the ZOOM campaign, were presented and discussed at the COP 22. International bodies are calling for climate change studies to be taught in schools

as a formal part of curriculums. The United Nations says that it should be part of teaching in all schools by 2025.

### **Countries which have adapted Climate education**

Despite signatories to the 2015 Paris agreement agreeing to improve education around climate change, very few countries have put this commitment into action. Cambodia has integrated climate change into a new and expanded earth science curriculum for higher secondary schools which was introduced in 2020. As well as pupil learning about key approaches and technologies, 15 pilot schools were assigned to work on projects such as tree planting and climate-smart agriculture. Some other countries are moving in a similar direction. Argentina's Parliament approved a National Law of Comprehensive Environmental Education in 2021. It requires environmental education to be taught in school at all age levels. Prior to this, environmental issues were taught in subjects such as technology and social sciences. Topics relating to climate change are taught in primary and secondary schools in the UK. However, the UK government has promised to deliver "world-leading climate change education" by 2023.

### **CONCLUSION AND SUGGESTIONS**

Legal innovation is significant in the occurring conflict against environmental threats. By developing versatile, productive, and statutory legal frameworks, the community can better defend the environment, promote sustainability, and ensure a healthier universe for upcoming generations. As environmental challenges pursue to develop, continued legal innovation will be required for mark these threats and realise long-term environmental goals.

In conclusion, addressing the climate crisis requires a fundamental transformation of our legal systems, driving innovation in climate governance, policy, and regulation. By embracing systemic change and collaborative efforts across finance, technology, and international cooperation, we can unlock the necessary solutions to mitigate climate change. Legal innovation must play a crucial role in this transition, fostering novel approaches to climate justice, carbon pricing, and sustainable development. Together, a more resilient and equitable future can be created, where the law serves as a powerful tool in the fight against climate change.

To effectively harness legal innovation in addressing climate change, environmental protection, and sustainability, it is crucial to develop forward-looking legal frameworks that promote sustainable practices and hold corporations and governments accountable. These can include incentivizing green technologies, mandating corporate sustainability, and supporting climate litigation to enforce environmental responsibility. Additionally, aligning national laws with international environmental agreements and fostering international legal collaboration are vital for cohesive global action. The use of technology, such as AI and blockchain, can enhance the enforcement and compliance of environmental regulations. Establishing specialized

environmental courts and encouraging public-private partnerships can further strengthen environmental governance. Empowering indigenous legal practices and involving local communities in law making are essential for creating laws that are both effective and equitable. Incorporating sustainability into legal education and providing training for legal practitioners can prepare the legal profession to meet the complex challenges posed by climate change and environmental degradation.



## **HARNESSING LEGAL INNOVATION FOR SUSTAINABLE DEVELOPMENT OF VILLAGES IN INDIA: A KEY TO UNLOCK THE POTENTIAL OF 909 MILLION**

Tejashwini Ramesh<sup>1</sup>

### **INTRODUCTION**

India is a diverse country with 1721 languages, several hundreds of dialects, a variety of religions, castes and subcastes with complex relationships; agro-climatic conditions ranging from sub-zero Himalayas to blazing sand desert of Thar and to fertile lands all over the country, which are all held together under democratic framework of governance. It has 6,40,930 villages with 909 million population, often in a condition of destitution and underutilization of resources and talents.<sup>2</sup> The villages of India have been witnessing the Urban rural divide greatly since globalization. The quality of amenities available and the income level is the mirror that reflects the sharp difference and prejudice between urban and rural areas in terms of lack of opportunity, employment, knowledge, innovation, connectivity, quality healthcare, efficient implementation of laws and schemes, in the rural areas. Rural development is an investment in the path of securing happy, peaceful and a prosperous country. The goal is to attain development with equity, prosperity with inclusion and industrialization with environmental protection. The research primarily focuses on understanding the role of legal innovation in sustainable rural development, the challenges faced by villages in India and the objectives that the further legal reforms should focus on to tackle these challenges.

### **UNDERSTANDING LEGAL INNOVATION AND ITS IMPORTANCE IN RURAL DEVELOPMENT**

**Definition of Law under Article 13(3)(a)** encompasses any law having legal force inside the borders of India, including Acts, ordinances, orders, bye-laws, rules, regulations, notifications, customs, or usage.<sup>3</sup>

**Legal innovation** refers to drafting of creative and improved laws in various forms that aims to address the existing challenges, promote overall social and economic development.

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1. Law Student, B.M.S. College of Law, Affiliated to Karnataka State Law University, Bengaluru.
  2. INDIAN EXPRESS, <https://www.newindianexpress.com/opinions/2023/Oct/01/know-the-india-that-still-lives-in-its-villages-2620001.html> (Aug. 26, 2021).
  3. INDIA CONST. art. 13, cl. 3(a)

With regard to rural development, legal innovation involves the drafting laws specifically targeting the unique needs of rural populations.

### **Importance of Legal Innovation in Rural Development**

Legal innovation can be resorted to for creating the following positive effects in rural India:

1. It can address the Unique Rural Challenges through inclusive, sustainable and tailored solutions.
2. It enhances the performance of Governance and the agencies and promotes accountability through decentralization and transparency.
3. Promotes Economic Empowerment by Legal innovations in Microfinance and SHGs that promotes financial inclusion and economic empowerment of the marginalized groups including women.
4. Ensures Sustainable Development by promoting sustainable agricultural practices, protecting natural resources while ensuring environmental compliance, developing and implementing climate resilience programs; all this helps rural communities to adjust to the consequences of global warming like climate change, drought, flood.
5. Facilitates Infrastructural Development through Public-Private Partnerships (PPPs) and Regulatory Reforms that simplify regulatory procedures and reduces bureaucratic hurdles to facilitate faster implementation of infrastructure projects and improves the quality of life in rural areas.

### **CHALLENGES FACED BY THE VILLAGES OF INDIA**

The multifaceted challenges of rural development in India that act as obstacles in achieving sustainable rural development are:

- 1. Inadequate Infrastructure Development:** Many villages still have road, electricity and digital connectivity issues which hampers their access to markets, education, healthcare, etc.

#### **Emphasis on Digital Connectivity**

India has made significant progress in the digital revolution, but there is still much work to be done to connect the disconnected regions. According to a report by the Telecom Regulatory Authority of India (TRAI), the broadband penetration rate in urban areas stands at 93%, while in rural areas it lags significantly at just 29.3%. Additionally, there are worries that the adoption of emerging digital innovations like digital wallets, IoT, and AI could increase the difference. In order for rural community members to reap the benefits that are now distributed unevenly

throughout urban and rural India, they must be empowered through reliable connectivity and equipped with the necessary skill sets. When used and expanded, the power of information sharing can offer a range of advantages, including e-commerce, smart farming, educational institutions, telemedicine services, simplicity of payment transfers through government programs, and distant employment prospects. Moreover, the digital divide in India is greatly exacerbated by a lack of digital understanding, cultural reservations, and linguistic barriers.<sup>4</sup>

## 1. Inefficiencies in Social Protection Programs

**Targeting and Coverage:** Social protection schemes often fail to reach the most vulnerable populations due to issues with targeting and coverage. For instance, the Public Distribution System (PDS) sometimes excludes eligible beneficiaries. It becomes more difficult to provide services to the intended recipients when block and gram panchayat levels lack the necessary financial and personnel resources. Additionally, there are approximately 440 direct benefit program schemes that require better implementation strategies and integration in order to maintain fiscal balance<sup>5</sup>.

**Implementation Delays:** Delays in the disbursement of benefits under schemes and pension programs affect the timely relief and support to rural households.

**Corruption and Leakages:** Corruption and leakages in the implementation of rural development schemes reduce their effectiveness, purpose and the intended benefits to the weaker section. The common explanations for the higher rates of corruption in remote regions compared to metropolitan areas include a lack of educational opportunities, inadequate ground-level surveillance, weak administration, and inadequate organizational outreach.<sup>6</sup>

**Weak Institutional Frameworks:** Insufficient capacity and coordination among implementing agencies lead to poor execution of the development programs.

**Participation and Accountability:** Ensuring active participation of rural communities in governance while enhancing accountability remain critical challenges.

## 2. Agricultural Sector Challenges

**Fragmented Land Holdings:** Land fragmentation essentially decreases the productivity and level of income of farmers.

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4. Shruthi A, G V & Sachin Chaudhari, *A Survey on Rural Internet Connectivity in India* (Aug. 26, 2021).

5. Shantanu Gupta, *Reshaping Social Protection in India*, Ideas for India (Aug. 08, 09.00PM), <https://www.ideasforindia.in/topics/governance/reshaping-social-protection-in-india.html>.

6. Shivani Suresh, *The reality of corruption in rural India*, TheSocialTalks, (Aug. 08, 2024, 09.30PM) <https://thesocialtalks.com/news-analysis/reality-corruption-rural-india/>

**Access to Credit and Technology:** Out of only 33% of producers having accessibility to credit resources, the farmers with large agricultural land have higher probability of getting access to credit whereas underprivileged castes and economically weaker have least probability of credit access.<sup>7</sup>

### 3. Employment and Livelihoods

**Underemployment and Seasonal Work:** Around 7% of rural India is unemployed whereas there is a significant proportion of villagers seasonally employed as well as underpaid, leading to economic insecurity. Sticking on to traditional methods of agriculture without diversified non-farm sectors also restricts employment and income generating opportunities.<sup>8</sup>

### 4. Education and Skill Development

**Access to Quality Education:** Inadequate educational infrastructure, poorly trained teachers, gender discrimination, poor connectivity leads to high dropout rates hence limiting the potential for human capital development.

**Vocational Training:** In comparison with the enormous rural population the vocational training at their use falls short. Effective vocational training programs equip rural youth with skills required in the job market.

### 5. Healthcare Access

Rural areas often have limited healthcare infrastructure and facilities, with a shortage of medical professionals. Even when services are available, the cost of access can be prohibitive to many rural households. The World Health Organization reported that for every 1000 rural Indians, there are only 0.45 available doctors, a statistic that's only been aggravated by a handful of underdeveloped countries in Africa. In case of medical facilities like Diagnostic centers the numbers get much worse.

### 6. Gender Inequality

Due to prevailing gender discrimination in the minds of the villagers' women in rural areas still encounter major obstacles when trying to access chances for work, healthcare, and education as compared to men. This patriarchal idea of women as a subordinate to men and is meant only inside the four walls of the house is apparent with prevailing domestic violence and rate of women actively participating outside the house.

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7. Ramasamy, P., Malaivasan, U. *Agricultural credit in India: determinants and effects*. Ind. Econ. Rev. 58, 169–195 (2023). <https://doi.org/10.1007/s41775-023-00187-8>

8. Forbes India, <https://www.forbesindia.com/article/explainers/unemployment-rate-in-india/87441/1>, (Aug 09, 2024)

## **7. Climate Change and Environmental Sustainability**

Rural communities are more susceptible to the effects of climate change, such as irregular rainfall, droughts, and floods, because of their location and heavy reliance on agriculture. Furthermore, in order to prevent environmental deterioration and guarantee long-term food security, sustainable agriculture practices must be widely adopted.

### **BRIEF OF KEY LEGISLATIVE ACTS AIMED AT RURAL DEVELOPMENT IN INDIA**

#### **a). Key legislative acts to regulate Agricultural produce**

##### **1. The Agricultural Produce Market Committee (APMC) Act 2003 (various State Acts and are amended periodically):**

The Acts aim is to control agricultural product sales in order to protect farmers' rights to fair pricing and lessen middlemen's exploitative practices.

Impact: Market yards and effective marketing infrastructure were built. This Act notifies producers of agricultural products grown in the area and stipulates that the first sale of these commodities may only be made through commission agents licensed by The APMCs that were founded under the Act and under the APMC's authority. The APMCs have the following amenities: roadways, lights, drinking water supply, police station, post-office, bore-wells, the storage facility farmers facilities center, tanks, a wastewater treatment plant, soil-testing laboratories, restroom segments, auction halls, weigh bridges, godowns, shops for retailers, canteens, etc. The Act also provides notification of various taxes, fees/charges, and cess imposed on transactions done in the Mandis.<sup>9</sup>

##### **2. The Essential Commodities Act of 1955**

Objective: Act aims to regulate the manufacturing, distribution, and accessibility of necessities in order to stop black marketing and stockpiling.

Impact: Protects farmers and consumers by stabilizing prices and ensuring the availability of essential goods.<sup>10</sup>

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9. eNAM, Stakeholders Involved: APMCs, <https://enam.gov.in/web/stakeholders-Involved/Apmcs> (Aug. 09, 2024).

10. Dep't of Food & Public Distribution, The Essential Commodities Act, 1955, at <https://dfpd.gov.in/WriteReadData/Other/act5.pdf> (Aug 10, 2024).

**b). Employment and Livelihoods****1. The Mahatma Gandhi National Rural Employment Guarantee Act of 2005 (MGNREGA)**

Objective: An Act to improve their livelihood stability for families in the rural regions of the nation by offering every household that has adults who volunteer to work at least 100 days of guaranteed wages in a given fiscal year, as well as for matters related thereto or incidental. Impact: Increased the security of one's means of subsistence, produces enduring assets, and hence boosts the rural economy by generating jobs.<sup>11</sup>

**2. The National Rural Employment Programme of 1980 (NREP)**

The Objective is to create productive work for women and men in rural regions who are unemployed or underemployed. Priority was provided to landless labor, SCs and STs among landless labor, and no contractors were involved in any of the NREP's projects. This creates community assets for continuous and direct benefits to the poor increasing overall quality of life.<sup>12</sup>

**3. The Pradhan Mantri Kaushal Vikas Yojana of 2015 (PMKVY)**

The Ministry of Skill Development & Development & Entrepreneurship (MSDE) has launched this flagship skill certification scheme with the goal of empowering many young Indians to enroll in industry-relevant training for skills that will improve their chances of finding employment. Individuals will also be evaluated and certified under Recognition of Prior Learning (RPL) if they have prior training or expertise. The government covers all of the costs associated with assessment and training<sup>13</sup>.

**c). Social Welfare and Basic Amenities****1. The National Food Security Act of 2013**

The upholding of Article 21—the right to life with dignity—signifies a paradigm change from the welfare to the right-based approaches to food security. Up to 75% of the rural population might get subsidized foodgrains under the Act's Targeted Public Distribution System. Therefore, the Act allows for the delivery of grain products to approximately thirty percent of the population through significantly subsidized programs. In addition, the Act's requirement

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11. Ministry of Rural Development, National Rural Employment Guarantee Act, at [https://nrega.nic.in/MGNREGA\\_new/Nrega\\_home.aspx#](https://nrega.nic.in/MGNREGA_new/Nrega_home.aspx#) (Aug. 10, 2024).

12. The Food for Work Programme Was Renamed, Testbook, at <https://testbook.com/question-answer/the-food-for-work-programme-was-renamed--62c54e0b6b25f54692df14b0> (Aug. 10, 2024).

13. Press Information Bureau, Pradhan Mantri Kaushal Vikas Yojana, at <https://www.india.gov.in/spotlight/pradhan-mantri-kaushal-vikas-yojana#tab=tab-1> (Aug. 09, 2024).

that the head of the home be the oldest woman in the household—who must be at least eighteen years old—means that it is a step towards enhancing the power of women. This ensures food security and adequate nutrition for vulnerable rural populations.<sup>14</sup>

## **2. The Right to Education Act 2009**

Article 21-A guarantees all children between the ages of 6 and 14 the right to a full-time, free, and compulsory primary education of an appropriate and equitable quality in an accredited institution that meets certain essential standards and norms. The Right of Children to Free and Compulsory Education (RTE) Act, 2009, is a consequential legislation envisioned under this article. This encourages rural communities to have access to high-quality education, which supports long-term socioeconomic growth.<sup>15</sup>

## **3. The Swachh Bharat Mission (Gramin) 2014**

The goal of the project was to make India Open Defecation Free (ODF), which reduced the number of fatalities from diarrhea and allowed households to save an average of INR 50,000 a year on medical expenses. Additionally, it resulted in a decrease in contamination of groundwater and improved confidence and respect for women by giving them greater access to sanitary facilities.<sup>16</sup>

## **d). Financial Inclusion and Economic Empowerment**

### **1. The Pradhan Mantri Jan Dhan Yojana (PMJDY) of 2014**

Ensuring affordable access to financial services such as banking, savings and deposits, transfer of funds, financing, insurance coverage, and pensions is the aim of the National Mission for Financial Inclusion. To ensure affordable access to financial goods and services and to make it possible to use technology to save costs and broaden reach. This scheme essentially offers universal availability of financial services, which includes at least an elementary bank account for every household, and banks the unbanked via basic savings bank deposit (BSBD) accounts with minimal paperwork, relaxed KYC, e-KYC, account opening in camp mode, zero balance, and zero fees. Additionally, offers free accident insurance coverage of Rs. 2 lakhs on Indigenous Debit cards, which can be used for payments and cash withdrawals at merchant locations. Additionally, this program uses additional financial instruments like microcredit,

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14. National Food Security Portal, <https://nfsa.gov.in/portal/nfsa-act> (Aug. 10, 2024)

15. Ministry of Education, The Right of Children to Free and Compulsory Education Act, 2009, [https://www.education.gov.in/sites/upload\\_files/mhrd/files/upload\\_document/rte.pdf](https://www.education.gov.in/sites/upload_files/mhrd/files/upload_document/rte.pdf) (Aug. 09, 2024).

16. DEPARTMENT OF DRINKING WATER AND SANITATION, ABOUT SWACHH BHARAT MISSION, [https://swachhbharatmission.ddws.gov.in/about\\_sbm](https://swachhbharatmission.ddws.gov.in/about_sbm) (Aug. 09, 2024).



microinsurance, overdrafts for consumption, and micro-pensions to support the unpaid portion.<sup>17</sup> Hence enhances financial inclusion and enables direct benefit transfers to beneficiaries.

By examining these Acts, we can understand the legal framework that supports rural development and identify areas where further reforms and innovations are needed to achieve sustainable and inclusive growth

One of the Case Study that projects the impact of legal innovation is Kudumbashree in Kerala. Kudumbashree, a community-based poverty alleviation program under NRLM that covers the entire State of Kerala It's among the biggest global networks for women. This neighborhood network is established to eradicate poverty and empower women.

**The implementation strategies included:**

- a. Formation of SHGs: This is done in three tiers; Neighborhood Groups (NHGs) are the primary level units, Area Development Societies (ADS) are the ward level, and Community Development Societies (CDS) are the local government level.
- b. Capacity Building: Extensive training programs for SHG members leading democratic leadership, management, and technical skills.
- c. Micro-Enterprises: Promotion of micro-enterprises in various sectors such as agriculture, dairy, handicrafts, and services.

**The following were the impacts of the initiatives:**

- a. Economic Empowerment: Thousands of women-led micro-enterprises have been established, providing sustainable livelihoods and improving household incomes.
- b. Skill Enhancement: Vocational training programs have enhanced the skills and employability of rural women and youth.
- c. Social Transformation: Empowered women, improved social cohesion, and contributed to overall community development.<sup>18</sup>
- d. Another example can be the JEEVIKA in Bihar.

**RECOMMENDATIONS FOR LEGAL REFORM AND CONCLUSION**

The below are the key recommendations for New Legal Frameworks and Reforms to enhance Rural Development to address the identified gaps and challenges in rural development:

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17. Press Information Bureau, <https://www.pib.gov.in/PressReleaseIframePage.aspx?PRID=1952793> (Aug. 10, 2024).

18. KUDUMBASHREE, ABOUT KUDUMBASHREE, <https://www.kudumbashree.org/pages/7> (Aug. 16, 2024).

### **1. Comprehensive Rural Infrastructure Development Act (CRIDA)**

Objective: The Act shall be a proposed piece of legislation aimed at holistic and comprehensive development of rural infrastructure by addressing all the connectivity deficiencies.

Provisions: The focus should be on infrastructure improvement by developing and maintaining necessary infrastructures like roads, bridges and public buildings. Further focus shall be laid on ensuring water, electricity, internet and renewable energy availability. The Act should aim to coordinate efforts between local authorities, the federal, State, and commercial sectors. All these developments shall be implemented in an environmentally sustainable manner.

### **2. Digital Connectivity Act**

Objective: This Act should aim to provide Universal Access to the internet and closing the digital gap between rural and urban areas in order to connect the unconnected. Community internet centers shall be established in villages to facilitate access to digital services and education. Facilitating the delivery of Government services and benefits through digital platforms to improve accessibility. The cost associated with digital services and technology shall be reduced with respect to the targeted beneficiaries with Public Private Partnership.

### **3. Social Protection and Welfare Act**

Objective: There are various Social Security Schemes, the challenge lies in ensuring the efficient targeting, delivery, and coverage of social protection programs, this Act shall aim to tackle the challenge.

Provisions: The Act should establish the criteria and mechanism to accurately identify and target beneficiaries, reducing leakages and ensuring that assistance reaches the intended populations and reduce exclusion errors. It should streamline delivery by implementing systems and processes that facilitates timely and effective distribution of social benefits. Also it shall strengthen the grievance redressal mechanisms and enhance accountability to address issues of corruption and inefficiency. It shall effectively utilize technology and digital platforms to perform the aimed functions. It is necessary to create awareness on the schemes available among the unaware and negligent. It shall set up a system to perform regular review and update, with respect to the eligible beneficiaries as the socio-economic changes. It is equally necessary to ensure effective coordination among Government Departments and Local Bodies for comprehensive service delivery.

### **4. Rural Quality Healthcare Access Act**

The goal is to enhance rural healthcare services and infrastructure.

Provisions: The Act shall mandate the establishment of primary healthcare centers in every remote village irrespective of the population with the principle 'every life matters and everyone

deserves equal access to quality healthcare irrespective of their geography and demographics'. The Act should provide incentives like bonuses and career advancement opportunities for healthcare professionals to work in the rural areas. It should create a system to keep track of the availability of all the necessary medical equipment and medicines in the centers.

### **5. Agricultural Land (Consolidation and Modernization) Act**

**Objective:** The aim is to tackle the challenge of fragmented land holdings among farmers and promote the usage of modern agricultural practices.

**Provisions:** The Act shall encourage voluntary and consensual consolidation of land with fair compensation and provide legal support, this shall happen in a manner it enriches both the parties sustainably. A portal shall be made through which subsidies and incentives shall be given for adopting the modern sustainable agricultural practices and technologies to increase yield. The Act shall also promote more Farmer Producer Organizations (FPOs) to increase collective bargaining power and access to local and markets.

### **6. Agricultural (Credit and Insurance) Act**

**Objective:** To provide better access to credit and insurance to farmers.

**Provisions:** The Act shall mandate all the banks to allocate a decided percentage on the basis of population of farmers in the locality as to provide their loan portfolio to small and marginal farmers who needs financial assistance. The steps to avail loan shall be simplified when it is availed for agricultural purposes and shall be given in more reduced interest rates to make sure the loans taken will not transform into evils when the agriculture fails due to the everchanging climatic conditions. With the help of Artificial Intelligence, a report shall be regularly made to analyze the effects of future Climatic conditions on the agricultural activities and when it is genuinely found that the farmer has incurred loss in the loan taken, the loan shall be waived. Using Technology and Artificial Intelligence in this process shall also decrease the chances of corruption.

### **7. Rural Women Empowerment Act**

**Objective:** This Act shall aim to tackle the gender discrimination still existing and promote equality in rural areas.

**Provisions:** The Act should prohibit discrimination based on gender and ensures that equal treatment is given in the field of education, healthcare, and employment opportunities for rural women. It should stringent the laws already existing against violence and harassment against women in rural areas. It shall take steps to create awareness about the legal rights and remedies available to women and foster the confidence in the justice and police system. The Act shall take various steps to promote participation of women in decision making and local governance

through educating the women on their reservation provided under laws and make programs for capacity building.

### **8. Rural Policy Coordination and Continuity Act**

**Objective:** This Act shall aim to streamline and build Coordination between all the different connected Government Departments and Agencies to ensure Efficient Coordination and Continuity.

**Provisions:** It shall establish a Central Coordinating Body which performs overseeing functions on the effective implementation of all the schemes of both Central and State Government. It shall establish a comprehensive monitoring and evaluation system to track and report the progress on all the initiatives implemented. The systems and networks established under this Act shall make necessary pre plans to cope up with all the policy changes made by the Center and State Government to achieve smooth transition without major disruptions.

### **9. Switching to Climate-Resilient Farming Techniques and opting Organic Farming**

Strategies include:

- a. Drought Resistant and Flood tolerant crop varieties should be widely developed through genetic engineering and given to farmers in a subsidized manner.
- b. Promotion of agro-forestry and adopting integrated framing techniques will essentially diversify income sources and also enhance resilience among vulnerable farmers.
- c. Free training with resources made available among farmers on adoption of conservative agricultural practices as such crop rotation, cover cropping and minimal tillage will increase the rate of adoption among even the ignorant farmers.
- d. Provide subsidies, market access and technical and financial assistance to adopt organic farming.
- e. Reduce chemical impact on environment by encouraging the use of bio fertilizers and bio pesticides.
- f. Awareness can be created on the benefits of organic farming.
- g. Special premium access can be granted to organic farmers.

### **10. Adopting to Efficient Water Management**

The strategies include:

- a. Wide implementation of the efficient and natural water shed method where barren land can be made better use can improve availability and quality of water while mitigating the risk of flood.
- b. Provide incentives to encourage adopting micro irrigation system like micro and sprinkler irrigation which conserves water, tackles soil erosion and wastage of water.
- c. Develop community-based water management plans to ensure equitable distribution and sustainable usage of water resources.

Incorporating all these small changes can create a significant change in the outcome. The need of the hour is to recognize even the smallest loophole in the system that leads to ineffectiveness of the laws enacted and schemes launched and find solutions and effective implementation of the same. Thus the research has recognized major challenges among the villagers and provides recommendations and strategies after analyzing some of the already existing laws and schemes. The problems recognized in the research can broaden the urban and rural divide even further, if not provided reasonable timely solutions.

## LET'S KNIT THE FABRIC OF GLOBAL SUSTAINABILITY : THE SOLUTION TO THE DERAILING SDG GOALS

VishnuPriya P.S<sup>1</sup>

*"It is not just about inventing new solutions but about transforming our relationship with the planet. We must shift from a paradigm of exploitation to one of stewardship. This requires profoundly rethinking how we produce, consume, and live within the limits of our planet."*

- Johan Rockstrom<sup>2</sup>

### INTRODUCTION

The term 'sustainability' has been etched into our minds, our conversations, the choices we make in our everyday life, the national policies and the decision table of the political stalwarts. The concept of 'Sustainable Development' is the need of the hour, yet the room falls into an eerie silence, while discussing on achieving the SDG Goals 2030, more specifically Goal 17. The world that we live in, is environmentally conscious, yet according to the Secretary General of the UN, in the SDG Report 2024, we have achieved only 17% of the SDG Goals, while we are nearing 2030. Nations have invested tremendously for 'going green' yet why are our efforts not being the impetus to achieve 2030 goals?

Nations across the globe are perturbed by the urgency of tackling the triple planetary crisis, yet our responses to combat the crisis to date have to largely national i.e.; setting domestic targets, formulating policies, subsidies, various schemes, conducting awareness programmes about sustainable living, etc. Our efforts have been on the track of progress, yet on the bigger picture, our progress seems to be thin on the ground. Thus, the expression of true solidarity to the goal of the decade 'leaving no one behind' is achieved by establishing the synergy of nations that strive towards 'collaborative global sustainability'.

This research brings together the idea of the 'Global Sustainability initiative' as a collective responsibility of the world, involving the governments, the private sector and the people to act as one, to bring sustainable development, and to formulate a unified system of targets, protocols, micro- policy decisions to achieve the 2030 SDG goals. The study analyses various successful models of sustainable initiatives by various nations and how they can be implemented globally.

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2. Director, Potsdam Institute for Climate Impact Research, Potsdam.

## THE WORLD WE LIVE IN TODAY: CARBON NEUTRALITY, GOALS AND ITS IMPLEMENTATION

Climate change, Greenhouse gas emissions, and carbon footprint have been the targeted topics of the decision in recent years, the plethora of climate action plans, policies, and niche legislations have all aided in global goals on the transition to a zero-carbon world.

In 2015, the Paris Agreement was formulated to bring down the global temperature by 2 degrees Celsius. It was adopted under the ‘United Nations Framework Convention on Climate Change (UNFCCC)’ at the COP-21 conference. According to the agreement, the signatory countries are required to submit their NDCs (Nationally Determined Contributions) every 5 years. Latest NDC pledges of Top 3 Emitters :

- CHINA: Achieve net zero by 2060
- USA: Achieve net zero by 2050
- INDIA: Achieve carbon neutrality by 2070

On analysing these pledges, one understood that nations have projected to achieve carbon neutrality only in 3 decades. The focus should be on an existential question, that is, would the earth survive until then? Unfortunately, the answer is negative, as per the latest reports of the International Energy Agency, Global energy-related CO<sub>2</sub> emissions grew by 0.9% or 321 Mt in 2022, reaching a new high of over 36.8 Gt. Specific challenges in 2022 contributed to the growth in emissions. Of the 321 Mt CO<sub>2</sub> increase, 60 Mt CO<sub>2</sub> can be attributed to cooling and heating demand in extreme weather and another 55 Mt CO<sub>2</sub> to nuclear power plants being offline. The biggest sectoral increase in emissions in 2022 came from electricity and heat generation<sup>3</sup>.

This is the world in which we live; our production, consumption and exploitative utilization of resources have yielded both fortunes and disasters. A policy framework that works expeditiously to re-wire the damage that’s caused is the need of the hour.

Furthermore, achieving carbon neutrality entails catalysing a broader transition towards a low-carbon economy and society. This shift entails reshaping consumption patterns, fostering sustainable urban development, and integrating climate considerations into investment decisions. In a nutshell, to curtail the ever-growing carbon footprint, we need to formulate an umbrella policy, that expands across borders, and the oceans for the blue planet to heal.

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3. IEA 50 , <https://www.iea.org/reports/co2-emissions-in-2022> ( 10<sup>th</sup> august 2024)



## BEHIND OUR BLINDED REALITY: WHY NATION ACROSS THE WORLD FAILS TO REACH AGENDA 2030

*“We are the first generation to be able to end poverty, and the last generation that can take steps to avoid the worst impacts of climate change.” - Ban Ki Moon.<sup>4</sup>*

The Sustainable Developmental Goals mainly focuses on shared vision to end poverty, rescue the planet and build a peaceful world.<sup>5</sup> Agenda 2030 is a plan of action that strives for the betterment of people and planet. It consists of 17 Goals and 169 Targets projected to be attained by 2030. It is truly an umbrella policy that brings a wide spectrum of issues under its canopy, it thus, demonstrates the scale and ambition of this new universal Agenda. Our collaborative partnership is aimed to stimulate action and alleviate that hinders the ‘5Ps’ i.e.; People, Planet, Prosperity, Peace, and Partnership.

The Achievement of Agenda 2030, dawns the era that leads us to the life we aspire to live, the environment that is healed of our past mistakes and thrives in prosperity and a world where all get an equal of share of the resources. But is Agenda 2030, a utopian dream? or will it turn out to be one? According to the SDG Report 2024, the Covid 19, Climate change, war and conflicts, all have deviated and derailed SDG Goals from the projected target. Only 17% of the projected targets for the SDG Goals have been achieved. The annual investment gap for developing countries to attain Agenda 2030 is \$4 trillion. 23 million add to the population of people who live in extreme poverty, and 100 million more are added to the suffering of hunger daily.<sup>6</sup> The Greenhouse Gas concentration hit a record high in 2022 and is on a continued rise.

Against the backdrop of faltering SDG Goals, the right solution is to bring together governments, the private sector, civil society and other partners to assess challenges, and formulate holistic global policy, that can set the world back on track to achieving the SDGs.

## INTERNATIONAL POLICIES ALIGNED TO GLOBAL SUSTAINABILITY

### Partnership for Planet: Indo – French green alliance

This initiative is one of the 3 pillars of the Indo–French Horizon 2047 roadmap. It aims at the intensification of cooperation between India and France on issues such as climate change, biodiversity, health and environment. The alliance weaves for a greener, more inclusive future. It has been under operation since 2008, and has done around 100 projects like the protection of

4. Former UN secretary general.

5. UNITED NATIONS, <https://www.un.org/sustainabledevelopment/decade-of-action/> (10<sup>th</sup> August 2024).

6. UNITED NATIONS, <https://www.un.org/en/desa-en/remarks-introduction-secretary-general-progress-report-sdgs-high-level-political-forum> (10<sup>th</sup> August 2024).

a one-horned Rhino in Assam, the Pune metro system and Chandigarh's future water supply, and are few successful ones.<sup>7</sup>

### **Partnership between India and UNDP**

The Government of India and UNDP have been partnered for over 6 decades in almost all areas of human development, from democratic governance to poverty eradication, to sustainable energy and environmental management.<sup>8</sup>

### **Green Strategic Partnership**

The partnership is between India and Denmark, for working towards being carbon-free and reducing carbon emission up to 70 % for achieving SDG 7 on affordable and clean energy.<sup>9</sup>

### **Carbon credit market at take-off stage: News report**

Carbon credit offers a partial solution and an extra dimension in the strategy for mitigating for anthropogenic greenhouse gas emissions causing climate change.

### **Economic Survey 2023-24 has two chapters titled Climate Change and Energy Transition**

This deals with trade-offs and climate change in India. Carbon credits are typically generated by an entity that undertakes an activity of mitigating by preventing, reducing or removing the emissions either internally in their process or in external activities such as the afforestation program. There are entities without any obligations for emissions that generate carbon credits for marketing them. Carbon credits are measured in terms of one credit being equivalent to one tonne of emission of Co<sub>2</sub>(tCo<sub>2</sub>e).

## **LIMITATIONS IN ADOPTING GLOBAL SUSTAINABILITY FOR ACHIEVING SDG 2030**

The 'Global Sustainability Partnership for reaching our Goals for 2030, is the solution that can't slip out of our hands, it is to bring the nations across global to have unified and 'all-under-one-roof' targets, protocols, and implementation system, rather than having scattered, dual or clustered partnerships that are for the specific area of development. Thus, the task at hand

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7. Thierry Mathou , France : India's steady partner in green growth The Hindu , (10<sup>th</sup> august 2024), <https://www.thehindu.com/opinion/op-ed/france-indias-steady-partner-in-green-growth/article68358833.ece>
  8. UNDP, <https://www.undp.org/india/publications/undp-and-india-partnership-sustainable-development> (10<sup>th</sup> august 2024 )
  9. Mette Frederiksen , Charting Green Frontiers : India and Denmark as Strategic Allies , Observer researcher foundation , (10<sup>th</sup> august , 2024 ) <https://www.orfonline.org/expert-speak/charting-green-frontiers-india-and-denmark-as-strategic-allies#:~:text=In%202020%2C%20India%20and%20Denmark,addressing%20global%20challenges%20and%20opportunities.>

is long-visioned, multi-tier, tedious, yet highly effective in healing the planet and making it a better world to live in. Although it is the solution for the future we want, there are hindrances that the nations collectively face, and must proactively foresee and take precautionary measures to neutralize the effects that dampen the efforts. The hindrances that can be envisaged, are ***Enmity between nations, War, Historically Indifferent relationship, Strained relationship etc.*** UN currently has 193 nations as its members, generally when an agreement is being put to vote or discussion, with it arises the difference in opinion, spotlighting the issues that pertain to the nation's cooperation in various agreements, for example, *the concerns raised by the developing nations on the pending aid funds that was to be received from the developed countries*; Huge expenditure to construct sustainable infrastructure and systems. According to Sadek Wahda, the Chairman and Managing director of I Squared Capital, the green infrastructure is scaled higher on the allocation of funds than the conventional infrastructure.<sup>10</sup> Unequal availability of funds in comparison between Developed, Developing, and Underdeveloped countries leads to Geographical divide between nations. Establishing unified sustainability mechanisms, when the nations have different geographical conditions, for instance, the nations in tundra regions experience a close spell and have issues with the rapid melting of the ice and the rise of the sea level; while the tropical and sub-tropical regions experience the extreme summer, shorter monsoon or floods etc. Thus, the geographical divide cannot be brushed aside when formulating the global sustainability policy. Technological divide between nations leads to mass consumerism. To achieve the short-term profit goals, the industry functions with compromised industry equipment standards and maintenance, and improper waste management; thus leading to mass production and the growth of a fast-paced industry. In turn, the consumers have a wide variety of commodities to purchase, the consumers end up spending a lot on non-essential commodities, and the whole ends up causing accumulation of waste on earth. The process of Greenwashing is an issue in the 21<sup>st</sup> century, the people across the globe are becoming more eco-conscious, every other day. The industry giants exploit the desires of the consumers, by using deceptive language in advertisements, convincing the consumer to have made a sustainable choice by choosing their product. The issue of Greenwashing can be wiped out if nations bring about a common law with stricter punishment, rather than imposing a fine, as large companies are willing to continue using the same strategy, and paying a fine imposed is calculated to be a minuscule part of their profit.

The Global Sustainability Partnership is not a zero fallacy solution, but it is the most holistic and anchoring solution clawing earth from the ever-growing sustainability issues.

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10. MCKINSEY AND COMPANY, <https://www.mckinsey.com/capabilities/operations/our-insights/accelerating-sustainable-infrastructure-an-investors-perspective> ( Last viewed on 15<sup>th</sup> august )

## RECOMMENDATIONS FOR FORMATION OF THE POLICY

A Green and sustainable world is the world that we aspire to live in, nations have been making persistent efforts to drive in the direction of sustainability, but their efforts have been either too scattered, poorly implemented, or too specific to tackle all the issues under its canopy. Thus, the policy that the world needs today, is the holistic one, globally applicable, one that has the ability to get derailed SDG goals back on track, on the other hand, one that works from the grassroots level evoking active citizenry, one that is cost-efficient and permanent, and one that does not cause harm to earth for infrastructural developments.

### Recommendations of the elements that aid in sustainable development

In the age of Globalisation, every other day, the cities grow, and new cities bloom with a flood of opportunities that lead the people to settle in large numbers. With these opportunities, issues of overpopulation, improper sanitation, development of slums, etc. also arises. Through green city planning, the cities and over populated areas needs to instil sustainable city planning, thus, making cities less of a pollution hub; for example, Copenhagen is the world most sustainable city, and the first city to be carbon neutral by 2025. The sustainable infrastructure involves constructing apartments and buildings that can be navigated, to the top floor by cycling. The highly energy-efficient building structure allows passive solar heating to all the apartments. The green roofing prevents the heat from escaping. Singaporean Model of Public housing helps to combat overpopulation and slum dwellings and installation of proper sanitation system. 80% of the resident population of Singapore lives in public housing facilities.<sup>11</sup> Masdar city is the first completely energy-self-sufficient city, that runs without fossil-fuel-powered vehicles at the street level. The city's layout encourages the practice of walking, aiding in setting a comfortable pedestrian environment, the Abu Dhabi government has constructed shaded streets and courtyards to provide shelter from climatic extremes. Wind and Photovoltaic farms are constructed around the city, making it energy-sufficient. Green Transport, which is a Sweden Model in Sweden has around 450 bus lines, 3 shuttle boat lines and a metro system that covers around 100km under the Stockholm Public transport system, and around 8lakh people through public transport in Stockholm region. Sweden has the largest green transportation system, that has been using renewable energy since 2017.<sup>12</sup> According to the Costa Rica case study of Restoration of Forests and Biodiversity, Costa Rica's Forest reserves were wiped out to create profits for the colonizers. Forest cover shrunk to 25% by 1990. Thus, in 1996, introduced the policy called 'Pago De Servicios Ambientales' Payments for Environmental Services. According to the policy, the government pays the citizens who take efforts to protect forests

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11. HOUSING AND DEVELOPMENT BOARD; <https://www.hdb.gov.sg/about-us/our-role/public-housing-a-singapore-icon> (16<sup>TH</sup> August 2024)

12. SMART CITY SWEDEN ; <https://smartcitysweden.com/best-practice/368/sustainable-public-transport-in-stockholm/> ( Last viewed on 16<sup>th</sup> august 2024 )

and other natural resources, on the other hand, a tax was imposed on fossil fuel consumption, which was directed to the funds of the policy.<sup>13</sup>

These are a few of the incredible initiatives, that have provided an impetus for sustainable development in different parts of the world. These initiatives turned out to be successful, because of a major role played by the citizens who made conscious efforts to bring a green world, the standardized implementation systems developed and alternative policies developed that would nullify the hindrances etc. Thus, evolving policies is not the only essential element as the step towards a sustainable future, but also takes measures to have an anchoring implementation system.

## CONCLUSION

To curb the on-going carbon footprint surge, the derailment of the SDG goals, restoration of the natural state of the environment, formulation of a collaborative global sustainability partnership is needed. For which all must adhere to the slogan, which aligns with the goals of UNESCO i.e.;

- Let green spread on our campus
- Let green spread in our curriculum
- Let green spread in our research
- Let green spread in our culture
- Let green spread in our community

To cut the Gordian knot of the ever-growing sustainability issues and for the ‘idea’ of ‘Global Sustainability’ will thrive, only if the active citizenry is involved. The inhabitants are the backbone of the land, and their conscious efforts to restore the land’s former glory is the strongest pillar in achieving Sustainable Development. When the ignorant masses are enlightened about the deteriorating condition of the blue planet, no governmental policy is as efficient as it is. *Article 51-A(g) of the Constitution of India states that citizens have a duty to protect and improve the natural environment, including forests, lakes, rivers, and wildlife, and to show compassion for living creatures.*

Thus, the future that we want tomorrow can only be earned by the collective efforts of the government, the private sectors and the people.

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13. Justine Calma , *Want to restore a forest ? Give it back to Indigenous peoples who call it home*, The Verge, (16<sup>th</sup> Mar. 2024 , 7.28pm )<https://www.theverge.com/2024/4/22/24133444/forest-restoration-indigenous-human-rights-costa-rica-earth-day>

## A GEOPOLITICAL ANALYSIS OF TERRITORIAL DISPUTES BETWEEN INDIA AND CHINA

Jitya Sp<sup>1</sup>

Bathmapriyan S<sup>2</sup>

### INTRODUCTION

India and China are trying to enter the political arena of superpowers to include and indulge themselves in international political movements and activities. In this race of political, economic social and military development, these countries have created a sensitive geographical border. The relationship shared by India and China holds positive and negative implications, the sensitive geographical border has created negative implications and has also strained the relationship between the two sovereign states.

The stain has turned out to become a territorial dispute and the Sino-Indian border is usually classified into three major geographical locations which are the Western, middle and Eastern sectors. The western sector comprises the areas of Ladakh and Xinjiang province, and here **the territorial dispute is over Aksai Chin. The middle sector comprises the boundary of Himachal Pradesh and Uttar Pradesh with Tibet. The Eastern Sector is also called the North Eastern Frontier Agency, now known as Arunachal Pradesh.**

**After the Chinese invasion of Tibet in 1950 and due to the constant failure to establish a diplomatic tie, the Sino-Indian war broke out in 1962 in which China won, which led to minimal diplomatic and trade relationship between both the nation-states.** During an official visit to China in December 1988, Prime Minister Rajiv Gandhi pledged to find a “fair and reasonable settlement while seeking a mutually acceptable solution” to resolve the boundary issue. After Rajiv Gandhi’s visit, there have been many visits by both sides to each other states to improve diplomatic relationships. But, after India’s nuclear tests in 1998, ties between China and India reached a low point.

Currently in the 21<sup>st</sup> century, after five decades of improving diplomatic relationships, and reducing the tension in the sensitive borders, troops of both nations faced off against each other in the disputed Doklam plateau in 2017 and Galwan valley in 2020. From the above discussions

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1. 4<sup>th</sup> Year B.A.LL.B, Alliance School of Law, Alliance University.

2. 4<sup>th</sup> Year B.A.LL.B, Alliance School of Law, Alliance University.



of events, we can understand that the relationship between India and China is tangled into each other in many forms and manners which will be discussed further in the paper.

## LEGAL PERSPECTIVE AND GEOPOLITICAL IMPLICATIONS

As nation-states emerged throughout human civilization, there came a need for an organised system of rules to regulate the actions of the sovereign states. These needs are being addressed by the United Nations and by The International Court of Justice to some extent by using charters, sanctions, precedence and dispute resolutions.

According to *Article 2(4) of the UN charter*, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”<sup>3</sup> The usage of words “shall” can be noted in the above-mentioned statement. These words with a tone of peace are used to not get over on the sovereignty of the state, which is most times crossed over by states and states act according to their will.

The following are the settlement mechanisms that took place between India and China to resolve the territorial dispute:

- The Agreement on the Maintenance of Peace and Tranquillity: It was signed in 1993, and called for a renunciation of the use of force, recognition of the LAC, and the resolution of the border issue through negotiations.
- The Agreement on Confidence Building Measures in the Military Field along the LAC: It was signed in 1996, which laid down pledges on non-aggression, prior notification of large troop movements, and exchange of maps to resolve disagreements over the LAC.<sup>4</sup>
- The Border Defence Co-operation Agreement: It was signed in 2013 following the Depsang Valley incident.

“The Declaration on the Principles of Economic Cooperation and Comprehensive Collaboration”<sup>5</sup> of 2003 concentrated on important concerns about the local population in the sensitive area and upholding military relations. Both nations also reached a broader agreement to work on parameters and principles to settle the border dispute. China started to withdraw its interest when the nuclear agreement was signed between India and USA in 2007.

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3. United Nations, *Charter of the United Nations*, 1 UNTS XVI, 24 October 1945.

4. United Nations Peace maker; Agreement Between the Government of the Republic of India and the Government of the People’s Republic of China on Confidence-Building Measures in the Military Field Along the Line of Actual Control in the India-China Border Areas.

5. Prabesika Pradhan and S. S. Bindra, *Resolution Of Conflicts Through Negotiated Settlement And CBM: A Case Study Of Indo-China Border Dispute*, 8(4): 15922-15934, Nat. Volatiles & Essent. Oils, 2021.



This key incident is overlooked in the border dispute situation between India and China, which gives us a crucial observation of how geo-political relationships shape a dispute between nations.

The sovereign states, most of the time don't consider the suggestions of the international regulatory organs but act according to its will and national object.

This tension between these two states has led to more polarisation of the international bloc'. Russia being the geographical neighbour to China, and a good ally with India has always stood in the awkward mediator position, trying to diffuse the tension between India and China by encouraging dialogue between the both states. The Russian military showed retaliation to the sales of S-400 missiles to China due to the spying activities against Russia. The United States also tries to play the role of a mediator between the two states but, due to the rising tensions between the Sino-American relationship, The United States has a slight lean towards India's side.

### **Economic Statistics**

As the major powers in the Asian continent, the relationship between India and China is one of the important factors that decide the political and economic conditions among many factors. In 1950, India became the first non-socialist country to extend its hands for diplomatic ties with China. The late 1980s saw the start of India and China's active economic cooperation. Since 1993, a sizeable portion of bilateral commerce has been made up of China's imports into India. Total exports from India saw a turn to a higher note between the years 2004 to 2005 when they increased from \$4,098,514,365 to \$7,183,792,308, and from that turn, the exports have been increasing gradually. The global coronavirus pandemic's economic effects, rising tensions along China's border, and India's overall aim to tip the power balance in its favour have all contributed to changes in the trading landscape between the two countries in recent years<sup>6</sup>. Bilateral trade between India and China stood at US\$ 136.26 billion in the year 2022 and US\$ 125.62 billion in 2021 with a growth of 8%. As of 2022-23, China was India's third-largest trading partner. As of the latest data, the total exports from India to China in the year 2023 have been valued at up to \$16,245,421,866.

### **Strategic relationship between India and other nations**

#### **Relationship between India and Russia:**

The relationship between India and Russia is one of the most important international relationships of India and a long-standing one. The relationship has a key role to play, even in framing India's foreign policies. After the signing of the "Declaration on the India-Russia

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6. Natalia Galistcheva & Maria Reshchikova, *India-China Trade: History, Present State and Prospects*, vol. 26(2), HSE Economic Journal, National Research University Higher School of Economics, pages 307-332, 2022

Strategic Partnership” in 2000 the India-Russia tie has reached a new intensity with improved cooperation in almost every area including defence trade, security, people-to-people ties, culture and many more. After the Galwan Valley clash between India and China, Russia hosted a trilateral summit in Moscow consisting of ministers of India and China. This points out the important role of Russia being a mediator in the Indo-China border dispute by encouraging both nations to have a diplomatic conversation and resolving the conflict.

### **Relationship between India and The United States:**

The relationship between India and The United States is a dynamic relationship including many bilateral agreements and cooperation in many fields of work to cultural and person-to-person ties. In 2016 India and the United States signed the Logistics Exchange Memorandum Of Agreement (LEMOA). This agreement lays out the fundamental guidelines for the reciprocal exchange of supplies, services, and logistical support between the armed forces of the United States and India. The Agreement will greatly improve the Indian Armed Forces’ ability to operate, particularly in responding to humanitarian emergencies and providing disaster relief. Other agreements include the Communications Compatibility and Security Agreement (COMCASA), and the Basic Exchange and Cooperation Agreement (BECA) to name a few that show the relationship between India and The United States of America. India’s stance in promoting its position on the border dispute is strengthened by the US’s diplomatic support in international fora like the United Nations. This backing contributes to drawing more attention and pressure from other countries on to China.

### **Environmental issues**

Aksai Chin has Asia’s largest metal deposit known as Huoshaoyun Lead- zinc mine. China is both the leading producer and consumer of zinc which is also required in large quantities by India. China has been actively working on the Huayu gold mine in Lunze (Lhuntse), south Tibet, close to the border with China-claimed Arunachal Pradesh. The year 2017 saw an acceleration of development concurrent with a tense 73-day standoff between India and China in Doklam on Bhutan’s western border. India’s objection to China’s construction of a road on land claimed by Bhutan is supported by India. The Lhunze mine’s expansion has been accompanied by massive infrastructure and an increasing PLA presence. This has led to analogies between China’s use of resources and infrastructure development to support its “island” reclamations in the South China Sea and its use of the same resources to support its sovereignty claims in south Tibet. Chinese Foreign Ministry spokesman Lu Kang said that China has the right to develop the mine because it was “completely within China’s sovereign territory” in reaction to media attention to the Lhunze mine, which is located only 15 km from the disputed boundary with India. In the vicinity of the line of control, China and India have both been enhancing their infrastructure. China, according to India, has been building roads close to contested areas, such

as the Gogra border post, to make mining ventures easier in the future. Chinese analysts believe that India is attempting to obtain a tactical advantage over China in the area by completing the Darbuk-Shyok-Daulat Beg Oldi (DSDBO) road last year, which leads to an airstrip in Ladakh. completing the Darbuk-Shyok-Daulat Beg Oldi (DSDBO) road last year, which leads to an airstrip in Ladakh.

## **EVENTS THAT LED TO THE TENSION BETWEEN INDIA AND CHINA**

### **Sino-Indian War (1962)**

China and India fought each other fiercely and for a short time during the 1962 Sino-Indian War. It took place between October 20 and November 21, 1962, with the main cause being border disputes between Arunachal Pradesh (then known as the North-East Frontier Agency) and the Aksai Chin region. China launched an unexpected offensive, taking large amounts of territory in both areas. China unilaterally declared the end of the conflict and withdrew from the disputed areas, but they kept control of Aksai Chin. The fight brought to light issues about border security and national defence for both countries, and it had a lasting effect on Sino-Indian ties. Along some sections of the border, there is no mutually agreed-upon Line of Actual Control (LAC) and the border between China and India is not clearly defined. The Indo-Chinese War of 1962 led to the formation of LAC. China and India disagree on where to draw the border.

### **String of Pearls**

Encirclement is a concern due to China's strategic presence and infrastructural development in several of the nations that surround India, including Bangladesh, Sri Lanka, Pakistan, the Maldives, and Myanmar.

### **Water Conflict**

Without a formal water-sharing agreement, China is building dams in the higher sections of the Brahmaputra River (Tsangpo), endangering India and raising questions about flooding and water availability.

### **Dalai Lama and Tibet**

China charges India of inciting unrest in Tibet as a result of the Dalai Lama's presence there and the demonstrations that Tibetans have organized against China in India and other nations.

### **Arunachal Pradesh and Stapled Visa**

The issuance of stapled visas by China to citizens of Arunachal Pradesh raises concerns over India's sovereignty and territorial integrity.

**South China Sea**

India's strategic interests are impacted by China's territorial claims in the South China Sea, which are being disputed by neighbouring nations. These claims raise questions about regional stability and freedom of navigation.

**China's Belt and Road Initiative (BRI)**

India opposes China's BRI, especially the China-Pakistan Economic Corridor (CPEC), which crosses across Pakistan-claimed Indian territory.

**China Nexus with other countries**

China's military assistance to Pakistan. Their alliances with one another's principal adversaries, the US and the USSR, have kept them from developing into strategic allies and collaborating on matters of strategy. The expanding disparity in power between India and China: Given that China's GDP is five times larger than India's, it is challenging for India to be flexible without becoming capitulatory. The development of infrastructure, especially in Tibet, has created a security conundrum where military ties deteriorate to the point where one or both sides may feel pressured to go to war. The diplomatic efforts and talks needed to address and resolve the conflicts have led to strained relations between China and India. To sway their relations and use the "China card" against India, China attacks India's involvement in and relationships with Bhutan and Nepal.<sup>7</sup>

**Doklam Standoff**

Tensions have arisen in the area as a result of China and Bhutan's dispute over the Doklam/Doka La region, as well as India's military and diplomatic backing of Bhutan. By the end of August 2017, the standoff was coming to an end. An agreement was made by China and India to remove their soldiers from the region. Both nations removed their troops from the nearby area, and China consented to halt road building in the disputed area. The impasse brought to light the precarious state of relations between China and India and emphasized the value of diplomatic efforts to settle border conflicts. It also raised awareness of the Doklam region's strategic importance. A complicated scenario including territorial disputes, geopolitical interests, and regional security dynamics was the Doklam standoff.<sup>8</sup>

**Galwan Valley attack**

The "Galwan Valley attack" describes a bloody skirmish between Indian and Chinese forces in the disputed Aksai Chin region's Galwan Valley on June 15, and 16, 2020. The two nations were engaged in a larger border standoff that included this altercation. Twenty Indian

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7. Vijay Gokhale, *Lessons for India-China Relations*, 2022

8. B. R. Deepak, *The Doklam standoff: What could be done?*, 2017

soldiers lost their lives in the skirmish, but the number of Chinese casualties was not disclosed. The fight was characterized by being the deadliest between the two countries in decades and supposedly included just hand-to-hand fighting without the use of weapons. As a result of the event, which damaged India-China relations, military tensions rose and diplomatic attempts to defuse the situation were made.

## **CONCLUSION AND SUGGESTION**

### **Summary**

From the colonial era, geopolitical considerations have intensified the historical territorial disputes between India and China, particularly over Aksai Chin and Arunachal Pradesh. The ongoing instability in the region is exemplified by the 1962 Sino-Indian War and later conflicts such as the Doklam in 2017 and the Galwan Valley in 2020. The effectiveness of bilateral accords and international legal frameworks in settling conflicts has been largely lacking. While they have contributed to a decrease in direct military confrontations, agreements like the 1993 Maintenance of Peace and Tranquillity and the 1996 Confidence Building Measures have not addressed the fundamental problems.

India and China now have close economic relations, with China being among India's top trading partners. However, these economic ties are frequently strained by military and political crises. India's geopolitical posture against China is greatly influenced by its strategic alliances with countries like the US and Russia. The ecology is greatly impacted by the construction of infrastructure and the extraction of natural resources in contentious areas, such as in the mining of Aksai Chin and Tibet. The militarisation of these vulnerable areas by both countries has worsened the state of the environment.

### **Suggestions and Future Prospects**

Both nations ought to step up their diplomatic efforts to have ongoing conversations and take steps to foster confidence. To avoid misunderstandings and effectively handle disagreements, the highest levels of government should establish a bilateral framework for regular contact. Involving international organisations such as the International Court of Justice and the United Nations can offer impartial forums for arbitration and dispute settlement. To guarantee a peaceful settlement of disputes, both countries should abide by international rules and agreements.

Collaborative efforts in trade, technology, and environmental preservation can foster mutual reliance and lessen the chance of confrontations. Building confidence and addressing common concerns about resource management are two benefits of working together on transboundary environmental challenges. Mutual trust can be increased by putting more forceful confidence-boosting measures into place, such as cooperative military drills and exchanges. Suspicion

can be decreased by open dialogue and information sharing about military operations and construction projects close to the border.

Even while strategic rivalry and old grudges will likely always be obstacles, persistent diplomatic efforts and economic interdependence may be able to stabilise ties. The dynamics of relations between India and China will continue to be shaped by the engagement of other countries such as the United States and Russia. The regional power balance would be impacted by their distinct alliances and strategic interests with China and India. The future of relations between India and China will be significantly shaped by projects like the Belt and Road Initiative (BRI) and India's Act East policy. Initiatives for cooperative regional integration can improve Asia's connectivity, economic growth, and political stability.

In conclusion, there are chances for both countries to work towards a more stable and cooperative relationship, even though the territorial conflicts between China and India pose serious hurdles. Diplomatic efforts, economic cooperation, respect for international law, and pre-emptive steps to foster confidence are needed to achieve this. The future geopolitics of the world and the larger Asian power structure will be significantly impacted by Indo-China relations.

## **SOCIOLOGICAL, PSYCHOLOGICAL, AND LEGAL IMPLICATIONS OF VULNERABLE POPULATIONS IN NORTHEASTERN INDIA: A COMPREHENSIVE ANALYSIS**

Nishita Baishya<sup>1</sup>

Rituraj Mal Deka<sup>2</sup>

### **INTRODUCTION**

Crime is an issue when it comes to a culture of mismanagement by the state and the failure in the societal structure of the system. The population of northeast India constitutes 3.76% which is culturally diverse and geographically dispersed. Most of the population had been one of the most vulnerable groups having a long history of discrimination and there have been very limited outcomes. The research deals with the analysis of the currently implemented data from BNS (Bharatiya Nyaya Sanhita) and the previous IPC (Indian Penal Code).<sup>3</sup> The region consists of people from various tribes and in India there are 705 ethnically distinct communities of such scheduled tribe communities. The routes of caste-based discrimination can be noticed back to the Hindu philosophy, and colonial rule in India has strengthened in many ways.

There has been an increasing trend of crimes committed by non-tribal members of the population against tribal communities across different states. This trend does not account for crimes where both the offender and the victim belong to the same caste or ethnic group.<sup>4</sup> National Crime Record Bureau (NCRB) is considered to be the important agency responsible for the publication of crime statistics and the concrete data-based on crimes against those tribes that are less in quantity and partial in coverage. The lack of importance given to the region despite being an region sharing border with over five countries, had led to the development of organized criminal activities with influence from alien bodies. The people from the region are still victimized due to their historical prejudice against them by the state, despite having

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1. 3rd Year, BA (Psychology and Sociology), Mount Carmel College, Bengaluru.
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  3. Kabiraj, P., *Crime in India: A Spatiotemporal analysis*. Geo Journal, 1-22. (2022).
  4. Census of India. *Schedule Tribes Population- Census 2011* (Retrieved from <https://www.census2011.co.in/scheduledtribes.php> on 14/03/2023) (2011).



protections by statutes like Untouchability (Offences) Act, 1955 and the Atrocity Act, 1989 which solidifies their interest but still lacks support from the state in certain instances<sup>5</sup>.

Culture is considered to be the way of life for a society which contributes to a greater influence in terms of food, language, belief system etc. The concern regarding Northeast India, famously known as the '*seven sisters*' means that the seven states together make it the Northeastern part of India. Geographically the northeastern part is located in a quiet secluded part of the mainlands and this has influenced a lot in terms of the lack of development. There total population of the region is estimated to be about over 4.5 crores.<sup>6</sup> The socio-cultural situation of the northeast region of India in the context of geography includes varied mountains, jungles, and plains.<sup>7</sup> The current situation in the region has a greater role in the area of mental health for the affected people. The Northeast region of India is mostly vulnerable to various issues and the mental health concerns had been much neglected in this region. The *National Mental Health Survey of India 2015-16* has found that the lifetime mental morbidity in states like Assam is about 8.1% and 19.9% in Manipur.<sup>8</sup> Such factors are mostly connected with the mental health of the people in every region. These socio-cultural factors have played a vital role in mental illness and mental illness is a combination of biological, psychological, social and cultural factors.<sup>9</sup> The region being located in a very secluded part of India puts it in a position to be exposed to a lot of vulnerable activities which at last has a huge impact on the mental health of the vulnerable community of northeast India in specific the women and the children.

### THE SOCIETAL STRUCTURE OF THE NORTHEASTERN REGION

The current situation of the region has seven massive changes over the past several decades in which the population has witnessed tragedies and lesser changes in their lives. The issue of poverty is a major issue over the region in which over 34% of districts had witnessed over high to very high level of poverty.<sup>10</sup> The North-Eastern states of India are largely inhabited by tribal populations, which reflects a significant level of social challenges and underprivileged

5. Economic Times. *Parliament passes bill to restore original SC/ST atrocity law* (August 9, 2018). (Retrieved on October 24, 2020 from <https://economictimes.indiatimes.com/>).
6. K.R. Dikshit and Jutta K Dikshit, *North-East India: Land, People and Economy*, Springer Netherlands, 2013.
7. *Id.*
8. Murthy RS. *National Mental Health Survey of India 2015-2016*. Indian J Psychiatry. Jan-Mar;59(1):21-26. 2016 doi: 10.4103/psychiatry.IndianJPsychiatry\_102\_17. PMID: 28529357.
9. *Id.*
10. *Poverty Index as a Tool for Adaptation Intervention To Climate Change in Northeast India - Scientific Figure on ResearchGate*. Available from: [https://www.researchgate.net/figure/District-wise-Distribution-of-Poverty-in-Assam\\_fig3\\_251349477](https://www.researchgate.net/figure/District-wise-Distribution-of-Poverty-in-Assam_fig3_251349477) (accessed 11 Aug 2024)

conditions due to their lack of connection with the mainland. The situation calls for substantial efforts to enhance their social standing beyond the tribal communities, the entire region faces a range of pressing social issues, including terrorism, communal conflict, superstition, illiteracy, unemployment, gender disparity, and overall social backwardness. The frequent occurrence of communal conflicts among the diverse communities in the North-Eastern region, stemming from differences in religion, language, and ethnic culture, can be largely attributed to a lack of understanding and misinterpretations about each other's beliefs, practices, and identities.<sup>11</sup> These conflicts arise due to the inability to appreciate and respect the unique cultural and social fabric that defines the region's rich diversity. For instance, there has been multiple state border disputes amongst several Northeastern<sup>12</sup> states which has led to the creation of wider differences amongst several ethnic groups residing over the region. The entire region is plagued by numerous terrorist and subversive activities fueled by factors such as regional identity, religion, language, and ethnicity. These activities often receive support from foreign entities aiming to destabilize and weaken India in which countries like Bangladesh, China and Myanmar had played a pivotal role in such matter.<sup>13</sup> Such external influences exacerbate the existing tensions and contribute to the challenges faced by the region and highlights the need for comprehensive strategies to address both internal and external threats to peace and stability.

## THE PSYCHOLOGICAL IMPACT OF THE POPULATION

In the year of 2017, Mental disorders were the world's second leading cause of disease burden in terms of years lived with disability (YLDs) and sixth leading cause of disability-adjusted life-years (DALYs), posing a significant challenge to mental health systems, particularly in low- and middle-income countries.<sup>14</sup> It has also come to the notice that Mental health is being recognised as one of the priority areas in various health policies around the world and has also been included in the Sustainable Development Goals.<sup>15</sup> This has raised concern for the overall

11. V. Bijukumar,, *Social Exclusion and Ethnicity in Northeast India*, The NEHU Journal, Vol XI, No. 2, July pp. 19-35, 2023
12. Smirti Priya Das, *Inter State Border Disputes in North East Region of India: Special focus on Assam and its Bordering States*, International Journal of Mechanical Engineering, Dibrugarh University, ISSN: 0974-5823, Vol. 6 (Special Issue, December 2021) DOI : <https://doi.org/10.56452/224>
13. *China's influence in South Asia: Vulnerabilities and resilience in four countries - carnegie endowment for international peace*. Available at: <https://carnegieendowment.org/2021/10/13/china-s-influence-in-south-asia-vulnerabilities-and-resilience-in-four-countries-pub-85552> (Accessed: 07 August 2024).
14. India State-Level Disease Burden Initiative Mental Disorders Collaborators, The burden of mental disorders across the states of India: the Global Burden of Disease Study 1990–2017, *Lancet Psychiatry*, 7: 148–61, 2020
15. Id.

mental health of the entire nation but when we talk about the Northeast region, there is vague research about it.<sup>16</sup> The number of health issues among Indian tribes has risen dramatically, but there is a severe shortage of knowledge, accessibility, and treatment availability. In Northeast India, psychological disorders have skyrocketed. Years of insurgency, military atrocities, frequent violence, human rights violations, ethnic conflicts, substance abuse, isolation, and a drastic change from the traditional and customary way of life have resulted in mental health issues among Northeast residents of all ages, from young children in school to elderly adults.

Understanding the mental health components, how to receive therapy, and the difficulties that tribal communities have in obtaining support are of utmost importance. Faith healers play a critical role in the treatment of mental health illnesses in the Northeast; many communities still turn to their local faith healers before seeing a mental health professional. The development of culturally appropriate techniques and strategies is critical to estimating the prevalence of mental health issues in indigenous communities and developing effective treatment plans. Integrating indigenous ethnomedical knowledge with contemporary medicine is necessary for improvement. Sutar et al.'s cross-sectional investigation revealed a significant treatment gap, which necessitates a state-by-state examination of current service delivery strategies to meet the particular needs of mental health.<sup>17</sup> In the Dimasa community, family members and/or relatives attempt to care for an individual who is seen to be mentally ill or unstable by keeping them in the privacy of their home and restoring normalcy. The person stays under the guardian's supervision if no improvement is made. There may be instances in which people of this type distance themselves from their own family. In more extreme situations, people continue to be shut out of social interactions, marriage, companionship, society, and other regular life stages.

## LEGAL DEVELOPMENTS OF THE POPULATION: FROM POST COLONIAL TO INDEPENDENCE

Legal Theorists like Austin characterized customary law as a form of "positive morality," asserting that these laws emerge from the consent of the governed rather than from the authority of political leaders.<sup>18</sup> He argued that while customary laws can be viewed as moral guidelines, they are recognized as positive laws when the state formally adopts them. This adoption can occur directly, through legislation, or indirectly, when courts incorporate these customs into

16. Deso Barman and Dr. Humi Thaosen, *Psychological And Mental Health Challenges Among The Dimasa Kacharis Of Nagaland, India: An Overview*, OSR Journal Of Humanities And Social Science (IOSR-JHSS), Volume 28, Issue 10, Series 4 (October, 2023) 58-65, e-ISSN: 2279-0837
17. Roberts T, Shidhaye R, Patel V, Rathod SD. *Health care use and treatment-seeking for depression symptoms in rural India: an exploratory cross-sectional analysis*. BMC Health Serv Res. Apr 6;20(1):287. doi: 10.1186/s12913-020-05162-0. PMID: 32252760; PMCID: PMC7137455. (2020)
18. John Austin, *Lectures on Jurisprudence 101* (J. Cockcroft & Co. 1875-78)

their rulings. The tribes may not possess a comprehensive jurisprudential understanding of the concept of justice and its various manifestations, they nonetheless have a clear sense of what justice entails. R. Marret, in his study, asserts that “it is a fundamental error to assume that the tribal communities of Northeast India lack any awareness of right and wrong.”<sup>19</sup>

Initially, the British adopted a policy of non-interference in the Northeast, but they later acknowledged customary rights through “**Regulation X**,”<sup>20</sup> which recognized these rights as early as 1822. The Indian Evidence Act of 1872 further validated and preserved the region’s longstanding customary laws.<sup>21</sup> Over time, various regulations were introduced, creating a dual legal system that encompassed both formal and customary adjudication. This coexistence of legal systems is referred to as “legal pluralism.” While the Code of Criminal Procedure, 1891, and the Code of Civil Procedure, 1908, generally did not apply in tribal areas, the government restricted village and district customary courts from handling serious crimes punishable by severe penalties. Consequently, non-heinous crimes were adjudicated by traditional authorities according to customary conventions, marking the beginning of a pluralistic legal framework in the region. The British, rather than imposing Western administrative models, created space for the customary adjudication of justice in the tribal areas of NEFA.<sup>22</sup> This evolution can be reflected back to the Government of India, Foreign and Political Department Notification of 1914, which extended the Assam Frontier Tracts Regulation, 1880, to the hills inhabited or frequented by tribes such as the Adi, Miri, Mishmi, Singpho, Khamti, Bhutia, Aka, and Dafla. The hill areas were separated from the Darrang and Lakhimpur districts of Assam through notifications issued under the Assam Frontier Tracts Regulations, allowing for the preservation of traditional justice systems in these regions.<sup>23</sup>

## THE RELEVANCE OF THE AFR ACT 1945

The Assam Frontier (Administration of Justice) Regulation, 1945, was enacted to consolidate and amend the laws governing justice in the frontier tracts of Assam, granting statutory recognition to village and tribal councils. This regulation unintentionally aligned tribal society with the national mainstream by integrating modern criminal justice processes into customary justice mechanisms.<sup>24</sup> It established a two-tier justice administration system, comprising the

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19. R. Marret, *The beginning of Moral and Culture in An Outline of Moral Knowledge as mentioned in Administration of Justice in North East India*, Law Research Institute, 5, (1987)

20. Regulation X of 1822.

21. The Indian Evidence Act, 1872 (Act no. 1 of 1872)

22. 4 J.N. Das, *A Study of Administration of Justice among the Tribes and Races of North Eastern Region*, (“Law Research Institute, Eastern Region 1987)

23. Id

24. Assam Frontier (Administration of Justice) Regulation 1945

Deputy Commissioner and Assistant Deputy Commissioner at the upper level, and the Village Authority at the lower level, without separating the executive and judiciary functions. The village authority, known as Gaon Bura, differs from traditional councils, as it is appointed by the Deputy Commissioner under Section 5 of the regulation, thereby recognizing the traditional indigenous system while formalizing the village authority's powers and responsibilities.<sup>25</sup>

The Act, divided offenses into two categories: *Heinous* and *Non-Heinous*. Heinous offenses, including murder, rape, dacoity, and offenses under specific chapters of the Indian Penal Code, were tried by Assistant Political Officers and Political Officers, who exercised the powers of Judicial Magistrates and District and Sessions Courts, respectively.<sup>26</sup> Non-heinous offenses, such as theft, simple hurt, and criminal trespass, were triable by village authorities under Section 19 of the regulation, allowing for the adjudication of less serious crimes by traditional councils. This bifurcation determined the jurisdiction of formal and customary justice systems, with village councils handling non-heinous matters while serious offenses fell under the purview of colonial authorities.

## ANALYSIS OF THE QUESTIONNAIRE

The research involved two distinct groups in which one comprised of respondents from the Northeastern region of India, and the other from outside this area. Overall, 40.7% of the responses were from individuals not located in the Northeast, while 59.3% were from those within the region. The findings indicated a high level of awareness among participants regarding the challenges faced by vulnerable populations in the Northeast. A significant number of respondents attributed those delays in legal proceedings in the Northeastern region to inadequate legal representation, compounded by the region's hilly terrain, which is prone to landslides and floods during the heavy monsoon season. These natural disasters had disrupted transportation, making it difficult for residents to access essential services. Concerns were also raised about substance abuse, particularly among the youth, who are increasingly exposed to addiction risks. This issue not only jeopardizes their personal development but also hampers the stagnant economic growth of the region, as young individuals lose critical years of their careers to addiction. A standardized questionnaire assessing attitudes toward mental health revealed that overall, respondents maintained a neutral stance on mental illness, particularly concerning vulnerable populations in the Northeast. Participants suggested several solutions, including increased attention and care for affected individuals, enhanced awareness campaigns, and the integration of narcotics education into school curricula. The feedback from both groups

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25. 34 Customary Laws of Arunachal Pradesh: Conflict Areas of Customary Laws, Formal Laws, p.47

26. Section 2, Assam Frontier (Administration of Justice) Regulation 1945

indicated a partial awareness of the ongoing issues in the region and highlighted the need for a comprehensive nationwide awareness program. Such an initiative would aim to illuminate the challenges faced by the Northeastern region and address the systemic neglect of its basic needs.

### **THE REQUIREMENT OF CHANGE IN PSYCHOLOGICAL AND SOCIOLOGICAL LANDSCAPE**

The location considering the Northeastern region has been deprived of all the basic facilities compared to the main lands of India. And when talking about the mental health of the northeastern population, the progress is still very low with a very negligible awareness about the importance of mental health issues, even though it has been rising day by day due to the following problems mentioned above. It is highly recommended that people should be taught about the basics of mental health. Since the people are very well connected to their culture, incorporating local cultural practices and beliefs into mental health programs to make them more acceptable and effective will build trust in them, and it would also integrate knowledge. A proper training program should be implemented in all the educational, mainly in the villages as it is the root. The younger population should be the target group they are the ones who are being highly affected by the circumstances and are also the future. Roper educational initiatives must be taken into consideration for everyone starting from the school level.<sup>27</sup> The focus on each of the issues should be implemented on targeted economic development programs that will focus on improving the infrastructure and providing vocational training to all low-income groups. The issue related to terrorism and insurgency should be resolved by strengthening the political dialogue and peace with the insurgent groups with the socioeconomic development should be focused on the root cause of it.<sup>28</sup> The facilitation of dialogue between the state governments and local communities in a more effective way. The focus should be on a particular issue and giving it proper time and intervention would make things better in short time rather than focusing on everything altogether. The central government initiatives must be taken into consideration as the northeastern region has been neglected from the very beginning.

### **THE REQUIREMENT FOR A LEGAL CHANGE**

The Northeastern region of India has been at the forefront of the implementation of the newly enacted Bharatiya Nyaya Sanhita (BNS) 2023, Bharatiya Nagarik Suraksha Sanhita (BNSS) 2023, and Bharatiya Sakshya Adhinyam (BSA) 2023, which aim to modernize India's criminal justice system by simplifying legal processes, adopting a revolutionized victim-centric approach, addressing undertrial detention through bail reforms, and enhancing judicial oversight

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27. SDG Goal 4, UNICEF

28. Id.



to ensure the rights of the accused are upheld while also holding law enforcement accountable;<sup>29</sup> the northeastern states have welcomed these laws and have been actively preparing for their implementation, with over 15,000 police personnel<sup>30</sup>, judicial, and other officials and staff in the region receiving training, while Assam Chief Minister Himanta Biswa Sarma termed the BNS, BNSS, and BSA as watershed moments in India's criminal justice system, emphasizing the importance of cooperation from all stakeholders to ensure effective implementation,<sup>31</sup> and Arunachal Pradesh Chief Minister Pema Khandu lauding the newly implemented laws as a farsighted move towards ensuring political, economic, and social justice by ensuring timely completion of investigations and easier registration of FIRs while highlighting their sensitivity towards handling crimes against women;<sup>32</sup> however, challenges remain, such as infrastructure deficiencies in many courts and police stations, case backlogs, and the need for a shift in mindset and practices among legal professionals and law enforcement agencies, which will require continuous training and capacity-building programs to ensure the new provisions are applied effectively; nevertheless, the implementation of these laws in the northeastern region represents a significant step towards reforming India's criminal justice system, and continued commitment from the government, legal professionals, and civil society will be necessary to ensure that these reforms translate into tangible improvements for all citizens, ultimately strengthening the rule of law in the northeastern region and across India.

## CONCLUSION

The Northeastern region of India presents a unique and complex socio-cultural landscape that has significantly influenced the dynamics of crime and mental health in the area. With a population of over 45 million people, the region is home to a diverse ethnic group, each with their own distinct traditions, cultures, and languages. This diversity, coupled with the region's geographical isolation from the Indian mainland, has contributed to a sense of marginalization

29. *New criminal laws enacted from today: All you need to know about them*, The Economic Times. Available at: <https://economictimes.indiatimes.com/news/how-to/new-criminal-laws-enacted-from-today-all-you-need-to-know-about-them/articleshow/111391637.cms?from=mdr> (Accessed: 05 August 2024).
30. *Northeastern states welcome three new criminal laws to speed up justice*. MorungExpress. Available at: <https://morungexpress.com/northeastern-states-welcome-three-new-criminal-laws-to-speed-up-justice> (Accessed: 10 August 2024).
31. Assam CM Himanta welcomes new criminal laws, seeks cooperation of all for smooth implementation, Deccan Herald. Available at: <https://www.deccanherald.com/india/assam/assam-cm-himanta-welcomes-new-criminal-laws-seeks-cooperation-of-all-for-smooth-implementation-3087590> (Accessed: 11 August 2024).
32. Arunachal pradesh CM pema khandu terms new criminal laws as 'watershed' moment in country's judicial history, Deccan Herald. Available at: <https://www.deccanherald.com/india/arunachal-pradesh/arunachal-pradesh-cm-pema-khandu-terms-new-criminal-laws-as-watershed-moment-in-countrys-judicial-history-3087675> (Accessed: 08 August 2024).



and neglect among the local population. The region faces high incidence of crime, particularly those perpetrated against tribal communities by non-scheduled caste individuals. The lack of data has made it difficult for policymakers and law enforcement agencies to develop targeted interventions and strategies to address the problem. The people from the region continue to face victimization due to historical prejudices against them by the state, a situation that has been exacerbated by the region's proximity to five international borders, which has led to the development of organized criminal activities with influence from external sources. The socio-cultural factors prevalent in the region have also had a significant impact on the mental health of its inhabitants. The combination of biological, psychological, social, and cultural factors that contribute to mental illness in the region necessitates a varied holistical approach to mental health care that addresses not only certain symptoms but also the underlying societal issues that contribute to mental illness. The issues of crime and mental health in Northeast India requires a multifaceted approach that includes enhancing legal protections, improving data collection, and fostering socio-economic development.

## WORKING CONDITIONS AND HEALTH: A CRITICAL STUDY ON THE RIGHTS OF DOMESTIC WORKERS IN INDIA

Priyashikha Rai<sup>1</sup>

### INTRODUCTION

Domestic workers comprise one of the largest categories of unorganised sector in India. Nevertheless, a continued disparity prevails in their inclusion within labour laws and policy interventions. In India, the domestic workers' rights are subject to limited legal and institutional safeguards. They are among the most vulnerable groups, frequently lacking adequate working conditions, as they lack a legal framework to substantiate their claims. Domestic workers frequently depend on their employers' goodwill to receive certain benefits, as these are not guaranteed rights. The lack of regulatory mechanisms and adequate legal protection makes domestic workers susceptible to inadequate working conditions, exploitation, and abuse.<sup>2</sup>

Domestic work has been traditionally seen as not real "work", partly because women typically perform it for free in their homes which have led to its undervaluation in the labour market. This is paradoxical, given that domestic work is crucial for sustaining the labor force outside and ensuring the survival and well-being of millions of household members, but is carried out under the worst conditions. Domestic workers are particularly vulnerable to unsafe and abusive working environments.<sup>3</sup> The regressive perception of "domestic work" as an inherent or natural trait of women renders their rights invisible in legal discourse. Their invisibility is mainly due to the nature of their workplace, which is the private household. Interestingly, it is the location of the work, rather than its nature, that determines domestic workers' rights under labor laws. Most labor laws apply to individuals performing similar tasks such as cleaning or cooking in offices or factories, as these organized workplaces are recognized as places of employment by law, unlike private households.<sup>4</sup> Since domestic workers are engaged in "private dwellings", they often lack the ability and scope for negotiating better working conditions, wages, and other

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1. Priyashikha Rai, Ph.D. Research Scholar, Department of Law, Cooch Behar Panchanan Barma University, West Bengal, India.
  2. U. MAHANTA AND INDRANATH GUPTA, *RECOGNITION OF THE RIGHTS OF DOMESTIC WORKERS IN INDIA 2* (Springer Nature Singapore Pte Ltd. 2019).
  3. Louisa Acciari *et al*, *Right to health, right to live: domestic workers facing the COVID-19 crisis in Latin America* 29 (1) GENDER & DEVELOPMENT 11, 23 (2021).
  4. U. MAHANTA, *supra* note 2, at 24.

benefits. This results in precarious working conditions raising serious human rights concern, as they are exposed to unregulated working hours and exploitation.

The plight of domestic workers worldwide gained significant recognition in 2011 with the ILO Convention (C-189) at its Geneva Conference. The Convention aims “to ensure decent work for domestic workers” and establishes adequate labor standards to be adhered by the signatory nations on various aspects of domestic work. This was the first Convention to establish international labor standards for the protection of domestic workers.

## CONCEPT AND DEFINITION

Domestic workers are generally required to perform a range of chores. They are given tasks such as cooking, organizing, cleaning, washing clothes and dishes. Additionally, they may watch over children in the household, provide care for the elderly, run errands for the household, tend to the garden, or act as drivers. There is no standardized job description for domestic workers as they carry out all household chores in return for remuneration. Thus, they can be distinguished from a household or an unremunerated family member who offers similar assistance in the house. However, the undervaluation of domestic work in society can be partly because the duties involved are seen as something inherent to women, rather than as a formal occupation. Additionally, domestic work is often seen as a routine duty that women naturally perform out of affection and care rather than for monetary gain.

The “Convention on Domestic Workers, 2011” defines the term ‘domestic work’ as “work performed in or for a household or households”<sup>5</sup> and ‘domestic worker’ has been defined as “any person engaged in work performed in or for a household or households within an employment relationship.”<sup>6</sup>

In India domestic workers were given legal recognition for the first time as “workers” by the “Unorganised Workers Social Security Act, 2008” (UWSSA). Although the Act does not define “domestic worker”, Section 2(n) of the Act provides definition of ‘wage worker’ meaning “a person employed for remuneration in the unorganised sector” which also encompasses ‘domestic workers.’

In the year 2013, the “Sexual Harassment of Women at Workplace Act” defined “domestic worker”. However, the definition is exclusive to the women domestic workers. Section 2(e) provides that “*domestic workers mean a woman who is employed to do the household work in any household for remuneration whether in cash or kind, either directly or through any agency*

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5. ILO C189-Domestic Workers Convention, 2011 (No. 189), art. 1(a).

6. Id. art. 1(b).

*on a temporary, permanent, part time or full-time basis, but does not include any member of the family of the employer.”*

## **RIGHTS OF DOMESTIC WORKERS IN INDIA**

The ILO Convention on domestic workers was signed by India in 2011. However, India has not ratified the same, thereby evading the formal obligation to uphold the labour standards set by the Convention. There is no specific legislation safeguarding domestic workers' rights in India, despite the positive developments globally and the GOI's non-binding support for the ILO Convention No. 189. There have been no notable efforts made despite of the global recognition. They lack adequate protection under the labour legislation that safeguards decent working conditions.

The UWSS Act recognized employment relationship between the employers and domestic workers engaged to perform household activities in private residences. The Act provides for the central and state governments to formulate welfare schemes covering various aspects of social security benefits.<sup>7</sup> The Act further lays down framework for establishment of social security boards at the national and state level. However, this Act has a welfare approach and fails to categorically establish specific rights for the “domestic workers”. The other law that directly applies to the domestic workers is for protection against sexual harassment at workplace. The 2013 Act on sexual harassment provides redressal mechanism for cases relating to sexual harassment.<sup>8</sup>

In terms of fixing minimum wages, domestic work has been incorporated into the Minimum Wages Schedule in a few states, including Andhra Pradesh, Bihar, Karnataka, Kerala, Rajasthan, Jharkhand, and Odisha, through the establishment of minimum wage levels. Nonetheless, the minimum wage rates fall far below the threshold required to sustain a decent standard of living and are even lower than the rates received by construction or industrial workers.

One of the most concerning issues of the domestic work sector is that despite prohibition children are still engaged for domestic work, particularly as live-in workers, which makes them invisible to the general public. For this particular issue, India has a legal system in place to safeguard these children from exploitation. The “Child and Adolescent Labour (Prevention and Regulation) Act of 1986” prohibits employment of children under the age of fourteen in any occupation. The Act originally adopted in 1986 did not specifically “domestic work” in the list of prohibited occupations, but later in 2006 an amendment was made adding it in Part-A of the

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7. The Unorganised Workers Social Security Act, 2008, S. 3, No. 33, Acts of Parliament 2008 (India).

8. The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, No. 14, Acts of Parliament 2013 (India).

Schedule. The GOI notified “domestic work” as a hazardous occupation, hence prohibiting the employment of children as domestic workers. However, with the 2016 amendment employment of a child is prohibited in “all forms of occupations and processes”. The Act initially prohibited employing children only till the age of fourteen years. Consequently, children above the age of fourteen or adolescents are also prohibited to work in hazardous occupations.<sup>9</sup> Violation of the provisions of the Act shall result in minimum 6 months to a maximum 2 year imprisonment or fine of Rs. 20,000-50,000<sup>10</sup> The Juvenile Justice Act<sup>11</sup> extends care, protection, development and rehabilitation of children till 18 years of age.<sup>12</sup> However, the JJ Act has limited effectiveness in rescuing children engaged as domestic worker above the age of fourteen. The employment of a child in violation of labour laws renders the child as in need of “care and protection”.<sup>13</sup> The Act provides for the constitution of Child Welfare Committee for each district vested with powers concerning “children in need of care and protection.”<sup>14</sup> The Committee has power to dispose cases of violation of children’s rights as well as to provide for the basic needs of victims such as care, protection and rehabilitation.<sup>15</sup>

Many women and children also fall prey to trafficking and end up working in circumstances akin to forced labour where they are isolated from the outer world and documents being confiscated by the employers. The issue of trafficking is addressed by the Constitution of India under Article 23 which prohibits trafficking in human beings and all forms of forced labour. Criminal Law also addresses the issue aligning the provisions with the standard set by the Palermo Protocol, till recently under Indian Penal Code which was inserted by 2013 amendment. The term “forced labour” was noticeably excluded in this provision under Section 370 and the term “practices similar to slavery” had been used. In the new criminal law under Bharatiya Nyay Samhita, similar provisions have been incorporated under Section 143 and 146 dealing with trafficking and unlawful compulsory labour respectively.

Migration is an important dimension in the domestic work sector since the demand of domestic workers is high in the urban areas. This demand forms a pull factor for rural to urban migration. The “Inter-State Migrant Workmen’s (Regulation of Employment and Conditions

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9. The Child and Adolescent Labour (Prevention and Regulation) Act 1986, S. 3A, No. 61, Acts of Parliament 1986 (India).

10. *Id.* S. 14.

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

12. *Id.* S. 2(12)

13. *Id.* S. 2(14)

14. *Id.* S. 27

15. *Id.* S. 29

of Service) Act, 1978” regulates the conditions of employment and protection of the rights of inter-state migrant workers. The legislation is applicable to any establishment that hires a minimum of five interstate migrant workers. Given the nature of the recruitment process, the domestic work sector is not covered by this Act. The Act only applies when a contractor hires five or more workers to work for a single employer. Due to the fact that domestic workers typically operate independently or with only one other worker per household, the regulations set by this Act are not enforced. Placement agencies in certain states must comply with the registration requirement stipulated by the Shops and Commercial Establishment Act. Although this initiative aids in identifying the placement agencies but is not effective in regulating the working conditions of domestic workers.

The MoLE<sup>16</sup> has announced that a comprehensive “National Policy on Domestic Workers” shall be formulated. The objective of this initiative is to incorporate domestic workers within the legal landscape, enabling them with entitlements such as wages, right to form unions, access to social security benefits, and the establishment of a mechanism to address their complaints. If the Policy is approved, it has the potential to be a significant achievement in the ongoing struggle for the acknowledgement of domestic workers’ rights in India.

## ACCESS TO HEALTHCARE

Health is a key indicator of decent working conditions. In countries where social security is not adequately protected, access to health care services constitutes a complex problem. The indifference of policy makers on regulation of working conditions leads to a plethora of challenges for workers engaged in that sector.

Right to health is well established as a basic human right of every individual in the Human Rights jurisprudence, in particular the pioneer instruments UDHR and ICESCR under Article 25 and 12 respectively wherein right to “enjoyment of the highest attainable standard of physical and mental health” has been declared. The Constitution of the WHO stated that “enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition”. In India, although Right to health is not expressly enumerated in the Constitution, but through judicial activism in landmark case of *Bandhua Mukti Morcha*<sup>17</sup> and several other judgments it has been recognized as a fundamental right enshrined under Article 21. The Apex Court has emphasized the responsibility of the State to improve the living and working conditions of the working class owing to directives under Articles 39, 41 and 42. The non-justiciable directives in Article 39(e) state that the health and strength of workers should not be exploited, and no one

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16. Ministry of Labour and Employment, GOI.

17. *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802.

should be “compelled by economic necessity to perform work that is unsuitable for their age or strength.” Additionally, Article 39(f) asserts that childhood and youth should be safeguarded against exploitation.

The MoLE introduced the “Rashtriya Swasthya Bima Yojana (RSBY)” on April 1, 2008. This scheme aims to offer health insurance coverage to families living below the poverty line (BPL), so unorganised workers falling BPL will be eligible to the benefits provided by this scheme. RSBY beneficiaries are entitled to claim hospitalisation coverage of up to INR 30,000 with coverage extending for pre-existing conditions as well. The coverage encompasses a total of five individuals within the family unit, consisting of the household leader, their spouse, and a maximum of three dependents. A recipient of RSBY is entitled to get medical services without having to pay in cash at any one of the hospitals that are listed for the program. The beneficiaries are required to pay Rs. 30 as registration or renewal fee, while the premium is paid by the Central and respective State governments distributed on 75 and 24 percent respectively.

In 2011 the MoLE expanded the scope of RSBY to encompass domestic workers. This extension was officially announced on June 20, 2011. This inclusion was aimed to provide the domestic workers with health insurance coverage under the RSBY scheme, which initially targeted families below the poverty line. It is stated that domestic workers must be 18 years of age to enjoy scheme benefits. The State governments have the responsibility to identify domestic workers bearing certificate for confirming their domestic worker status from any tow of Resident Welfare Association certificate or Employer or Trade union certificate or Police verification certificate. However, there is limited access of RSBY for domestic workers primarily due to lackluster dissemination of information. Additionally, in order to be eligible for the RSBY system, domestic workers must provide verification of their identities. Obtaining evidence is extremely challenging for domestic workers, mostly because employers are often unwilling to offer an employer certificate. Additionally, migratory workers may not have the necessary paperwork to prove their residency<sup>18</sup>.

## **WORKING CONDITIONS OF DOMESTIC WORKERS IN INDIA**

Different aspects of “working conditions” entails wages, working time, leave periods, occupational safety, and special protection to prohibit child labour and forced labour.

In India domestic work sector is characterised by absence of law regulating the conditions of workbeing subjected to substandard working conditions, long working hours, sleep deprivation, physical and psychological abuses, and lack of nutritious food or hygiene which severely affects their health status. The domestic workers end up becoming victims of labour exploitation as

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18. U. MAHANTA *supra* note 2



defined in ILO Convention<sup>19</sup> on Forced Labour and the Palermo Protocol<sup>20</sup>. Policy responses in India to safeguard the rights of domestic workers are alarmingly inadequate.

The features of domestic work in India is marked by its informal nature, precariousness, and unfavorable working conditions such as absence of standard contract, low pay, long working hours, no stipulated rest periods, paid leave or holiday, job insecurity, inadequate social security benefits, and discrimination based on caste, class and gender.<sup>21</sup>

The live-in domestic workers face additional issues such as lack of privacy, inadequate accommodation and food, isolation and increased exposure to different forms of violence and abuse. Most pertinent concerns about the working conditions of domestic workers are discussed as follows.

- a. **Long working hours:** Domestic work often involves long working hours with little time for rest and leisure. Live-in domestic workers are expected to be available for work at all times. Furthermore, employers have a notion **that the tasks involved in domestic work require low levels of skills, so they keep on adding chores to workers leading to overburden**. In the case of part-time workers, to meet their ends they take work from multiple employers and hop from one to another the entire day working 10-12 hours a day.
- b. **Inadequate accommodation:** The accommodation provided to live-in workers are substandard, insufficient lighting, and inadequate food that fails to satisfy their daily nutritional needs. In more severe instances, they are not even provided with individual rooms and are instead required to sleep in open spaces such as corridors, dining rooms, kitchens, laundry areas, or any other accessible space.
- c. **Lack of privacy:** Live-in domestic workers often experience a lack of privacy, and some employers continuously keep them under surveillance. This issue is exacerbated by practices such as certain employers conducting inspections of the living quarters and belongings of workers at any given time, imposing restrictions on visitors, monitoring

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19. ILO C029-Forced Labour Convention 1930 (No.29)

20. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000 adopted by resolution A/RES/55/25 of 15 November 2000 at the fifty-fifth session of the General Assembly of the United Nations

21. S. CHIGATER *et al*, LOCATING THE PROCESSES OF POLICY CHANGE IN THE CONTEXT OF ANTI-RAPE AND DOMESTIC WORKER MOBILISATIONS IN INDIA. (UNRISD, 2016)

leisure time outside of working hours, and the overall lack of separate living space to ensure privacy between the employer's family and the domestic worker.

- d. Abuses:** Workplace abuse encompasses a range of exploitative practices. Domestic workers often face physical, verbal, and emotional abuse from employers. They are susceptible to harassment from placement agencies as well. Without a formal contract, arbitrary alterations in work contracts, salary deduction, or even non-payment of salaries are commonplace.
- e. Low wages:** Domestic work often pays poorly because minimum wage has not been stipulated. The wages remain low partly because domestic workers have limited ability to negotiate due to the lack of government regulations and monitoring. Several factors influence wage determination, including the employer's socio-economic status, the tasks assigned, the size of the employer's family, and the workplace location.
- f. Lack of Social Security:** The lack of social security benefits among domestic workers is a significant issue. They are deprived of benefits such as maternity benefits, employment injury, provident fund or old age benefits. This absence of social security leaves them vulnerable to financial instability and health-related challenges, as they themselves bear the costs of medical care and other emergencies. Employers often avoid formalizing employment relationships and do not provide contributions for medical or pension benefits. Illness, injury, or pregnancy frequently leads to immediate dismissal resulting in abrupt loss of income.

## ASSOCIATION OF WORKING CONDITIONS AND HEALTH

The working conditions have a direct impact on the physical, mental and social well-being of workers. A decent working environment contributes to improved health status of the workers. The variables of employment and health exhibit a reciprocal causal relationship, wherein good health status increases the likelihood of being employed, while simultaneously, employment status impacts the state of health. Working in favorable and decent conditions plays a positive role in both physical and mental health.

Working long hours without proper rest, job insecurity and lack of social security benefits indicate unfavorable working conditions, which can lead to negative effects on health. Conversely, job security, proper rest, paid leave and positive policy intervention leads to job satisfaction which is likely to have a positive impact on health. T. Barnay's study on economic literature in Europe found that the importance of suitable working conditions for the health of

workers is emphasized throughout the literature.<sup>22</sup> Thus, satisfaction with working conditions, regular hours and stable employment are associated with improved worker-wellbeing.

Fouskas characterizes domestic work as “precarious employment” that lacks the standard labor safeguards associated with regular employment. The prominent features are extremely restricted legal rights and social security benefits, uncertainty in employment, meagre pay, and a significant likelihood of poor health. The isolated and non-unionized character of employment in precarious work raises significant challenges to labor organization efforts.<sup>23</sup>

The working conditions of domestic workers clearly fall under precarious employment as the poor working conditions are discussed in the earlier section of this paper. Studies show that they are subjected to range of workplace hazards, from verbal abuse, violence and humiliations to burns, back and knee injuries and overwork in general.<sup>24</sup> An investigative study conducted by N. Nappo also showed that encouraging working conditions are associated with better health status of workers.<sup>25</sup> Another cross-sectional study on the urban working population of Peru showed that informal workers reported higher exposure to poor working conditions than formal workers and was found out that although poverty was one of the reasons affecting health, a substantial part of the adverse effect could be explained by poor working conditions.<sup>26</sup> The majority of domestic workers continues to work even when they are unwell or in pain since sick leave or paid leave is not recognized. There is both short term and long-term repercussions on their health, however the health hazards go unacknowledged by the employers as well as the employees. The dependency of domestic workers on employers for income curbs the scope of seeking redress for exploitation or abuse by the employer since the position of employer is always dominant for retaliation against the domestic workers’ interest.<sup>27</sup>

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22. T. Barnay, *Health, work and working conditions: a review of the European economic literature*, 17 THE EUROPEAN JOURNAL OF HEALTH ECONOMICS 693, 701 (2016).
  23. T. Fouskas *et al*, *Health Inequalities and Female Migrant Domestic Workers: Accessing Health-care as a Human Right and Barriers due to Precarious Employment in Greece*, 6 (2) JULIO-DICIEMBRE 71, 81 (2019).
  24. L. Acciari *et al*, *Right to health, right to live: domestic workers facing the COVID-19 crisis in Latin America*, 29 (1) GENDER & DEVELOPMENT 11, 24 (2021).
  25. Nunzia Nappo, *Is there an association between working conditions and health? An analysis of the Sixth European Working Conditions Survey data*, 14(2) PLOS ONE 1, 13 (2019).
  26. M. Silva-Peñaherrera *et al*, *Informal Employment, Working Conditions, and Self-Perceived Health in 3098 Peruvian Urban Workers*, 19 (10) INT. J. ENVIRON. RES. PUBLIC HEALTH 1, (2022).
  27. Nik Theodore *et al*, *Workplace Health and Safety Hazards Faced by Informally Employed Domestic Workers in the United States*, 67 (1) WORKPLACE HEALTH & SAFETY 9, 13-14 (2019).

## CONCLUSION

Domestic workers have been excluded from the legal landscape of labour regulations in the country. Optimal working circumstances are essential for the well-being of workers. The services provided by these workers to the employer and the high demand for their employment make them an essential component of the labour market. However, their noticeable exclusion from the legal discussion on labour law raises concerns about their acknowledgement and acknowledgement. In order to ensure that domestic workers are provided with satisfactory working circumstances, both inside their local communities and when working outside, it is imperative to implement a complete legislation that safeguards their rights and provides them with social security. The fragmented legal framework governing domestic employment fails to adequately safeguard the rights and welfare of the workers. Enhancing the working circumstances for this specific group of workers is undeniably a question of societal fairness. The prioritisation of addressing the inequities experienced by domestic workers in obtaining healthcare services, as well as the lack of regulatory measures to ensure satisfactory working conditions, should be a key focus on the policy agenda.

## **A CRITICAL ENQUIRY OF STATEHOOD OF PALESTINE: WITH SPECIAL REFERENCE TO MEMBERSHIP PROCESS OF THE UNITED NATIONS**

Prof. (Dr.) Sanjay Kumar Pandey<sup>1</sup>

### **INTRODUCTION**

International legal personality of a state has been a flowing concept<sup>2</sup> which remains changing. The statehood is a paramount condition of a territorially defined political entity, as it enables such entities, to enter treaties, to become member of organisations, conduct diplomatic relations and bring international claims. However, a shadowy concept that influence the discussions of statehood is recognition. An entity declaring to be a state must be recognized by existing entities already regarded as states. Some measure of acceptance may be required if an entity is to perform realistically as a state. Nonetheless some entities manage with minimal contact with other states. Therefore, the relationship of statehood and recognition in modern International Law must be examined. In the matter of statehood, the positivist doctrine places all the emphasis on the question of recognition.<sup>3</sup> Against this background, the statehood and recognition of Palestine is currently a hot-button issue among the world community. It is often stated that the “formation of a new State is ... a matter of fact and not of law”.<sup>4</sup> Hence, the identity and character of Palestine as a state have long been considered as paradox in the international society as Several countries assume that Palestine is not yet a state however it may become one, when an agreement is reached with Israel on the other hand some other states say that Palestine is already a state.<sup>5</sup> The uncertainty over Palestine’s legal status of statehood has prompted the inquiry in this paper. Statehood for Palestine, for the first time, had been claimed in a 1988 by Yasser Arafat, the leader of Palestine Liberation Organisation (PLO). This declaration led to recognition by some states but not by others. The people of Palestine were recognized as

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1. Prof. (Dr.) Sanjay Kumar Pandey, Professor of Law, Alliance School of Law, Alliance University, Bengaluru (India)
  2. Willaim Thomas Worster, ‘Functional Statehood in Contemporary International Law’, *Brooklyn Journal of International Law* ,46:1(2020) 39 -98, at42.
  3. James Crawford, ‘Criteria for Statehood in International Law’, *British Yearbook of International Law*, 1977, at 99.
  4. As said by Oppenheim, *Ibidem*, in James Crawford, at 95.
  5. John Quigley, ‘The Statehood of Palestine: International Law in the Middle East Conflict’ (Cambridge University Press, New York-2010) at ix.

having a right of self-determination, though it was not clear what that meant. United Nations had admitted the Palestine as a non -member observer state in the 2012<sup>6</sup> but not to membership in the organization.

Hence, the present paper critically enquires the statehood of Palestine. It also seeks any possible way of recognizing or entry of Palestine as full State through the membership of the United Nations (UN). Thus, the first part of the present research discusses briefly the concept of statehood and recognition of states. While the Second part examines the membership process of the UN and its impact. The part third examines the issues relating to the Palestinian statehood and its recognition. And part four is devoted for conclusion & suggestion.

## ESSENTIALS OF STATEHOOD

The foundation of a new state is basically a question of fact and law. Article 1 of the Montevideo Convention on Rights and Duties of States, 1933” lays down the most widely accepted formulation of the criteria of statehood in international law. It says that the state as an international person should possess the following qualifications: ‘(a) a permanent population; (b) a defined territory.

(c) government; and (d) capacity to enter into relations with other states.’ The concurrent presence of these elements makes a sovereign state having international personality. However, the absence of any of them for some time does not necessarily withdraw international personality from a state.<sup>7</sup> Effectiveness is the basis of the standards set out in the Montevideo Convention.

The principle of effectiveness necessitates that no entity should be regarded as a state within the meaning of international law unless the entity has a government which controls a defined territory and its inhabitants effectively and independently from any other States.<sup>8</sup> Once an entity fulfils the conditions set out in the Montevideo Convention that entity becomes a State, regardless of its recognition or non-recognition by other States and notwithstanding of any further issues such as its legality or otherwise or origin, its other rules of international law.<sup>9</sup> There are two theories that explains about the requirements of statehood. The first, Declaratory Theory and second one is Constitutive Theory. The first theory argues that a political entity owing to be a state would in fact be one which objectively fulfils the conditions of statehood as enunciated in the Montevideo convention, while the second, the Constitutive Theory, is based on the

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6. UNGA, A/Res/67/19, 4<sup>th</sup> December, 2012. <https://documents.un.org/doc/undoc/gen/n12/479/:visited on 14<sup>th</sup> July, 2024.>

7. Alina Kaczorowska, *Public International Law*, (Routledge, Taylor & Francis Group, London-2010) at 185.

8. *Ibidem*.

9. *Ibid*.

postulation that the statehood of the entity in question is dependent on the recognition by the other states.<sup>10</sup> A good number of majority of states supports Declaratory Theory, while the various jurist, such as Oppenheim, Georg Jellinek, Hans Kelsen, and Hersch Lauterpacht advocated for the Constitutive Theory.<sup>11</sup>

The central idea of the declaratists' premises on that "the Recognition assumes the existence of a state and not to create it."<sup>12</sup>

In fact, when an entity otherwise qualifies as a State cannot entitle the non-recognizing States to act as if the entity in question were not a State. Hence, it is acceptable that, in practice, recognition have important legal and political effects on the states. But the State practice on recognition of states is not universal. Various states have exercised their power to recognise the new entity as per their geo-political agenda. Recognition of China, Israel, Bangladesh, etc are some of the examples. State Practice shows that whenever an entity attempted to arise as a State against the desires of its parent State, its legal status remained uncertain until the consent of the parent State was granted.<sup>13</sup> If a state is to be created explicitly via recognition and in opposition of the wishes of the parent state, then such recognition needs to be essentially universal having effects of a collective State creation.<sup>14</sup> But such kind of state practice is rare now a days. The fragmented behaviours of states on the recognition creates hurdles before the state in question, and Palestine has been the burning example of it. Israel-Palestine disputes is still sucking the bloods of the innocent people. Therefore, recognition of its statehood is necessary. However, due to lack of consensus among the world, there is another gate to induct the Palestine as a state into the world community, which is the membership of the UN, because once the Palestine is admitted as a member of the UN, the states would gradually recognise the statehood of Palestine. Therefore, it is relevant here to examine the membership of the UN, which is discussed in the next part.

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10. J. D. van der Vyver, "Statehood in International Law," *Emory International Law Review*, 5:01(1991) PP: 9-102, at 12.

11. *Ibidem*, at 16.

12. *Ibid*, at 13.

13. Jure Vidmar, 'Explaining the Legal Effects of Recognition,' *International and Comparative Law Quarterly* 61: 2 (2012) PP 361-388, at 386.

14. *Ibidem*.



## MEMBERSHIP PROCESS OF THE UN

The issue of entry of states to membership in the UN has been one of the important issues, since its beginning, in the UNGA and UNSC.<sup>15</sup> Membership of the UN is enshrined under the Article 4 of the UN Charter. Article 4(1) says that the membership of the UN “is open to all peace-loving states that accepts the obligations contained in the United Nations Charter and which in the judgment of the United Nations, are able to carry out these obligations. The article also provides that “the admission of any such state to membership in the United Nations requires a Security Council recommendation followed by a decision of the General assembly”.<sup>16</sup> International Court of Justice,<sup>17</sup> in its advisory opinion, had acknowledged that Article 4(1) of the UN Charter sets five essential elements to be fulfilled by the applicant state for the membership of the UN, which are as under:

- be a State.
- be peace loving.
- Accept the obligations of the Charter.
- be able to carry out these obligations; and
- be willing to do so.

The IJC further detailed that “The natural meaning of the words used in Art 4(1) leads to the conclusion that these conditions constitute an exhaustive enumeration and are not merely stated by way of guidance or example. The provision would lose its significance and weight, if other conditions, unconnected with those laid down, could be demanded. The conditions stated in this paragraph must therefore be regarded not merely as the necessary conditions, but also as the conditions which suffice.”<sup>18</sup> Actually, it could not be argued, as per the view of the ICJ, that the political concerns could be superimposed upon a candidate that fulfilled the above five conditions as mentioned in the Article 4(1) of the UN<sup>19</sup> because “Such an interpretation would

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15. Leo Gross, ‘Election of States to United Nations Membership’, American Society of International Law Proceedings 48(1954) pp-37-59, at37.

16. Art.18(2) of the UN Charter: Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. It includes “the admission of new Members to the United Nations” also.

17. *Admission of a State to the United Nations*, [1948] ICJ Rep 57, at 62. <https://www.icj-cij.org/sites/default/files/case-related/3/003-19480528-ADV-01-00-EN.pdf>, Visited On 15th July, 2024.

18. *Ibidem*.

19. Paul Eden, “Palestinian Statehood: Trapped between Rhetoric and “Realpolitik” *International and Comparative Law Quarterly*, 62:1(2013) PP-225-239, at228.

be inconsistent with the terms of paragraph 2 of Article 4, which provide for the admission of “tout Etat remplissant ces conditions”-”any such State”.<sup>20</sup>

However, the intensive nature of the circumstances mentioned in the Article 4(1) did not prevent, in good faith, to consider a political factor associated with the very extensive and expandable conditions given in Article 4(1).<sup>21</sup> It is general base that Members are bound to act in good faith but are not bound to reveal the grounds for their vote or veto and it has also been generally undertaken that the above five requirements are pretty wide and offer themselves to diverse explanations.<sup>22</sup> However, there is a question that what standards would be applied to assess the abovementioned grounds.

Even though the Charter of the UN provides that the statehood shall be a requirement for original membership as well as for subsequent membership in the establishment it is unblemished that at the San Francisco Conference several of the participating nations were not states, for example- Bylo-Russian Soviet Socialist Republic, Ukrainian Soviet Socialist Republic, India, Philippine Commonwealth, Syria, and Lebanon -all these were not had a rank of a sovereign states.<sup>23</sup> It is relevant to mention here, that the previous patterns of UNSC shows that it has not been really apprehensive about the independence of the states for membership of the UN because USSR and US both have been open to give consent all the applicant states if other great powers would agree to support them.<sup>24</sup> Thus, the legal argument to exclude the applicant states from UN membership on the ground of lack of statehood has been political in reality. In addition to being State, the applicant entity must be ‘peace-loving’ This terminology can be traced in the declarations of the Great War Conferences. For example, the Declaration at the Moscoe Conference of Foreign Ministers, in 1945, presented that an International Organisation would be founded on the notion of “sovereign equality of all peace-loving states,” and Dumbarton Oaks Conference contained that membership of the organisation was to be “open to all the peace loving states.”<sup>25</sup> The define the term “peace-loving” has been a wasted workout and it has also been observed at the San Fransico that “No nation has ever professed any other sentiment”.<sup>26</sup> The Potsdam Declaration in 1945 had stated that participation in World War-II(WW-II) on the side of the Axis or Neutrality during that war was not a restriction to

20. *Ibidem*, Supra Note 17, at 63.

21. *Ibid.*

22. Leo Grass, Supra Note 15, at 41.

23. Joseph E. Black, Dissertation on “The Admission of New States to the United Nations” (North-western University, Evanston-1950) at 205-206.

24. *Ibidem*.

25. *Ibid.* at 208.

26. Leo Gross, *Supra Note 15*, at 42.

admit any state in the UN.<sup>27</sup> Though, the term ‘peace-loving’ is vague, however, it can be summarised as that a peace-loving state is not anti-war nation but rather willing to go to war to counter the aggressor nations who were is war lover. In fact, a peace-loving state must love peace so much that it will be ready to go battle against any state who wants to make hegemony on the world.<sup>28</sup>

As far as “acceptance of obligations of the Charter” is concerned, the term is used with a wider view. We should look to the Principles in Chapter 1, Article 2 which obliges the state to settle their disputes by peaceful means, to refrain from the threat or use of force in international relations, to support the UN in any action it takes in accordance with the present Charter, Besides this, the State must desist from giving assistance to any state against which the UN is taking preventive or enforcement action.<sup>29</sup> The constant defiance of the Principles may cause the expulsion from the Organization. Furthermore, the Members “agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.”<sup>30</sup>

Therefore, as per the analysis of the conditions of membership in the UN, it is submitted that Article 4(1) basically provides the elements for defining the eligibility of State for membership in the UN, whereas Article 4(2) places the procedure to effect the admission.<sup>31</sup> Thus, the main theory advocated here is that variations in United Nations practice concerning claims of statehood are a result not of a desertion of old-style legal principles of statehood but of the suitable practice of elasticity in interpreting these criteria in relation to the claim in which they are presented. Along with that, the basic standards of population, fixed territory, stable and effective government, and sovereign independence have been-and should be-followed reasonably tight<sup>32</sup>.

It is relevant to mention here that, apart from membership of the UN, an observer status has also grown up through the practice of the Secretary- General and the UNGA to enable those entities unable or unwilling to become members of the UN to participate in the work of the UN on a permanent basis and such Observer state can be divided into five categories-1. Permanent Observer missions of non-member States; 2. Observer status for national liberation movements; 3. Observer status for regional organizations and groups of States; 4. Observer

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27. *Ibidem*.

28. Black, *Supra Note 23*, at 210.

29. Leo Gross, *Supra Note 15*, at 43.

30. Article 25 of the UN Charter.

31. Leo Gross, *Supra Note 15*, at 44.

32. Rosalyn Cohen, “Concept of Statehood in United Nations Practice,” *University of Pennsylvania Law Review*, 109:8 (1961): PP 1127-1171, at 1168.

status for specialised agencies; and 5. Observer status for non-governmental organizations (NGOs).

## LEGAL STATUS OF PALESTINE

Palestine has had a prolonged and unpredictable past in its struggles to reach at the statehood.<sup>33</sup> Although international law remained unsuccessful to enable the statehood of Palestine for more than six decades ago, the legal topography has changed the worldwide .<sup>34</sup>The UN, founded on the ashes of WW-II, recognised the situation in Palestine which could damage the general welfare and friendly relations among the nations and only the partition was a practical solution.<sup>35</sup> The UNGA resolution 181 sought to find a peaceful solution to the Israel-Palestine crisis, but instead led to regional war as the Arab League rejected the proposal of the UN to create a Jewish State of Israel.<sup>36</sup> Ultimately, Palestine could not attain the statehood of it.

However, the struggle for statehood by Palestine has been continued. UNGA granted the Palestine Organisation (PLO) as the observer status in its capacity as a national liberation movement in November, 1974.<sup>37</sup> The UNGA resolution 3237 included the right of the PLO “to participate as an observer in the sessions and the work of all international conferences convened under the auspices of other organs of the United Nations”.<sup>38</sup> This move had enabled the PLO to gain observer status in several specialised agencies of the UN, including the UNESCO.<sup>39</sup> Statehood for Palestine had been claimed in a 1988 declaration that turned to recognition by several states but not by others. The UNGA had adopted a resolution which acknowledged the proclamation of the state of Palestine by the Palestine National Council on 15<sup>th</sup> November 1988 and affirmed the sovereignty of the Palestinian people over their territory occupied since 1967<sup>40</sup>. Further, in the month of July, 1998, UNGA by its resolution 52/250, conferred certain

33. Adam G. Yoffie, “The Palestine Problem: The Search for Statehood and the Benefits of International Law” *Yale Journal of International Law*, 36:02(2011)497-512, at 497.

34. *Ibidem*.

35. UNGA Res.181(II), UN Doc. A/519(19<sup>th</sup> November, 1947). <https://documents.un.org/doc/resolution/gen/nr0/038/88/pdf>. Visited on 17<sup>th</sup> July, 2024.

36. Yoffie, *Supra Note 33*, at 498.

37. See, UN Doc A/Res/3237(XXIX), <https://documents.un.org/doc/resolution/gen/nr0/738/39/pdf>. Visted on 17<sup>th</sup> July, 2024.

38. *Ibid*.

39. Eden, *Supra Note 19*, at 227.

40. UNGA Res43/177(15<sup>th</sup> December, 1988) <https://documents.un.org/doc/resolution/gen/nr0/531/56/img/nr053156.pdf>. Visited on 17<sup>th</sup> July, 2024. This Resolution also decided that “the designation of ‘Palestine’ should be used in place of the designation ‘Palestine Liberation Organisation’ in the United Nations System, without prejudice to the observer status and func-

additional rights and privileges on Palestine which were reserved for Member States, such as, right to participate in the debate of UNGA, the right to reply, right to raise points of order in the proceedings on Palestine and Middle East issues and right to co-sponsor draft resolutions on the Palestinian issues.<sup>41</sup> This resolution also permitted Palestine to sit after non-member States and before all the other observer and their allocation of seats was enlarged to six because observers are generally given two seats.<sup>42</sup> The US President Barak Obama also restated in his speeches, in the UNGA on 21<sup>st</sup> September, 2011, his idea that the Palestinian people deserved a State of their own provided that a peace agreement giving Israel with a guarantee of security was a necessary condition.<sup>43</sup> Mahmud Abbas president of Palestinian Authority (PA), on 23 September, 2024 had presented a formal application for the PA to become a full member state of the UN. He said in the UNGA it as “moment of truth” and further stated that their people wait to hear an answer from the world.<sup>44</sup> However, the Obama administration has blocked the Palestinian move in the UNSC. However, Palestine was admitted in the UNESCO as a member on 31<sup>st</sup> October 2011, nine states of the UNSC at that time voted in favour of membership of the same. The Report of the UNSC Committee on the Admission of New Members relating to the Palestinian application for UN membership exposes the intensity of profound splits among the members of the UNSC on the issue.<sup>45</sup> Hence, the UNSC not ever legally voted on the dispute of Palestinian membership of the UN. Therefore, it is felt that that UN track to get the statehood is very arduous and complex process.

The International Court of Justice (ICJ) is also not a stranger to the issue of “Palestine. the UN pulled the matter in the Court in twenty years back. The Court analysed the issue at the request of the General Assembly and opined that Israel’s security wall in the Occupied Palestinian Territories violated international law.<sup>46</sup>

An ICJ advisory opinion would provide as another necessary drive toward statehood. Besides this, the ICC<sup>47</sup> being a new organisation has already considered to participate in the

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tions of the Palestine Liberation Organisation within the United Nations System, in conformity with relevant United Nations resolutions and practice.”

41. UNGA Res/52/250. (13th July, 1998) <https://documents.un.org/doc/undoc/gen/n98/773/11/pdf>. Visited on 17<sup>th</sup> July, 2024.

42. Eden, *Supra Note 19*, at 227.

43. *Ibidem*, at 229.

44. Graham Usher, “Letter from the UN: The Palestinian Bid for Membership”, *Journal of Palestine Studies*, 41:01(2011) PP 57-66, at 57.

45. Eden, *Supra Note 19*, at 230.

46. Yoffie, *Supra Note 33*, at 506.

47. Its started to operate in 2002.

Palestinian issue, though The ICC has a restricted jurisdiction. Nevertheless, it did not stop from considering whether it had jurisdiction to prosecute Israel for the alleged crimes perpetrated in the Gaza Strip during its 2009 offensive. The PA has already argued its case and is awaiting chief prosecutor's jurisdictional decision. If the ICC allows the suit to proceed, it will implicitly be recognizing Palestinian statehood.<sup>48</sup> Thus, Palestine would have to be a state for the court to exercise its jurisdiction.

Apart from this, the Palestine also fulfils the Montevideo Convention, 1933 which are: a permanent population, a defined territory, a government and the capacity to enter into relations with other states. The conditions of a permanent population describe no obstacle and is unopposed in the case of the Palestinian territories.<sup>49</sup>

To meet the territorial condition for statehood, boundaries need not be conclusively settled as many states may have clashes with bordering states over their frontiers. Moreover, the territory of a state may be modified over time.<sup>50</sup> The ICJ has also expressed that "there is no rule that the boundaries of a State must be fully delineated and described, and often in various places and for long periods they are not."<sup>51</sup> Thus, the limit of Palestine's territory needs not be fixed to say whether Palestine has a defined territory.<sup>52</sup>

The condition of governmental control over the Palestine has been said that it does not qualify the Palestine as a state.<sup>53</sup> Several U.S. courts have also decided whether Palestine is immune from suit because of being a state have decided against Palestine statehood based on the criterion of control.<sup>54</sup> The Palestinians only have full control on a very small parts of their territory while the Israel have the control of near about 83% of the west Bank.<sup>55</sup> However, it is discovered that the term 'government' is not qualified by the adjective 'effective' in the

48. Yoffie, *Supra Note 33*, at 509. See also, Article 4(2) Rome Statute of the ICC. "The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State".

49. Felix Dane and Ilona-Margarita Stettner, "A Palestine State in the United Nations?: Prerequisites, Positions and Expectations Before the Meeting of the UN General Assembly", Konrad Stiftung 8(2011)pp-51-69, at 56.

50. Quigley, *Supra Note 5*, at 210.

51. North Sea Continental Shelf Cases (F.R.G./Denmark; F.R.G./Netherlands), 1969 ICJ 3, at 32.

52. Quigley, *Supra Note 5*, at 210. See also, Alain Pellet, The Palestinian Declaration and the Jurisdiction of the International Criminal Court", *Journal of International Criminal Justice*, 8:04(2010) pp981-999.

53. Ibidem.

54. *Ungar v. Palestine Liberation Organization*, 402 F.3d 274, at 288–292 (1st Cir. 2005).

55. Dane & Stettner, *Supra Note 49* at, 57.



Montevideo Convention.<sup>56</sup> Francis A. Boyle discovers Palestine to satisfy the control criterion and mentioned the various examples in which Palestinian authorities applied their control, even in the face of Israel's occupation.<sup>57</sup> The new state practice also shows that territorial units could be recognised as states even if they do not exercise full authority at the time of the recognition.<sup>58</sup> As far as capacity to enter into relations with other states is a condition for statehood, Palestine appears to satisfy it also. Various States have shown a willingness to engage with Palestine on the basis that it is a state. Mandate Palestine had the capacity for international relations, even though its exercise was in the hands of Great Britain.<sup>59</sup> Palestine has diplomatic or quasi diplomatic relations with many states. As of now 145 out of the 193 of the members of the UN have recognised Palestine as a State which is more than 75 % of total UN Member states. The issuing of passports is an acknowledged behaviour of government in the conduct of external relationships. States normally do not honour passports issued by entities they do not recognize. It is relevant to mention here that, since 1995, the PNA has issued Palestine passports, which are accepted by other states for entry into their territory.<sup>60</sup> The Palestinian National Authority (PNA), in 2009, started to issue electronic scanned passports, by this means joined a coordinated global system whereby states share data for immediate authentication of the identity of tourists.<sup>61</sup> Moreover, the right of self-determination is an inalienable rights which applies equally to all peoples,<sup>62</sup> hence, it has been given to Palestinians in a series of UN resolutions.<sup>63</sup>

## CONCLUSION AND SUGGESTION

There is bloodshed in the entire region of Middle East since the emergence of Israel-Palestine conflict. The UN also has failed to stop the killing of innocent people because of this conflict. The recent provocative attack by the Hamas on 7<sup>th</sup> October, 2023 has broken a new blood-thirsty war between Israel-Palestine. Hamas's launched 5000 rockets in which

56. Ibidem.

57. Francis A. Boyle, "The Creation of the State of Palestine" *European Journal of International Law*, 1(1990)301-306, at 302.

58. Dane & Stettner, *Supra Note 49* at, 57.

59. Quigley, *Supra Note 5*, at 211.

60. *Ibidem*, at 212

61. *Ibid.*

62. Article 1 paragraph 2 of the UN Charter: The Purposes of the United Nations are..... To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

63. UNGA/RES/58/163, December 22, 2003. <https://documents.un.org/doc/undoc/gen/n03/504/36/pdf>. Visited on 19<sup>th</sup> July, 2024.



250 Israelis were killed and 1000 were injured and in retaliatory attack by Israel also took 230 Palestinian lives more than 1000 thousand became wounded. The war is still going on since then and it has affected the entire region and international transportation also got adversely affected in the Mediterranean Sea. Hence, the Palestinian recognition of full statehood is to be given so that the peace could be assured in the region.

The Palestine fulfils all the criteria of Statehood, especially Montevideo Convention. Besides this, the right of self-determination under Article 1 of the UN Charter also supports their Statehood. The Palestine is looking for the UN membership which would mean the recognition of State of Palestine by at least two-third of the world community represented in the international organisation. It is submitted that if the UN confers the membership to Palestine, it will be an acknowledgment of reality. If UNGA recognise the Palestine a State, it is an indicative of an evidence of a high degree of international political support for the statehood of Palestine. Moreover, International recognition of Palestine by the UNGA also transforms into huge political favour for Palestinian statehood among the European states.

## LEGAL LIFEBOATS: SAFEGUARDING MIGRANTS AND REFUGEES IN THE GLOBAL CHAOS

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### INTRODUCTION

The humanitarian crisis at the US-Mexico border is turning eyes and has been a topic of discussion. Set in the violent background from where the migrants come facing poverty, threats from gang members and cartels, ongoing cases of drug abuse, and places that top the homicide rates, they need better transitioning laws to help them settle in countries where they hope for better conditions. Migrants from different parts of the world try to seek refuge and during this process, they are forced to face inhumane treatment. The dingy detention centres and lack of adequate facilities to house the migrants have raised concern on international forums and demand for human dignity and humane treatment during the process of apprehending migrants. Undocumented migrants face risks not only at the border but throughout their journey to the border. Their health risks, leaving family and hours of walking through the desert only to again get the brutal unspeakable treatment calls for attention. In light of these apprehensions, this paper is authored to bring in social transformation in the lives of migrants through legal thoughts and processes.

### WHY HAS THE US-MEXICO BORDER BEEN A CASE OF PERSISTENT CAUSE OF HUMANITARIAN CRISIS?

Brute force and barbarity are often the only languages spoken to illegal migrants. The undocumented migrants encountered at the borders of US-Mexico belong largely to countries of Mexico, Guatemala, Venezuela, Cuba, Ecuador, and Colombia.<sup>3</sup> The sole separation point of migration from these specific countries to the border as against other border migration is the ranking of homicide rates happening in their home country. Guatemala ranks fourth highest according to Homicide Monitor and Ecuador ranks first in homicide rates in Latin America as

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published by InSight Crime<sup>4</sup>. The migrants prone to violence by gangs and cartels are forced to choose to take shelter in another nation leaving their homeland. In the foreground, they are subjected to high homicide rates, gang violence and cartels, and cases of drug abuse. However, their background is tuning economic crisis and shrinking economy. In Guatemala, the harsh and unfavorable climate prevents farming and takes away the livelihood of the farmers. Not only are they not able to grow crops to feed themselves but are also faced with extortion. In such a scenario, they are determined to cross their borders first with absolutely no idea of the geographical terrain that stands before them. This perennial flow of migrants from these countries stacks up at the borders of the US-Mexico and becomes a case of the persistent cause of the humanitarian crisis. These numbers when added up, totaled 250,000 alone in 2023 according to the U.S Customs and Border Protection, hitting an all-time high in late December of 2023<sup>5</sup>. After leaving their borders their journey up north is faced with desert spanning 100,000 square miles along the border of US-Mexico, the Sonoran Desert.<sup>6</sup> All-time unfriendly geographical terrain, climate conditions, and temperatures ranging from 48°C at its hottest and -8°C at its coldest give its passers a memorable inhumane walk through the sands. These migrants face heat exhaustion as a result of this drive as the place is deprived of natural resources and plants and helps little to sustain human life. Since 1998 the border patrol has recorded more than 8000 deaths in the desert as a result of migration according to a newspaper article by the<sup>7</sup> 19<sup>th</sup> in the recent fortification of the border, a steel wall of height 30 feet will be constructed. This construction has not addressed any security concerns of the state but has brought upon itself a humanitarian crisis that is only growing each day. Migrants wanting to pass this wall try to climb and fall resulting in fatal accidents and blunt traumatic injuries suffered by the passer. This activity was accompanied by an increase in the Injury Severity Score (ISS) from 8.3 to 10.4 and an increase in mortality from zero to 16 deaths after border wall construction.<sup>8</sup> Statistics have shown that the death count of

4. Juliana Manjarrés, C.N. (2024) *InSight crime's 2023 homicide round-up*, *InSight Crime*. Available at: <https://insightcrime.org/news/insight-crime-2023-homicide-round-up/> (Accessed: 10 August 2024).
5. *Southwest Land Border Encounters* (no date) *U.S. Customs and Border Protection*. Available at: <https://www.cbp.gov/newsroom/stats/southwest-land-border-encounters> (Accessed: 10 August 2024).
6. Androff, D.K. and Tavassoli, K.Y. (2012) 'Deaths in the desert: The human rights crisis on the u.s.-mexico border', *Social Work*, 57(2), pp. 165–173. doi:10.1093/sw/sws034.
7. Kutz, J. (2024) *Under increasing pressure to migrate, more women are dying at the US-mexico border*, *The 19th*. Available at: <https://19thnews.org/2024/07/women-migrants-deaths-us-mexico-border/#:~:text=Since%201998%2C%20the%20Border%20Patrol,Arizona%20and%20New%20Mexico%2C%20respectively> (Accessed: 10 August 2024).
8. *Why Six countries account for most migrants at the U.S.-Mexico Border* (no date) *Council on Foreign Relations*. Available at: <https://www.cfr.org/article/why-six-countries-account-most-migrants-us-mexico-border> (Accessed: 10 August 2024).

vulnerable migrants has only increased at the border. The migrants seeking shelter are unaware of these challenges, the challenges of desert, wild animals, losing their family in the cold desert of the winters, and the challenge of not ever setting a free foot in another nation, they leave their awfully articulated home country. They embrace all kinds of risks including health hazards to migrate. This type of migration given the conditions of their state will never drop but in fact, will only increase. Them being undocumented brings more legal concerns in their way since they have to pass multiple customs with apprehensions of getting detained. To avoid this route, they might welcome other difficult and dangerous terrains and lose their lives there. Finally, after all this when they reach the border of US-Mexico they are either right outside the wall, and for some who make it to the detention centers and asylums, they are treated so unspeakably that which in itself becomes part of humanitarian concerns. Even after the all-time spike in migrants crossing these borders, the US is not equipped to handle migrants resulting in food scarcity, lack of adequate resources to keep basic human dignity and the treatment by the detainment center officers towards the migrants is anything but humane. Portraying the idea of national security leading to deaths at the border of those vulnerable migrants is not excusable and needs strict attention. The international humanitarian laws state that individuals and populations not participating in hostilities to be treated humanely and the population at the border are only migrants seeking refuge from their devastating situation in their home countries. They are already vulnerable among the vulnerables and the border detention centers should at least make the process not stifling for the migrants.

### **WHAT ARE THE CHALLENGES FACED BY THESE ILLEGAL MIGRANTS AND DO THESE CHALLENGES CONTINUE EVEN IF THEY CROSS THE BORDER SUCCESSFULLY**

The word “illegal” is quintessential to use in this context as most of these migrants are not on paper, that is, they are undocumented due to a variety of reasons such as restrictive border policies of the United States of America. Migrants who take a leap of faith by leaving their homes behind to escape from poverty, violence, or abuse are vulnerable to a series of obstacles that are hazardous to their well-being. Migrants from all walks of life are a part of this global chaos that aspires to cross the border.

#### **Before the border**

Migrants from countries such as Ecuador, Venezuela, Pakistan, Bangladesh, and even India, and people from other developing countries start their land journey from Colombia, the last point in South America before entering Central America. During this transition, they come across the Darien Gap, which is a dense jungle of about sixty miles stretching between

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Colombia and Panama and is infamously known for its tense terrains, swamps, mountains, and unpredictable climatic conditions. The area also has man-eating animals such as crocodiles and venomous snakes. Furthermore, the migrants are prone to encounters with thugs and bandits who extort them for money, sexual favors, and other valuable resources. In 2023, it was reported by Panama's Institute of Legal Medicine and Forensic Sciences that more than half a million migrants were able to cross this while more than fifty died in the Darien Gap. It is to be noted that these numbers are official and only of those whose bodies have been found and identified, which suggests that the actual number may be very high.<sup>9</sup> A graph titled "Monthly Migration Through Panama's Darién Gap" by WOLA Border Oversight illustrates how migration has drastically increased in mid-2021 and has been peaking ever since.<sup>10</sup> Furthermore, a report published by UNICEF illustrates the increase in the number of children crossing the Darien Gap from 2018-2023 and the count is already more than 30,000 within the first four months of January, estimating a hike of 34% in the whole year of 2024 from 2023.<sup>11</sup> In an article published by Missing Migrants Project, it was reported that a total of 686 deaths and disappearances were reported out of which 141 occurred somewhere near the Darien Gap.<sup>12</sup> The next predicament that awaits these migrants is crossing the Mexican Sonoran desert under the scorching heat of the sun with scarce resources in hand. The temperature here is between 110 – 115 F and many migrants suffer from dehydration and heat strokes due to this. The "Prevention Through Deterrence" policy adopted by the United States of America which aims to prevent illegal border crossings through increased border fencing, increased patrols, and higher surveillance has led the migrants to cross the border through such unregulated deserts. The number of deaths reported in the Sonoran Desert has been reported to be more than 7800 between 1998 to 2019 with the actual numbers way higher<sup>13</sup>.

9. Roy, D. (no date) *Crossing the darién gap: Migrants risk death on the journey to the U.S.*, Council on Foreign Relations. Available at: <https://www.cfr.org/article/crossing-darien-gap-migrants-risk-death-journey-us> (Accessed: 07 August 2024).
10. Isacson, A. (2023) *Darién Gap Migration fell in November*, Medium. Available at: [https://medium.com/@adam\\_wola/dari%C3%A9n-gap-migration-fell-in-november-74d953a215b5](https://medium.com/@adam_wola/dari%C3%A9n-gap-migration-fell-in-november-74d953a215b5) (Accessed: 07 August 2024).
11. *Child migration through the Darien Gap up 40 per cent so far this year* (no date) UNICEF. Available at: <https://www.unicef.org/press-releases/child-migration-through-darien-gap-40-cent-so-far-year#:~:text=Based%20on%20the%20trends%20observed,is%20no%20place%20for%20children>. (Accessed: 08 August 2024).
12. *US-Mexico border world's Deadliest Migration Land Route* (no date) International Organization for Migration. Available at: <https://www.iom.int/news/us-mexico-border-worlds-deadliest-migration-land-route#:~:text=Geneva%2FBerlin%2FSan%20Jos%C3%A9%20%E2%80%93for%20migrants%20worldwide%20on%20record>. (Accessed: 08 August 2024).
13. Wolf, J. (2022) *Dying in the desert: How U.S. border policies contribute to migrant mortality*, UCLA. Available at: <https://newsroom.ucla.edu/releases/how-dehydration-leads-to-migrant-deaths-in-desert> (Accessed: 09 August 2024).

### **After crossing the border**

Even if the migrants reach the border after combatting all these challenges, they are detained by the United States Border Patrol. Immediately upon detention, these migrants are questioned regarding their identity and their biometric information such as fingerprints and other photographs. After retrieving this information, they are put into detention centres controlled by United States Customs and Border Protection while they wait for their case to be heard. The time is indefinite, and the migrants are kept in the dark regarding their ongoing cases and are forced to live in dingy accommodations. The detention centres were proved to be overcrowded with minimum resources. In most cases, the children get separated from their parents. For instance, in recent times, the Torrance County Detention Facility in New Mexico has faced allegations after the suicide of a Brazilian migrant of not having safe living conditions and not providing legal counsel to detainees.<sup>14</sup> Joe Biden, the current President of the United States of America claimed that he would bring improvement in the present living conditions of the detention centres but instead, his plans have benefitted only the private prisons for which he was criticized as the government of the United States failed to administer its objective.<sup>15</sup> Asylum is one of the key concepts of protection and stay offered to these migrants if they prove that they were unsafe in their origin country and if they accept so, they are considered refugees and granted stay. The Immigration Courts, which are a part of the Executive Office for Immigration Review, hear the cases of all such migrants and determine whether their stay in the United States of America is valid or not. During the court proceedings, the judge is presented with the facts and background of the person with all other necessary details based on which the judge decides whether the person is eligible to be granted asylum or not.

### **Not Granted the Asylum**

The migrant undergoes a Credible Fear Interview where the asylum officer determines their credibility regarding their fear of prosecution in the origin country. Suppose the migrant fails to provide enough evidence. In that case, they are presented before the Immigration Court where the proceedings of their removal are initiated before the judge where they have a chance to present arguments against his or her deportation. If the judge is not satisfied, the migrant is ordered to be deported to their country of origin.

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14. Lee, M. (2024) *County in rural New Mexico extends agreement with ice for immigrant detention amid criticism*, AP News. Available at: <https://apnews.com/article/new-mexico-migrant-detention-facility-extension-032e5695f94490e6a2ff9b06b2cfc8da> (Accessed: 09 August 2024).
  15. (No date) *Biden vowed to reform immigration detention. instead, private prisons benefited* | Reuters. Available at: <https://www.reuters.com/world/us/biden-vowed-reform-immigration-detention-instead-private-prisons-benefited-2023-08-07/> (Accessed: 09 August 2024).



**Granted the asylum**

If the migrant is successful in proving their fear of persecution in their origin country, the migrant has a high chance of being granted asylum and stay in the United States of America. But it is to be noted that the situation doesn't get any better. The migrant is faced with social, financial, and other problems. They face difficulties while seeking jobs, interacting with other citizens, or even performing day-to-day activities in the States. Terms like "migrant" and "refugee" become a large part of their identity based on which they are socially excluded.

**WHAT ARE THE EXISTING LEGAL MECHANISMS AND HOW CAN THEY BE IMPROVED TO ANSWER THE CURRENT HUMANITARIAN CRISIS**

There are various legal proceedings that migrants and refugees go through which determines their status in the United States of America. On paper, various laws govern the well-being of the refugees and migrants but these laws are prone to loopholes and other flaws which do not make them effective for the purpose for which they were created.

**Immigration and Nationality Act, 1952**

This act was enacted to help the refugees who cannot return to their origin country and were forced to migrate. These refugees are to be helped by the government of the United States of America in terms of resettlement. The government agrees to aid these refugees in terms of employment, housing, language training, legal assistance, etc to integrate into the society of the USA. After a year, the refugees can apply for a green card or permanent residency and can get citizenship after completing five years.

Despite sounding all glamorous, these policies take a long time to follow up. The detention centers have been prone to criticism for not being up to the standards of living conditions. The investigation time taken by the officials to corroborate the story of the refugees has been indefinite. The families get separated and are forced to live in separate detention centers while waiting for their turn to be heard. They are completely alienated from the outside world as the officials do not update them regarding their status. In a news article published by Reckon in 2021, a report by the American Civil Liberties Union or ACLU suggested that the deaths that occurred in the detention of Immigration and Customs Enforcement (ICE) could have been avoided by providing adequate medical assistance. The report claimed that the medical staff had made incorrect diagnoses in more than 88% of the cases with delayed or incomplete treatment. Issues like improper COVID guidelines, destruction of video evidence, lack of documentation, flawed training, and understaffing were also reported. But this is just one of many cases that



have been reported over the internet while others do not even get reported because of the authorities.<sup>16</sup>

The main problem that lies is the laundering of resources. The United States of America is one of the most developed countries in the whole world with a pool of resources and technology. Despite this, the country's refugee system faces the issue due to improper management and unauthorized use of funds. In an article by the Washington Post, it was reported that inadequate funds and the failure of the Senate border bill which would have provided a 6 billion dollars funding to the 700 million dollars shortfall has led the ICE to release detainees because of the incapacity.<sup>17</sup>

### **Refugee Act, 1980**

This act was passed in the United States of America to deal with the refugees which aligns with their domestic law and policy. Though the United States of America was not a signatory to the Refugee Convention of 1951, it incorporated the term refugee as per the convention through the 1967 Protocol and the Refugee Act of 1980. This meant that people who were defined as refugees under this act could seek protection and residency in the United States of America. The United States of America has been dealing with the issue of refugees over the years and sought aid on humanitarian grounds but due to the recent increased influx of refugees and migrants in the past few years, the authorities have found it difficult to deal with it.

Under the presidency of Donald Trump, the "Remain in Mexico" or Migrants Protection Protocol policy was followed and had a significant impact in 2019. According to this, all the refugees whose applications were being processed in the States to grant asylum were directed to stay in Mexico until further notice. Although this policy was terminated, it had an adverse effect as the detention centers in Mexico itself were more dangerous. On humanitarian grounds, it was criticized for not having adequate shelters and the refugees were prone to assaults, kidnappings, and other forms of violence.<sup>18</sup>

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16. Arredondo, V. (2024) *ACLU finds nearly all deaths in ice custody between 2017 and 2021 were preventable*, *Reckon*. Available at: <https://www.reckon.news/news/2024/07/aclu-finds-nearly-all-deaths-in-ice-custody-between-2017-and-2021-were-preventable.html> (Accessed: 10 August 2024).
  17. (No date a) *After border bill failure, ice considers mass releases to close budget gap - The Washington Post*. Available at: <https://www.washingtonpost.com/immigration/2024/02/14/immigration-customs-enforcement-budget-deficit-republicans/> (Accessed: 10 August 2024).
  18. Lee, M. (2024) *County in rural New Mexico extends agreement with ice for immigrant detention amid criticism*, *AP News*. Available at: <https://apnews.com/article/new-mexico-migrant-detention-facility-extension-032e5695f94490e6a2ff9b06b2cfc8da> (Accessed: 09 August 2024).

When current President Joe Biden came into power, he claimed to make the situation better by taking a more humane approach to dealing with the refugees. This has been true to some extent as in 2022, through his administration's efforts, the Supreme Court of the United States of America ruled against this policy and removed it. However, the situation has not gotten any better because of the criticism of the public over granting asylum to the refugees more easily. The citizens have shown skepticism against Biden's policies as it would create a situation of scarcity in the United States of America.

### **Is there any way to reduce the crisis without agitating the citizens?**

What can be suggested in this paper is that the time taken for the investigation should be less with efficient administration. It can also be attempted that the authorities should not separate families unless required. While the migrants and refugees are waiting for their turn, they should be kept in detention centers that have adequate resources with proper planning and execution. The staff that is recruited for these centers should be properly trained to make any critical decisions both on grounds of the States' policy as well as humanity. Immediate action is to be taken against those who exploit the migrants based on their vulnerability. Relocating them to such places where they do not feel any exclusion and creation of jobs for them. This employment would only boost the economy of the United States of America.

### **Universal Declaration of Human Rights (UDHR)**

Universal Declaration of Human Rights (UDHR) is another milestone document of the United Nations as a common standard of achievement for all peoples and all Nations. This was proclaimed in 1948 in Paris. This document sets out articles to achieve human rights globally. Article 13 of UDHR states that:

- Everyone has the right to freedom of movement and residence within the borders of each state.
- Everyone has the right to leave any country, including his own, and to return to his country<sup>19</sup>

In this context, a migrant has the right to be treated with dignity and enforce their human rights. U.S.A. being a signatory to the UDHR is bound to follow its regulations. Another article pertaining to migrants is Article 14 of UDHR, which states that:

- Everyone has the right to seek and to enjoy in other countries asylum from persecution.

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19. *Universal declaration of human rights*, UNITED NATIONS, <https://www.un.org/en/about-us/universal-declaration-of-human-rights> (Accessed: 10 August 2024).

- This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.<sup>20</sup>

The first part of Article 14 lays down that, people facing persecution have the right to seek asylum in other countries. As laid out previously, the migrants at the US-Mexico border are ill-treated and face hostility and threats of losing their lives. In such conditions, the US making stricter border control policies is only aggravating the situation of the migrant's seeking asylum and haven in the US. The violence in the listed six countries to the point of making themselves rank the highest in homicide rates makes the people experience terror in their own countries, as such taking refugee in another country due to their border control measures now also makes it difficult for them to seek any refugee and makes them a victim of gross humanitarian crisis.

The strict border policy of the US should be in line with the immigration policies keeping in mind the humanitarian laws and the migrants and allow them a dignified process of transitioning in or have humane detention centres to keep them.

In a news by The Texas Tribune, *"A year ago, 40 men died in a detention center fire in Ciudad Juárez, Mexico. An examination by The Texas Tribune and ProPublica shows that it was the foreseeable result of landmark shifts in U.S. border policies."*

In this article, the status of detention centers for immigrants has been described as *"A 31-year-old Venezuelan husband and father, felt immediately nauseated by the smells of sweat, urine, and feces when Mexican guards ordered him into the cinder block cell in the border city of Ciudad Juárez."*<sup>21</sup>

Through this, we can see how stricter policies of the US Border Control only make it difficult for migrants and shape their lives in the worst way possible.

### **Department of Homeland Security and US Customs and Border Protection**

The Homeland Security Act of 2002 created the US Department of Homeland Security which looks into securing and managing borders of the US spread across 7,500 miles of land border with Canada and Mexico and other water bodies. The official website of Homeland Security states that: *"Protecting our borders from the illicit movement of weapons, drugs,*

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20.    ibid.

21.    Keemahill, D. and Trevizo, P. (2024) *How shifting U.S. policies led to one of the deadliest incidents involving immigrants in Mexico's history*, *The Texas Tribune*. Available at: <https://www.texastribune.org/2024/05/01/us-immigration-asylum-policy-juarez-fire/#:~:text=A%20year%20ago%2C%2040%20men,shifts%20in%20U.S.%20border%20policies> (Accessed: 10 August 2024).

*contraband, and people, while promoting lawful entry and exit, and lawful trade, is essential to homeland security, economic prosperity, and national sovereignty.*

*U.S. Customs and Border Protection (CBP), a DHS component, is one of the world's largest law enforcement organizations and the United States' first unified border agency. CBP applies a comprehensive approach to border management and control, combining customs, immigration, border security, and agricultural protection into one coordinated and supportive activity.*

*Other component agencies like U.S. Immigration and Customs Enforcement and the U.S. Coast Guard protect our borders from the illicit movement of weapons, drugs, contraband, and people, while promoting lawful entry and exit, and lawful trade, is essential to homeland security, economic prosperity, and national sovereignty. The Federal Emergency Management Agency provides support for processing and provides resources to local governments”<sup>22</sup>*

The Border Protection force is to ensure the Protection of the state from illicit drugs, and weapons among others. It was the U.S. Customs and Border Protection (CBP) that encountered 2.5 million migrants at the US-Mexico border. The website also has a *Migration and Border Security Strategy* tab wherein it has formulated a six-pillar strategy to address the migration problem. Them being:

- surging resources.
- increasing efficiency to reduce strain on the border
- administering consequences for unlawful entry or irregular entry such as a five-year bar on admission.
- bolstering the capacity of NGOs and working with state and local partners.
- targeting and disrupting networks of cartels and smugglers.
- and working with our regional partners to deter irregular migration<sup>23</sup>

However, even after putting these policies in place, no actual relief is sought for the migrants who suffer inhumane treatment at the border and further from the detention center officers. The death rate of migrants is rising at the border and further rising with the numbers of migrants coming from many other parts of the world. Biden government has implemented rules strictly limiting entry to the US asylum system. This has yet again led to the cost of human lives since people have to wait more than nine to get one entry pass of the 200 allowed.

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22. Border security: Homeland Security, U.S. Department of Homeland Security, <https://www.dhs.gov/topics/border-security> (Accessed: 10 August 2024).

23. *ibid.*

## CONCLUSION

The task of managing the migrants and refugees does not align with the foreign policy of every country. But what needs to be understood is what pushed these migrants and refugees to leave their origin country in the first place. This is because of the lack of opportunities in their home countries because of the political instability, conflict, and gross violation of human rights. Most of the people migrating to the United States of America belong to developing and underdeveloped countries which have faced over the years a lot of violence and social disorder. It is because of this that were pushed to the length where they had to give up their resources, assets, and social identity to escape from this predicament and move to a place to survive. The main issue here lies with the administration which fails to manage the well-being of its citizens. The migrants and refugees are in a country that pushes itself to a state of anarchy and needs legal intervention and support from their neighbouring countries to act as their lifeboats.

## **LEGAL FACETS OF PANDEMIC, HUMANITARIAN CRISIS, AND GLOBAL EMERGENCIES FOR SUSTAINABLE FUTURE**

Mridusha Chetry<sup>1</sup>

Bhavya Praveen Pai<sup>2</sup>

### **INTRODUCTION**

Looking at the cases by recent events such as the COVID-19 pandemic, the Syrian refugee crisis, and climate related incidents, such occurrences have highlighted the inability and dire need for more flexible and antifragile legal systems. These events put a strain on public health and humanitarian resources, but also the functioning of governance and international law, and sustainability, and the narrative in developing for development. The way the law has responded to these emergencies has often been inadequate as it has done a poor job of engaging with the real problem or any anticipation of what might come next.

These global risks are interconnected in that they are escalating the already complicated circumstances for the legal community. For example, an epidemic can cause an economic downturn or make resources harder to come by, which could lead to social unrest, which might in turn cause a ripple effect, and make an even bigger global emergency and trigger an even larger humanitarian crisis. Similarly, global emergencies, either environmental or geopolitical, can force communities to face movement, destabilize economies or ruin social connections. These cascading effects lead to a need for a re-examination of how to construct and use legal systems, to make them changeable, inclusive, and lasting.

The globe is confronting unprecedented global dangers, as pandemics, global catastrophes, and humanitarian crises become more common and complicated. These issues are not isolated; they are inextricably linked and frequently intensify each other. Pandemics, for example, COVID-19, can disrupt economies, strain healthcare systems, and cause widespread social and political unrest. Similarly, humanitarian emergencies caused by conflicts, natural catastrophes, or climate change can foster disease transmission, complicating recovery efforts. These interrelated challenges have a significant impact on sustainable development. As these risks grow in number and intensity, they threaten to derail progress toward global development goals, exacerbate existing inequities, and generate new vulnerabilities. The evolving landscape

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of global risks demands a more integrated and holistic approach to legal frameworks, one that not only addresses the immediate challenges posed by these crises but also promotes long-term resilience and sustainability.

By utilizing innovative legal practices, we may forge a future that not only tackles the pressing issues of the day but also establishes the groundwork for a more equitable and robust global community. This study aims to contribute to this ongoing conversation by exploring the legal dimensions of global crises and offering insights into how legal frameworks can evolve to meet the demands of a rapidly changing world.

## **LEGAL FRAMEWORK FOR PANDEMIC RESPONSE**

### **Rejecting the dichotomy between public health and human rights**

The pandemic has resurfaced the importance of considering the relationship between public health objectives and individual rights. Governments across the world have imposed extraordinary restrictions on movement, assembly, and economic activity to protect public health. As a result, there was a fundamental tension between protecting public health and respecting human rights.

### **Core Principles of International Law**

The legal framework for public health emergencies centers on principles like proportionality, necessity, and non-discrimination<sup>3</sup>. These principles, found in various international human rights documents, guide governments in balancing public health measures with individual rights.

**Proportionality:** Restrictions must match the public health threat. This means carefully evaluating the risk's nature and severity, the measures' effectiveness in addressing the risk, and how these measures impact human rights.

**Necessity:** Public health actions should be needed to achieve their goal, with no less restrictive alternatives available.

**Non-discrimination:** Restrictions must be applied equally without discrimination based on race, religion, ethnicity, gender, or other grounds.

### **The Human Rights Challenge**

COVID-19 brought forth complex human rights challenges. Mandatory lockdowns & restrictions on movement were essential to slow the virus's spread but severely impacted freedoms of movement, assembly, and livelihood. Access to healthcare (including testing,

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3. Elgaronline, <https://www.elgaronline.com/view/jghl/1/1/article-p122.xml>, (last visited July 26, 2024)



treatment, and vaccination) became crucial.<sup>4</sup> Socioeconomic inequities were accentuated as well.

### **Case Study: COVID-19 in India**

India's response to the COVID-19 pandemic serves as a striking example of the difficulties in balancing public health & human rights<sup>5</sup>. The nationwide lockdown initiated in March 2020 aimed at halting the virus's spread, yet it caused notable economic distress and human suffering. Migrant workers were particularly affected. Furthermore, the government's approach during the pandemic sparked concerns regarding issues such as data privacy and freedom of expression.

During the crisis India leaned towards the Disaster Management Act 2005 to encourage its response. The uniqueness of this act posed challenges while implementing, however the act had broader framework for emergency countermeasures.

During this time the concerns regarding data privacy and surveillance were at the peak. At the same India's drug manufacturing capability played a major role in the contribution of medicines when there was a global shortage of medicines.

### **Balancing Act**

Composing an appropriate balance between public health and human rights remains complicated and is an ongoing criticism. It is important to promote public participation in decision making. Ensuring Fairness and allegiance. It requires a right based approach which genuinely promotes and prioritizes the protection of vulnerable groups. It is essential to provide robust system for independent evaluation and conflict resolutions.

### **The Role of International Organizations**

The World Health Organization (IHR) stands as the leading global public health agency, entrusted with the mission to promote health, ensure global safety from health, & serve the vulnerable<sup>6</sup>. The essential role of WHO which includes the regulation of global health responses, providing technical guidance, and setting morals and standard. In spite of all the mentioned merits, the pandemic indicated the challenges faced by the WHO, which is the political interference, lack of resources, and the requirement of a legitimate power.

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4. Siani, A. A Review of Global Inequities in COVID-19 Vaccination Access and Uptake. In: Son, B.W.K. (eds) *The Landscape of Global Health Inequity*. Integrated Science, vol 22. Springer, Cham.

5. <https://www.keaipublishing.com/en/journals/global-health-journal/>

6. Heymann, D.L., Prentice, T. and Reinders, L.T., 2007. *The world health report 2007*

The United Nations system also considerably donated to pandemic response through its various agencies and programs.<sup>7</sup> Organizations like UNICEF, the World Food Program (WFP), and the Office for the Coordination of Humanitarian Affairs (OCHA) offer crucial support in areas such as immunization, nutrition, and humanitarian assistance.

### **The International Health Regulations (IHR)**

The International Health Regulations (IHR) of 2005 form the primary legal framework for global health security. They outline a system for countries to detect, report, & respond to public health emergencies of international concern (PHEICs). Though essential in enhancing global health security, the COVID-19 pandemic exposed several shortcomings within the IHR.

The efficacy of the IHR was impaired by:

- Uneven implementation: Differences in countries' capacities to enforce the IHR.
- Insufficient resources: Limited funding for both national and global health security systems.
- Weak enforcement mechanisms: Lack of robust sanctions for non-compliance.

Limited scope: The IHR largely focus on infectious diseases with few provisions for other public health emergencies.

### **The Need for Reform**

The pandemic being Covid-19 has elaborated the requisites for a stronger and more adjustable legal framework for pandemic preparedness. Some of the key areas for plausible reform include strengthening of authority, Enhanced funding, boosted monitoring and early warning systems, wide varieties of opportunities, and progressed information sharing. All these mentioned requisites are important and has its own unique characteristics.

### **Legal Innovation in Pandemic Response**

The rapid response to pandemic was a matter which has to be disused thoroughly. The COVID-19 pandemic requisites expeditious & innovative legal responses to address unprecedented challenges<sup>8</sup>.

### **Expedited Approval Processes for Vaccines and Treatments**

The grave necessity for a safe and essential vaccines and treatments boosted the development of expedited approval process. Regulatory agencies implemented a strict protocol to conduct

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7. Leal Filho, W., Brandli, L.L., Lange Salvia, A., Rayman-Bacchus, L. and Platje, J., 2020.

8. <https://journals.sagepub.com/doi/full/10.1177/2053951720976680>

clinical trials and other required procedures while maintaining a strict safety standard. Public health needs and patient safety was important and has to be balanced accordingly.

Operation Warp Speed was an operation initiated by the United States which illustrated a large-scale public-private partnership which directed at accelerating vaccine progression and production. Another important process was the conditional approvals, which many countries introduced in regard to expedite permission to medical initiatives while needing the ongoing safety monitoring.

### **Legal Frameworks for Data Privacy and Contact Tracing Technology**

The use of data privacy and contact tracing technology has played a major role in containing the virus. Nevertheless, this uplifted the complex legal repercussions which is related to data gathering, storage, sharing and security.

- Data privacy regulations: In the situation of public health emergencies, the current data protection laws were put into test. It was essential to maintain careful consideration to balance privacy rights with the necessity of contact tracing.
- Emergency powers: Governments often invoked emergency powers to collect & process personal data for public health purposes. These powers' legal basis & limitations became subject to scrutiny.
- Transparency and accountability: Ensuring transparency in data handling and establishing robust accountability mechanisms were crucial to building public trust.

### **International Cooperation on Intellectual Property Rights and Equitable Vaccine Distribution**

The equitable distribution of vaccines & other medical countermeasures emerged as a critical challenge. Intellectual property rights (IPRs) played a significant role in shaping access to these essential goods.<sup>9</sup>

TRIPS flexibilities: Countries explored ways to utilize flexibilities within the WTO's TRIPS agreement to increase access to affordable medicines.

Compulsory licensing: Some countries considered compulsory licensing as a means to authorize the production of generic versions of patented medicines.

Technology transfer: Encouraging technology transfer to developing countries was crucial for building local manufacturing capacity.

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9. <https://link.springer.com/article/10.1007/s40319-021-01041-1>

Vaccine equity initiatives: International collaborations such as COVAX aimed to ensure equitable access to vaccines globally.

The COVID-19 pandemic has shown the vital of legal innovation in tackling public health emergencies. By learning from these experiences, it is possible to develop more robust & adaptable legal frameworks for future pandemics.

## **LEGAL INNOVATION IN A GLOBALIZED WORLD**

Globalization has significantly altered the global landscape, bringing both opportunities & challenges for legal frameworks<sup>10</sup>. The interconnectedness of economies, and cultures calls for innovative legal responses to emerging issues.

### **The Impact of Globalization on Law**

Globalization has sped up the pace of legal change. The basic tendency being transformative legal issues which will be looked up in investments, disputes etc. Merging of legal system which helps in effortless international trade and commerce. Introducing new legal arenas and the challenges to state sovereignty.

### **Legal Innovation in a Globalized Context**

Legal innovation is vital to address the challenges and opportunities brought by globalization by international cooperation which will help to tackle global challenges such as climate change, pandemics and terrorisms. Dispute Resolution is a bit more efficient and productive dispute resolution mechanism which includes international arbitration and mediation. Regulatory Cooperation which Enhances cooperation among regulatory bodies to handle issues like financial regulation, consumer protection, and environmental protection. Paris agreement is one example for legal innovation which was a global effort to tackle climate change.

### **Challenges and Opportunities**

Globalization brings about opportunities for legal innovations but at the same time it presents challenges which is the enforcement challenges, digital divide and sovereignty concerns. Legal innovation is key to navigating global complexities. By adapting to new technologies, fostering international cooperation, and adapting to changing circumstances, the legal arena can help create a more just and equitable world order.

### **Strengthening International Cooperation**

Global emergencies like pandemics, climate change, and financial crises show the limitation of unilateral national responses which needs sudden collective action.

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10. <https://www.jstor.org/stable/4140814>

The unilateral approach falls short for complicated global issues. For instance, a country's response to a pandemic can be less effective if the virus spreads from other nations.

Substantial international collaboration is required to address these challenges which is sharing resources, knowledge, and technology. Vaccine development can be boosted by agreements on resource sharing. Research initiatives which are collaborative can accelerate the solutions to global problems.

International organizations play a crucial role in promoting cooperation. The United Nations, with its specialized agencies, provides a platform for multilateral diplomacy and coordination. Regional organizations also contribute significantly. For example, the European Union has shown how regional integration can address common challenges.

However, challenges remain. Power imbalances among nations, differing priorities & rising nationalism can hinder cooperation. Building trust and confidence among nations is vital for effective collaboration. Also, ensuring fair distribution of benefits and burdens is key to sustaining cooperation.

### **Role of Domestic Law & Policy**

Domestic law & policy lay the groundwork for a nation's reaction to global emergencies. Aligning national frameworks with international human rights obligations bolsters a country's ability to safeguard citizens and aids in global efforts.

Strengthening domestic legal frameworks means incorporating international human rights standards into national laws, policies, and practices<sup>11</sup>. This includes ratifying treaties, enacting domestic legislation to implement treaty obligations (and setting up effective enforcement mechanisms). Such alignment ensures that human rights are maintained even during crises, preventing the regression of hard-won gains.

Additionally, solid domestic legal frameworks are vital for building resilience. Social protection systems—such as unemployment benefits, healthcare coverage, and disaster insurance—help mitigate the impact of emergencies on vulnerable groups. These systems act as safety nets, stopping further marginalization and potential social unrest.

Investing in disaster preparedness and response through legislation is essential. This means establishing early warning systems, creating emergency response plans & allocating sufficient resources for disaster management. Laws governing the procurement of essential supplies, mobilization of resources, and coordination among government agencies are critical for effective crisis management.

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11. <https://heinonline.org/HOL/LandingPage?handle=hein.journals/washlr83&div=21&id=&page=>

### **Fostering Public Participation in Decision-Making**

Public participation is considered as the key to building trust and legitimacy in government responses to any crisis. However, it is necessary to incorporate inclusive and participatory legal procedures to ensure that diverse views are considered.

The legal frameworks which promote fairness and access to information are fundamental for public participation. Citizens can access the governmental data and hold the officials accountable by enabling the right to information laws.

Legal tools play a major role in empowering the citizens to participate in the development and implementation of crisis preparedness. In regards, community-based disaster management plans can be carried out by participation of the same. However, the law supports these initiatives by presenting thorough guidelines for the public and protecting their rights as participants.

### **LEGAL RESPONSES TO HUMANITARIAN CRISES**

#### **Safeguarding at-risk population in the crises**

Humanitarian crises on a whole have a big impact on vulnerable groups such as the children, the elderly, migrant workers, refugees, and the internally displaced persons (IDPs).<sup>12</sup> Humanitarian crises on a whole have a huge impact on vulnerable groups such as the children, the elderly, migrant workers, refugees, and the internally displaced people. These groups of people face numerous challenges during these unannounced emergencies. The elderly and the children need more help because they rely on others to care for them. The refugees and the displaced people too might not be able to get the basic services in their daily life or legal protection. International organizations and international laws include organizations like the UN with the Geneva Conventions and human rights agreements which require countries to protect these vulnerable groups in emergencies. Countries at the other end must make sure that people can get food, water, toilets, and places to live. The UN Guiding Principles on internal displacement spells out what countries should do to protect, and help displaced people (IDP) wherein the 1951 Refugee Convention says countries must protect the refugees. Protection of women and children has also been signified in such emergencies by organizations such as CEDAW, and CRC. Nevertheless, many barriers need to be surmounted to guarantee that such rights are respected in complicated humanitarian circumstances. States could lack both resources and political will to provide adequate protection or may prioritize other issues over the needs of impoverished groups. A deliberate targeting of civilians, especially marginalized communities during war zones, often makes it more difficult for humanitarian assistance delivery and respect for international legal rights. Moreover, it exacerbates their situation because of lack of accountability mechanisms

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12. Bradley, M., 2016. Protecting civilians in war: the ICRC, UNHCR, and their limitations in internal armed conflicts. Oxford university press.

for abuse messages often directed towards them in form of impunity towards violations committed against them. This requires that strong legislative frameworks as well as efficient implementation mechanisms and international cooperation should be part of efforts aimed at protecting vulnerable populations in similar situations.

### **Dealing with Discrimination in Humanitarian Responses**

One way this can manifest itself is through discrimination based on race, religion or belief system like gender or disability within humanitarianism itself. Prejudice of this kind may lead to unequal allocation of resources, denial of services or even targeted violence against certain groups within communities. The existing legal systems prohibit discrimination in humanitarian aid including global human rights law and humanitarian law following documents like the Geneva Conventions, the International Covenant on Civil and Political Rights (ICCPR), and the Universal Declaration of Human Rights (UDHR) which all uphold the idea of non-discrimination.

Fair access to assistance is a cornerstone of effective humanitarian intervention. Discriminatory practices not only compromise the rights of affected groups and increase division and tension, but also hinder humanitarian efforts. It is the responsibility of the full range of humanitarian actors, e.g. governments, non-government organizations (NGOs) and international organizations, to ensure that aid is distributed equitably, in accordance with need.

Common examples of discrimination clearly illustrate how detrimental prejudiced humanitarian efforts can be. In 1994, with respect to the limited aid to Rwanda during the genocide, the ethnic prejudices in the genocide were a major factor with certain factions of the population receiving assistance, while others did not. After Hurricane Katrina in 2005, racism and socioeconomic inequalities meant there was unequal access to relief. Those in poorest areas, including the African American neighborhoods, were disproportionately affected by Katrina. Both examples demonstrate the importance of legislative and policy-based mechanisms to prevent and combat discrimination in humanitarian aid.

### **Legal innovation in response to humanitarian crises**

Legal innovation as the name suggests ‘innovation’ has unveiled new procedures and powers specifically designed to resolve the distinct challenges encountered in responding to humanitarian emergencies<sup>13</sup>. One of these is drafting legal norms that ensure safe passage of humanitarian materials in conflict-affected regions. If formal legislation of this type exists and is applied, then humanitarian donations can reach affected populations notwithstanding obstacles imposed by parties to the conflict. For example, the UN Security Council has in some cases

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13. Schuemer-Cross, T. and Taylor, B.H., 2009. The right to survive: the humanitarian challenge for the twenty-first century. Oxfam.



required that the parties to a conflict mandate and facilitate the safe and unhindered passage of humanitarian supplies.

A second area of legal innovation involves creating systems of accountability for international human rights abuses during humanitarian emergencies. There is a need within contemporary international law for mechanisms to prevent and prosecute international crimes, such as war crimes, crimes against humanity and genocide. This task falls to the disciplinary regime of international criminal law—whether it be prosecutions brought to the International Criminal Court (ICC) or some other international criminal justice entity.

Finally, legal innovation manifests in the adaptation and exploitation of information technology for humanitarian purposes. For example, blockchain technology has started to be used to provide traceability and transparency in humanitarian assistance, excluding corruption and ensuring that resources are sent to the intended beneficiaries. This is just one illustration of how legal innovation has incorporated new technologies to improve humanitarian assistance. There are also other examples of how international humanitarian law is adapting to new developments. Some normative developments are taking place that include addressing human rights issues and rendering humanitarian assistance to those in need, such as the concept of climate refugees or persons with disabilities in humanitarian operations.

The Syrian Refugee Crisis: This crisis was the commencement of the straining of international law and policy. Burden-sharing among states remains uneven with some countries shouldering a disproportionate amount of responsibility. The International refugee law, of 1951 refugee conventions, has been dragged as much as it can. The law offers a large variety of protection but its applicability to large scale refugees has been limited and it's a topic to debate.

The crisis also emphasizes the significance of international cooperation and solidarity. Nevertheless, there is still a considerable gap due to the lack of a comprehensive global approach to refugee protection

## **LEGAL INNOVATION'S ROLE IN BUILDING A SUSTAINABLE FUTURE**

### **Laws Regulating the Safe Transit of Humanitarian Supplies**

Humanitarian crises in conflict areas, where access or permission to access civilians of that state is often restricted or denied, the most important issue is the safe passage of these citizens within their own state. Therefore, it is important to have a legal framework in place for humanitarian actors to save the lives of these civilians and actors in the system for more than just the crisis relief phase. Humanitarian law is important for the immediate relief of the civilians and the long-term support of the civilians.

SDG 3 stating Good Health and Well-Being is directly related to the implementation of the legal frameworks for safe passage as it ensures that medical assistance can access communities in need, in order to reduce morbidity and mortality rates. It also supports SDG 10 which states Reduced Inequality by ensuring that marginalized and vulnerable populations have equal access to resources that can save their lives, regardless of their physical location or political circumstances. In addition, they support SDG 16 that stands for Peace, Justice, and Strong Institutions by calling for adherence to international humanitarian law standards, which first promote the rule of law and second, reduce the likelihood of new conflicts and violence.

However, the success of these legal frameworks will depend on the commitment of governments or non-State actors to conform to the international agreements. International humanitarian corridors require robust international collaboration, oversight, and enforcement in order to maintain their integrity and functionality. In addition, the legal frameworks need to prepare for new challenges and areas, for example, cyber threats to humanitarian action or the potential militarization of the routes on which humanitarian assistance can be distributed, under which humanitarian law would need to adapt and continuously innovate.

### **Models of Accountability for Human Rights Violations**

Humanitarian crises often involve very serious human rights violations, such as genocide, crimes against humanity, and war crimes. It is critical to have accountability mechanisms in place to ensure that the persons responsible are put on trial and the victims receive restitution. Therefore, international criminal law, as seen through the ICC process, has the role of deterring such acts and giving a legal avenue for justice.

The importance of accountability systems in humanitarian response with respect to SDG 16, which is committed to peace, justice, and strong institutions, is paramount. Systems of accountability are significant in humanitarian response for a number of reasons. The efforts to hold perpetrators of crimes accountable not only allows for breaking the cycle of violence, restoring confidence in the public towards legal systems, it also has a longer-term impact on long-standing peace and stability. Taken at another level of analysis, accountability efforts in post-crisis urban and rural communities contribute to creating resilient communities. This is a long-term contribution to SDG 11, which represents Sustainable Cities and Communities.

There are still several challenges to consider when creating or measuring accountability systems. Although justice is paramount it can be easily thwarted by the political landscape, a lack of finances, and the complexity of the global legal system. Thus, there is room for on-going legal innovation to bolster the independence of legal mechanisms in humanitarian practice.

Improving public engagement and authority over decision-making is an important facet of legal innovation in humanitarian action. Legal innovation as it applies to humanitarian action,

can promote wider reflection and transparent processes in tying the legitimacy and effectiveness of humanitarian decision-making to enabling affected populations to participate in the decisions that affect them. Legal frameworks that are participatory may be better suited for post-crisis strategies as they will almost certainly produce more adaptive and context sensitive results, such as community consultations and participatory planning.

SDG 16 demands the establishment of effective, responsive and inclusive institutions at all levels, which at face value submits that inclusive decision-making is necessary. Moreover, legal innovation could assist with social cohesion, trust-building, and ensuring that humanitarian solutions reflect the actual needs and aspirations of affected populations when communities are included in governance processes. As such, this strategy also aligns with SDG 10 by reducing inequalities to resources and services and SDG 3 by promoting health and well-being through Community led health efforts.

Moreover, more inclusive decision-making can lead to more outcomes that are sustainable and durable. Working with an example of disaster response plans, local communities can be included in the development and execution stages of the plans and make sure these plans look environmentally sustainable and culturally appropriate. This is to help the communities to be more sustainable and resilient in the long term and to be effective in the short term.

### **The Role of Legal Innovation in Making a Sustainable Future**

For the resolution of both current and future problems, legal innovation in humanitarian response is crucial. By creating new legal instruments and structures, the international community can make forward progress in promoting the protection of marginalized communities, ensuring accountability for human rights violations, and adapting to new and future emergencies to collectively achieve the SDGs. Specifically, efforts to achieve Goals 3, 10, 11, and 16 will be crucial for these objectives.

As we are looking to ensure that humanitarian responses lead to longer-term sustainability and equity and are effective in the short term, legal innovation must continue. Law is only going to get more important in creating a sustainable world for the future and can only continue to increase in importance as we face more intertwined and complex global challenges. Law will only continue to grow as an essential part of establishing transformative social change and help the world better prepare for the needs of our future.

### **CONCLUSION**

No amount of emphasis could be given to the importance of ongoing legal innovation considering the increasing complex global problems that the world faces. The dynamic, global nature of pandemics, humanitarian catastrophes, and emergencies requires the development of

legal frameworks that are thorough yet adaptable; flexible yet model; and alert to new hazards. The typical unmanageable nature of these emergencies highlights a need for innovative solutions to fill in the gaps left behind by traditional legal frameworks.

It is necessary to re-imagine and re-vamp our existing legal frameworks to respond better to a rapidly changing world. This requires a continuous commitment to research, evaluation, and the development of new legal instruments, strategies, and laws. It is crucial for legal academics, practitioners, and policymakers to work together in order to ensure that legal systems adjust to global realities. The Sustainable Development Goals (SDGs), particularly SDG 3 (Good Health and Well-Being), SDG 10 (Reduced Inequality), SDG 11 (Sustainable Cities and Communities), and SDG 16 (Peace, Justice, and Strong Institutions) cannot be realized without ongoing legal innovation. We can contribute to providing legal frameworks that can better manage the challenges presented by global crises, protect vulnerable groups, and contribute to sustainable development by advocating for continued legal innovation.

The case studies mentioned in the paper pose a legal landscape during global emergencies. The responses must balance among public health, human rights and economic consideration. The major lessons which are learnt is to have a flexible legal framework, strong international relations, protection of human rights, data privacy and protection, building resilience. The COVID-19 pandemic and the Syrian refugee crisis gives a conclusion on effective legal responses during global emergencies.

A comprehensive approach is needed to build a resilient and sustainable future given emerging crises such as pandemics, humanitarian disasters, and global emergencies. Since no country is able to address these crises alone, it is necessary to strengthen international cooperation. Legal frameworks are essential for establishing comprehensive responses that are governed, fair, and globally coordinated to ensure international cooperation is based on equitable terms and conditions for resource sharing, debt forgiveness, and joint research efforts.

Moreover, addressing the disproportionate exposure and vulnerability of marginalized communities in crisis contexts depends on prioritizing social justice in legal frameworks, assuming they are accessible and reflective of human rights protection. Legal frameworks must address human rights, secure equitable resource and service access, and establish rights violations sanctions. By responding to immediate needs through a law and social welfare lens, this strategy can facilitate social stability and harmony on a long-term basis. An additional element is the necessity of involving the public in resilience building. The laws and policies that govern resilience must ensure transparency, inclusion, and public participation to ensure the public is included at every phase of crisis response in proposing and enacting laws and policies. This is not only a way of building the foundation for a more cohesive social order, but

also ensuring the appropriateness and acceptance of legal remedies, ameliorating the readiness of society to encounter future adversity.

In the end, legal innovation is a significant driver for all of these tasks. Responding to crises within the context of rapidly transforming legal frameworks is an opportunity to generalize resilience to a broader spectrum of areas, beyond the COVID-19 pandemic and other global emergencies. Legal innovation is not tactical or short-term, but a pathway to create a more just, sustainable, and equitable global society.

**CHAPTER - 4**  
**TRANSFORMATIVE CONSTITUTIONALISM,**  
**TECHNOLOGY AND SOCIAL MEDIA**  
**ACTIVISM**





## **SOCIAL MEDIA ACTIVISM: AN EFFECTIVE TOOL OR A DISTRACTION**

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### **INTRODUCTION**

Social media is a type of digital communication that uses various media platforms, such as websites and mobile applications, to increased interactions and engagement between users. These platforms enable users to share content, connect with others, and participate in discussions in real-time, creating a dynamic and interactive communication environment. These platforms build an easy to use digital interface in which users can easily and readily share their personal interests, experiences, and details about their everyday lives with others.

There are diverse digital spaces that leads the users to create, share and interact with a wide range of user-generated content, creating increased connectivity and information exchange among individuals and communities.

Social networking sites are a prominent example of social media platforms that enable a wide range of interactive features, such as media sharing, profile updates, and the ability to connect and join online communities. These platforms facilitate social interaction, information exchange, and the formation of virtual relationships among their users.

Every individual is motivated towards participating in virtual communities in exchange for various rewards, including friendship, appreciation, knowledge, and a sense of active participation, leading to crowd wisdom, financial support, collective creation, as well as various other rewards and benefits such as increased social connections, access to specialized knowledge and expertise, opportunities for collaborative problem-solving, and a sense of belonging to a larger community.

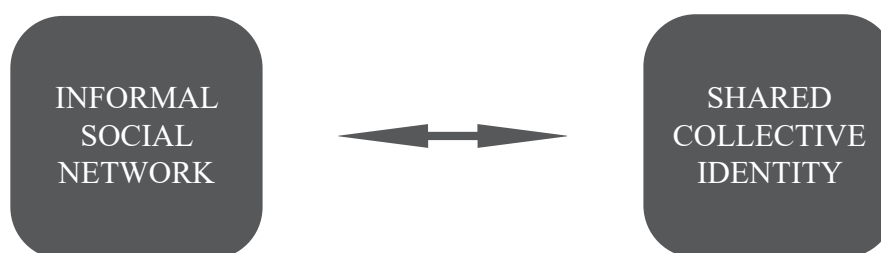
These popular statements exist as a tangible substance we call 'public opinion' within the circle we refer to as the 'public sphere'. The significance of public opinion is undeniable: governments rise, and fall based on the whims and sentiments of the citizenry, and policies enacted by those in power are viewed as either statement of pure reason or lack of good sense depending on their perceived alignment with the prevailing attitudes and beliefs of the populace.

### **ROLE OF SOCIAL MOVEMENTS IN SOCIAL MEDIA ACTIVISM**

Social media platforms may be necessary for the constitution and maintenance of two key aspects of social movements: firstly, being the organisation of informal social networks and

secondly, the construction of shared collective identities among participants. These digital spaces can facilitate the coordination of activities, the spreading of information, and the bringing in of a feeling of oneness in the community and common purpose among members of a social movement.

Social media groups are digital catalyst — strong, determined and unconventional leadership structures that play an instrumental role in the guiding and facilitation of collective efforts and initiatives through the use of digital tools and platforms. These groups often serve as influential and innovative catalysts, leveraging the connectivity and collaborative potential of social media to mobilise, coordinate, and direct the efforts of diverse communities towards shared goals and objectives.



*FIG 1*

Social movements take help of social media to inspire the participants, getting them to engage in political talk and actions beyond the digital world. They shape public opinion by sparking discussions around political issues, allowing participants to share their ideas and perspectives. Social media gives marginalized groups a platform to voice their concerns and amplify their voices, democratizing access to information. Social movements use social media as a tool to quickly launch campaigns, effectively riding on current events to grab attention and support. Participants in social movements often practice consumer activism, boycotting or supporting products for political reasons, which pressures companies to address social issues. Social media encourages small-scale actions that contribute to a larger cause, though there's debate about their effectiveness. Social movements can build communities around shared causes, creating unity and a collective identity among participants. They can counter traditional media narratives by providing alternative viewpoints and coverage of underrepresented issues. The discussions started on social media can spill over into traditional political discourse, swaying policymakers and public agendas. Social movements use social media to challenge existing political norms and practices, pushing for change through grassroots activism.<sup>1</sup>

## THE LEARNING COMMUNITY THEORY

According to this theory all the engagement in social media could be extended to all members of the higher education institution in the learning community. Therefore, despite of the culture

1. *Supra notes 8,*

the interests of various groups, the learning community has the certain key characteristics such as the influence, shared events, membership and fulfilment of needs and emotional connections among the members.<sup>2</sup> Following is the participation theory explain via four elements.

The First Element: Loyalty to the Group: - The participants in a learning community must feel a sense of loyalty and belonging to the group.

The Second Element: Provide Opportunity: - It must provide an opportunity for role players to meet particular needs by using their influence. The idea of student activism creates an idea of student political involvement. This can be achieved through engaging in various campaigns, such as organising rallies and petitions, utilising mass media platforms to raise awareness, and participating in demonstrations.<sup>3</sup> Activism has a crucial role to play in empowering students to influence the university-wide community and actively pursue their academic, social, and civic demands. By engaging in organised efforts, students can advocate for changes that enable them to achieve their educational and personal goals within the university setting.

The Third Element: Need Fulfilment: - The fulfilment of an individual needs which are possible to achieve through individuals' influence by the community. By the use of mass demonstration, strong dialogues and other factors it is possible to achieve this feat. This involvement in community-driven activities and advocacy allows students to voice their concerns, collaborate with peers, and work towards addressing their personal and academic needs within the broader social context<sup>45</sup>.

The Fourth Element: Interconnection: - The interconnect and dependency of individuals and stakeholders within the university community. This community consists of diverse stakeholder groups, such as students, faculty, staff, administrators, and external partners, each with their own distinct interests and perspectives. However, these interests are inherently interconnected, as the actions and decisions of one group can have significant *impacts on the others*. *Understanding and*

2. Mthokozisi Emmanuel Ntuli & Damtew Teferra, *Implications of social media on Student Activism: The South African Experience in a Digital Age*, 15 J. HIGHER EDUC. AFRICA 63 (2017),.
3. P.G. Altbach, Student Political Activism in International Higher Education, in *An Encyclopedia* 247 (P.G. Altbach ed., 1991).
4. D. DELLA PORTA & M. DIANI, *SOCIAL MOVEMENTS: AN INTRODUCTION* (John Wiley & Sons 2006).
5. L. Diaz Romero, *Enhancing Civic Engagement in the Digital Age: Global Activism, New Media and the Virtual Public Sphere* I CONGRESO INTERNACIONAL DE COMUNICACIÓN Y SOCIEDAD DIGITAL 1 (2013).

*creating this interconnectedness is crucial for promoting collaboration, mutual understanding, and a thriving university ecosystem*<sup>6</sup>.

## CYBER ACTIVISM

Creating a social change requires activism which follows specific steps. For example, some technological foundations of certain past social and political movements include the use of only one digital tool or application such as Twitter. Nevertheless, there is a current drift towards wider use of many different social media tools and applications for various purposes that are bringing up what can be called the second cyber activism wave or ‘cyber activism 2.0’. Unlike traditional types of digital activism, this approach is usually more natural in nature since it relies heavily on multiple online platforms’ unique features to enhance advocate outreach, enhance coordination, and magnify effect at large<sup>7</sup>.

There are free examples of cyber activism. One of the more famous case studies of cyber activism comes from the 1999 “Battle of Seattle” which saw upwards of 70,000 protestors collectively come together via extensive online activity and coordination to take on the powerful World Trade Organisation (WTO) in mass demonstrations and civil disobedience.<sup>8</sup> Another case study of the Wikileaks disclosure of classified U.S. State Department communications to different diplomatic missions around the world, this created a global scandal regarding the unauthorised release of sensitive information and critical assessments of sovereign governments’ policies and actions.<sup>9</sup> Another use of technology to protest governments and their decisions is through hacking, a practice employed by various groups and individuals. There is an online activist collective known as The Anonymous is an example of this kind of disruptive digital activism, using hacking techniques to draw attention to their political causes and challenge the actions of governments and other powerful institutions.<sup>10</sup> Leaders of social movements are increasingly recognising the potential technology has in enhancing and empowering their efforts aimed at driving social change.

6. R.E. Freeman & D.L. Reed, *Stockholders and Stakeholders: A New Perspective on Corporate Governance*, 25 CAL. MGMT. REV. 88 (1983).
7. Rodrigo Sandoval-Almazan & J. Ramon Gil-Garcia, *Towards Cyberactivism 2.0? Understanding the Use of Social Media and Other Information Technologies for Political Activism and Social Movements*, 31 GOV’T INFO. Q. 365 (2014).
8. MICHAEL D. AYERS & M. MACCAUGHEY, *CYBERACTIVISM: ONLINE ACTIVISM IN THEORY AND PRACTICE* (1st ed., Routledge 2003).
9. M. Fenster, *Disclosure’s Effects: WikiLeaks and Transparency*, 97 IOWAL. REV. 753 (2012). C. Hood, *Commentary from FOI World to WikiLeaks World: A New Chapter in the Transparency Story?*, 24 INT’L J. 635 (2011).
10. K.E. Himma, *Hacking as Politically Motivated Digital Civil Disobedience: Is Hacktivism Morally Justified?* SSRN ELIBRARY (2005).

These online realities and the interactions that take place within them constitute as well as reinforce one another. They are also mutually constitutive, with virtual spaces continuously influencing and being influenced by the social practices enacted in them. Users also frequently capitalise on the affordances of online platforms to selectively connect with others they agree with while remaining detached from individuals espousing conflicting belief systems or alternative ideological orientations. These processes involve forming agent communities that enable people to pool around collective stories which in turn help group bond and align emotions symbiotically. All these steps encourage a collective sense of community identity among members of society. The recursive and dynamic nature of the emergence process calls for a trans-disciplinary, multi-methodological research inquiry that incorporates inputs from multiple academic fields into it<sup>11</sup>.

Emerging social media platforms such as Clubhouse have the potential to further expand the connections women make to one another, enabling them to type new networks and communities. This can, in turn, broaden the reach and impact of gender-equality activism, as women are able to connect, share ideas, and coordinate their efforts on a larger scale. These platforms have also become popular among healthcare professionals, who are utilising them as educational tools to disseminate information, share best practices, and engage in discussions related to women's health and empowerment<sup>12</sup>.

## **ONLINE DISCRIMINATION, COMBATING AND PROTECTION OF THE VULNERABLE GROUPS**

Discrimination on online platforms, particularly through social media, has become a burning issue. Hate speech usually targets vulnerable communities and minority communities. These communities include women, LGBTQ+ individuals, racial and ethnic minorities, and religious groups. The derogatory and the stereotypical language used, such as abusive comments and threats of violence, can create negative environments for affected individuals. Moreover, social media acts as huge platform on cloud for the online harassment that disproportionately affects marginalised communities, with severe psychological and emotional consequences for the victims. Very often these comments are pointed out by sensible individuals, through the process called "calling out" it is still a largely committed violence against the community. In the worst-case scenarios, the abuse can move out from the online world to the real-world violence, further increasing the marginalisation of targeted individuals and communities. Misinformation and

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11. Adrian Lüders, *Alejandro Dinkelberg & Michael Quayle, becoming "Us" in Digital Spaces: How Online Users Creatively and Strategically Exploit Social Media Affordances to Build Up Social Identity*, 228 ACTA PSYCHOLOGICA 103643 (2022).

12. Nooshin Beygui et al., *social media as a Tool to Advance Women in Cardiology: Paving the Way for Gender Equality and Diversity*, 3 CJC OPEN S130 (2021).

intended propaganda on social media also result in harmful stereotypes against specific groups. Blatant lies and false narratives often aim to manipulate and move public opinion, and this can lead to further violence. Social media algorithms that give more importance to engagement can amplify misinformation while the other persons contribute and interact with the said post creating awareness that reinforces existing biases and limit exposure to diverse perspectives. Propaganda targeting specific groups disseminated through social media can shape narratives that serve specific interests, often at the expense of marginalised communities, and employ emotional tactics to sway public opinion, further embedding discriminatory beliefs in society.<sup>13</sup>

There are various ways in which hate speech on social media can be combatted. Combating hate speech requires a multi-faceted approach involving stakeholders like social media platforms, governments, civil society organisations, and users. Key strategies and solutions include strengthened content moderation, with the implementation of robust policies prohibiting hate speech and harassment, investment in human moderators and advanced AI technologies to promptly detect and remove harmful content, and transparent reporting mechanisms for users to effectively report violations. Fact-checking and disinformation mitigation efforts, such as collaborating with fact-checking organisations to combat misinformation related to hate speech, promoting accurate information through prominent featuring of fact-checked content, and educating users on the importance of verifying sources and critical thinking, are also crucial. Increased transparency and accountability regarding social media algorithms, which prioritize and amplify content, including hate speech, through independent audits to ensure fairness in content distribution and prevent unintentional amplification of harmful content, is another important measure. User empowerment and digital literacy, involving the promotion of media literacy and digital citizenship to equip users with the skills to critically evaluate online information, as well as educational initiatives that focus on recognizing propaganda and hate speech and teaching individuals to verify sources and identify misinformation, can empower users to get to the digital sector more safely. Ethical design and responsible product development, where social media platforms adopt principles that prioritize user well-being and safety and develop interfaces that discourage the spread of hate speech and enhance user control over content consumption to minimize algorithmic bias, are also key strategies. Collaborative initiatives, involving the creating of collaboration between social media platforms, governments, civil society, and academia for effective policy development and best practices, and the engagement of diverse perspectives in decision-making processes, can further enhance these efforts. Strong legal frameworks, where governments enact and enforce laws which balance freedom of expression along with the need to combat harmful content requires establishing a

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13. W. Ian O’Byrne, *Educate, Empower, Advocate: Amplifying Marginalized Voices in a Digital Society*, 19 CONTEMPORARY ISSUES IN TECHNOLOGY AND TEACHER EDUCATION J. 640 (2019).



measure to hold platforms accountable for their content. This must also include public-private partnerships and education and awareness campaigns this will help to collectively contribute to create a safer, more inclusive digital space that discourages hate speech and promotes respect for all individuals<sup>14</sup>.

Social media platforms have an important role to play in protecting vulnerable groups from harm, misinformation, and discrimination. To improve this, they can take several important steps.

Setting up ground rules: - They should strengthen content moderation by setting clear rules against hate speech and harassment. This should be done by using a mixture of trained human moderators and automated systems (bot system) to quickly identify and remove harmful content.

Reporting mechanism: - Every social media platform should also have a mechanism which helps in reporting a violation of the ground rules. This reporting tool enables users to report violations and keep up with the actions taken.

Fact Checking Information: - Fact-checking improvements are another essential step. Verification of the information before it spreads is an important step every social media company can work in partnership with fact-checking organisations and promote accurate content as a way of dealing with misinformation. They should also make provisions that allow users to flag false content.

Create Awareness: - Governments, civil society organisations and schools must take initiatives to be involved in this effort to create a safer space.<sup>15</sup> This can be also done by taken help of legal aid agencies like National Legal Services Authority of India.



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14. ibid

15. ibid



## IMPACT OF MISINFORMATION

When people are constantly exposed to false narratives it can make discriminatory views feel acceptable which leads to more significant social divisions. This kind of toxicity filled environment allows violence to become more common. Online platforms, where misinformation spreads easily, often see a rise in harassment, with false narratives encouraging abusive behavior that can spill over into real-world violence. Social media algorithms, designed to keep users engaged, can unintentionally amplify this harmful content, creating echo chambers that reinforce extreme views and further endanger marginalised communities. To combat the violence fueled by misinformation, it's crucial for individuals, organisations, and governments to work together to create a more inclusive and equitable online space<sup>16</sup>.

Previous studies on Indian fake news have had two limitations: they have not thoroughly examined the sources of social media fake news, content types, & broad topics and they have mainly focused on the religious and political aspects. Researchers have identified various types of fake news, such as unintentional reporting errors, fabricated stories not based on news articles, conspiracy theories, satire that could be mistaken as factual, and misleading but not entirely false reports. Other researchers have explored additional categories, including poor journalism, satire, advertising, and propaganda. Social media fake news has become a subject of interest across disciplines, but a comprehensive classification of its content is still lacking. Health-related fake news appears to be the most prevalent, followed by religious and political fake news. Crime-related fake news has the highest percentage in online media, followed by health and religious fake news, while entertainment-related fake news is the least common. Online media is infamous for spreading fake news relating to health, religion for the sake of entertainment<sup>17</sup>.

## PUBLIC SCRUTINY AND CRITICISM OF JUDICIAL DECISIONS

There are many studies which have been conducted wherein the judges in their specific use of social media while maintaining their judicial independence, protecting judges from the external influences and creating a trust filled relationship. There are certain recommendations including establishing of clear guidelines for proper conduct, while creating support systems for judges who are facing social media pressures, implementing of the policies to protect judges from harassment, introducing various government led training programs on digital literacy and stress management, encouraging public engagement and promoting the use of social media for education and public engagement. These recommendations are made with an aim to create a

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16.    ibid.

17.    Shalin Jyotishi & Alex Lovelace, *Social Media & Fake News in India*, ASIAN J. FOR PUB. OPINION RSCH. (2020).

supportive environment for judges, uphold judicial independence, and enhance the integrity of the judicial process in the digital age<sup>18</sup>.

Social media tend to put immense pressure on the judges on their decision making and thus leading to compromises on judicial independence. Judges, once protected from public opinion, now tend to face intense scrutiny and criticism on social media platforms, leading to diminished views of judicial impartiality. This environment can make the judges consider public backlash, intense feedback and potential riots before giving out the decision. Continued research, digital literacy, training and sessions with the IT experts, psychological training on dealing with the hatred are some ways in which judges will be able to deal with this issue. Therefore, it has become a matter of importance to learn about the how the judges should be trained to deal with these modern problems with the modern solutions.

### **INFLUENCE AND SOCIAL MEDIA CAMPAIGNS**

Social Media campaigns are very famous for creating awareness though the idea of social media falls in the grey area, there are sometimes social media has done more good than bad.

In 2014, to raise awareness and provide donation for the ALS research Ice bucket challenge was introduction. The campaign was simple, it asked participants to dump a bucket of ice water over their head or someone else's, and then nominate others to do the same within 24 hours or make a charitable donation. The challenge at the time went viral on social media, it was aided by its low participation barrier, there was an entertainment value, and many celebrities were involved. The \$115 million in donations was transformative, allowing the association to invest in research, assistive technologies, and improve healthcare access for those living with ALS.

In the early 2010s there were certain number of protests, uprisings, and armed rebellions which took place in Tunisia around the area of North Africa and the Middle East. These revolutions aimed to target poor living conditions and oppressive regimes. Due to the influence of the local news report the news gained national and international awareness. The spread of local news reporting through mass and international media brought these issues and events into global awareness. The government with its autocratic approach was looked into a bad light and this led to gain international pressure from the system.

The Black Lives Matter as a movement began as a grassroots online community dedicated to combating police violence and anti-black racism targeting African Americans. By leveraging power of social media and the #BlackLivesMatter hashtag, this community has successfully organised, mobilised, and raised awareness, eventually growing into an organisation with over

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18. Douglas Kwame, *The Influence of social media on Judicial Independence*, 4 J. MODERN L. & POL'Y 49 (2024).

40 chapters committed to supporting Black lives. The #BlackLivesMatter hashtag was created by co-founder Patrisse Khan-Cullors, inspired by a heartfelt letter from fellow co-founder Alicia Garza following the tragic killing of Trayvon Martin. According to the Pew Research Center, this hashtag was used nearly 30 million times on the twitter ever since its inspection, slowly but steadily gaining traction and leading to widespread daily usage.

The Me-Too movement served as a platform for women from various backgrounds who have endured sexual harassment. The movement is considered to be one of the ways of the feminists movements. The movement centres on the experiences of survivors of sexual violence across various social strata. Women took to social media by sharing their narrative. The Me-Too movement was founded in 2006 but gained attention in 2017. There were multiple high-profile actresses who disclosed their experiences of sexual harassment which they suffered in the film industry and began using the hashtag of #MeToo to raise awareness<sup>19</sup>.

## CONCLUSION

Social media has today's generation in their grabs. It's a medium irrespective of the conservative media beliefs. There it is understood as a safer space which has been created for the various marginalized groups. Therefore, by setting up ground rule, creating effective reporting mechanism, performing fact Checking information, creating awareness by promoting media literacy initiatives to empower users can create a stable environment for the people. Addressing the issues relating to mental health impacts of online abuse and providing emotional support resources to the victim are also important steps to help in building a more supportive digital environment. The dynamic nature of the law has to be put to play by regularly reviewing the policy, including feedback responding to challenges and initiating effective measures.

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19. *A Guide to Social Media Activism*, Maryville Univ. (Aug. 9, 2024), <https://online.maryville.edu/blog/a-guide-to-social-media-activism/>.

## ON THE ROAD TO SUSTAINABLE GOVERNANCE IN INDIA: LOCATING AND RESOLVING THE CONFLICT BETWEEN THE RIGHT TO INFORMATION AND OFFICIAL SECRECY

Ayushi Khuswaha<sup>1</sup>

### INTRODUCTION

In the 21<sup>st</sup> century, democracies have acquired a renewed purpose in which they must ensure not just institutions ideal to their character but also sustain them through “peace, justice, and strong institutions.”<sup>2</sup> Sustainable Development Goals (SDGs)<sup>3</sup> are considered landmarks in streamlining the sustainable goals for a progressive and committed global society through a range of goals which international participants, especially states, ought to commit to and implement through effective, participatory, and responsive institutions.<sup>4</sup> Goal 16,<sup>5</sup> pertinent to our discussion, is one of the major goals reaffirming the international pledge to enhance the strength and purposes of institutional governance wherein human rights are respected and enforced—of which *access to information* remains the thematic focus in this paper. The relationship between democracies and sustainability has been studied considerably to posit that the principal nature of democracies envisages the creation of a platform for fostering basic humans and institutionalizes checks and balances to prevent abuse of and arbitrary exercise of power.<sup>6</sup> This is in contrast to how democracies are generally construed to include only minimum realization and upholding of freedoms and electoral participation wherein people vote for their government and leave to it to determine the future course of action based on the basic ideals of a democratic framework.<sup>7</sup> With the assimilation of SDGs across borders and into the governance

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1. Research Scholar, WBNUJS, Kolkata
  2. UNITED NATIONS DEPARTMENT OF ECON. & SOC. AFFS., Goal 16: Peace, Justice and Strong Institutions, United Nations, <https://sdgs.un.org/goals/goal16> (last visited Aug. 9, 2024).
  3. *Id.*
  4. It states that “Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.”
  5. The Role of Democracy in Sustainable Development, United Nations Development Programme Blog (July 5, 2023), <https://www.undp.org/blog/role-democracy-sustainable-development>.
  6. Dan Banik, *Democracy and Sustainable Development*, 1 *Anthropocene Science* 2022 1:2 233 (2022), <https://link.springer.com/article/10.1007/s44177-022-00019-z> (last visited Aug 9, 2024).
  7. *Id.*

frameworks, democracies have been lent substantive tenor that strengthens their core values<sup>8</sup> through the broad concepts of fairness, justice, rights, and checks and balances.<sup>9</sup> Naturally, this requires creating and sustaining accountable and transparent institutions ensuring citizens are acquainted with how they are being governed, especially with respect to environmental, economic and social parameters to make *informed* decisions<sup>10</sup> in the present and the future. In the current scholarship on sustainable development, the political dimension is often overlooked when, as a matter of principle, effective governance toed to democratic values upon sufficient implementation can assure holistic growth of the global community. In India, sustainable development in governance is gaining traction, *albeit* slowly, but the emphasis has increased on enhancing accountability through transparency. The momentum has, particularly, increased with the enforcement of the country's *sunshine law*,<sup>11</sup> which provided a statutory framework for enforcing one's right to access information on important matters of public importance. The entire scheme of the Right to Information Act 2005 (RTI Act 2005)<sup>12</sup> rests on the judicially recognised, constitutionally implicit right to information in Article 19(1)(a)<sup>13</sup> which is reflected in the Preamble of the Act which emphasises the creation of an 'informed citizenry' based on the transparency of information to hold 'governments and their instrumentalities accountable to the governed.'<sup>14</sup>

Despite the campaign for transparency in the scheme of the RTI Act 2005, the legislative intent was to position a framework wherein the demands of the administration are addressed in a balanced manner. In *Institute of Chartered Accountants of India v. Shaunak H. Satya & Ors.*,<sup>15</sup> the Supreme Court pointed the same out that the Act endeavours to prevent any such dissemination of information that results in adversely affecting 'other public interests'<sup>16</sup> therefore, Section 8 enumerates a list of specific kinds of information which shall be disclosed unless public interest warrants.<sup>17</sup> However, as has been evident time and again, public administration is not always

8. United Nations, *Democracy* | *United Nations*, <https://www.un.org/en/global-issues/democracy> (last visited Aug 9, 2024).

9. Larry Diamond, *Democratic Regression in Comparative Perspective: Scope, Methods, and Causes*, 28 *Democratization* 22 (2021), <https://in-pursuit-of-development.simplecast.com/episodes/larry-diamond> (last visited Aug 9, 2024).

10. RAHUL SAGAR, *SECRETS AND LEAKS : THE DILEMMA OF STATE SECRECY* (2016).

11. Legislations such as RTI Act 2005 are often referred to as sunshine law.

12. Right to Information Act, 2005, No. 22, Acts of Parliament, 2005 (India).

13. INDIA CONST. art. 19(1)(a).

14. *supra* note 11 at Preamble.

15. *Institute of Chartered Accountants of India v. Shaunak H. Satya & Ors.*, 2011 (8) SCC 781.

16. *Id.*

17. *supra* note 11 at § 8.

very keen on actively disclosing information to the public and availing of the exemptions under the *sunshine law*.

Stakeholder participation is key to sustaining democratic values in a governance system. In India, the constitutional ideals commit the State to ensure ‘justice, equality and liberty for the people’, which incidentally can be found as part of our sustainable development goals. However, there remains a lingering concern that obstructs the process of strengthening the citizens’ right to information that matters to me, environmental or otherwise—and it is called the Official Secrets Act 1923 (OSA 1923).<sup>18</sup> Not until the landmark *Raj Narain*<sup>19</sup> ruling, was the rule secrecy only to be breached in the rarest of the rare cases. The existence of the anti-espionage law carried forward the imperialistic legacy of distrust, conspiracy, and exclusion wherein the members of the public were deprived of. Interestingly, while the OSA 1923 remains in force in the same form and substance as it did back in the pre-Independence era, the British laws on official secrets, especially after the recommendations of the Franks Committee,<sup>20</sup> have contained, if not eliminated, the rigour of their catch-all provisions.

With the seeping impact of secrecy in administrative affairs, public officials are prone to engaging in excessive discretion in the determination of what information can and cannot be classified as an official secret. Drawing legitimacy from the OSA 1923, there remains no qualification about the classification procedure, with only a few Security Classification Manuals available for public access. Thus, effectively, governments, their ministries, departments, and other instrumentalities can withhold information and argue their non-disclosure because by virtue of the information being an official secret it falls within the ambit of the RTI Act 2005. Moreover, the very scheme of the OSA 1923 is crafted to create internal surveillance wherein any unauthorized disclosure of any kind of official secret, irrespective of its substantive relevance, is addressed punitively.

This brings us to the flashpoint of the conflict wherein sustainable development acknowledges the undisputed role of access to information in building new and strengthening accountable institutions. Administrative necessities support the application of secrecy when managing sensitive affairs. The author reasons that the problem does not lie in the usage of official secrecy as an instrument of administrative control; the problem rests on the degree and the context to which it is used, especially when it stymies the process of stakeholder participation in democracies and the global campaign for a sustainable future. For India, the

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18. The Official Secrets Act, 1923, No. 19, Acts of Parliament, 1923 (India).

19. State of Uttar Pradesh v. Raj Narain, 1975 AIR 865.

20. Gail Bartlett & Michael Everett, *The Official Secrets Acts and Official Secrecy*, [www.parliament.uk/commons-library/intranet.parliament.uk/commons-library/papers@parliament.uk/@commonslibrary](http://www.parliament.uk/commons-library/intranet.parliament.uk/commons-library/papers@parliament.uk/@commonslibrary) (last visited Aug 9, 2024).



location and resolution of this conflict are imperative, especially in light of its commitment to the 2030 Agenda for Sustainable Development.

## THE PURPOSIVE AND LEGISLATIVE FRAMEWORK OF OFFICIAL SECRECY IN INDIA

Secrecy, in general, is integral for establishing and reassessing relationships among humans.<sup>21</sup> It is understood as an exercise of personal autonomy through which the transfer of knowledge is facilitated. The degree and nature of secrecy determines the relationship's character; such relationships are not merely personal but extend to a wide range of formal and organizational relationships. With the ability to expand or curtail informational exchange, secrecy is known to be a potent tool for institutionalizing hierarchies, creating, as George Simmel states, 'barriers between men.'<sup>22</sup> On a personal level, the impact of the exclusion is limited to the participants involved. However, wherein the ambit of secrecy extends above and beyond the threshold of social relationships and acquires an organizational personality, the stakes are higher. It is, especially, of monumental consequence in democracies.

### Official Secrecy in Democracies

The word 'secret' comes from the *Latin* word '*secretus*'<sup>23</sup> which translates to 'to separate' or 'to set apart.' While there are several connotations to the usage of the word, it acquires a very specific one in the context of political theory.<sup>24</sup> When clubbed with the word 'state' or 'official', the meaning expands to the formal concealment of information from the public in governance. If one were to navigate the history of its usage, there are plenty of sources indicating that secrecy, *per se*, was inevitable in matters of governance.

For instance, *Rig Veda* celebrates *varuna*<sup>25</sup> spies and acknowledges their wisdom and sacrifices in ensuring effective public administration. This is probably the oldest reference to espionage in India. Then there is *Arthasahstra* in which Katuliya writes extensively on the use of spies classified into two categories, namely *Samstha* and *Sancara*<sup>26</sup> to ensure that public

21. Gary T Marx & Glenn W Muschert, *Simmel on Secrecy. A Legacy and Inheritance for the Sociology of Information*.

22. Georg Simmel: The Sociology of Secrecy and of Secret Societies, [https://brocku.ca/MeadProject/Simmel/Simmel\\_1906.html](https://brocku.ca/MeadProject/Simmel/Simmel_1906.html) (last visited Aug 9, 2024).

23. Latin Definition for: secretus, secreta (ID: 34440) - Latin Dictionary and Grammar Resources - Latdict, <https://latin-dictionary.net/definition/34440/secretus-secreta> (last visited Aug 9, 2024).

24. LAWRENCE QUILL, SECRETS AND DEMOCRACY (2014).

25. The Indic Roots of Espionage: Lessons for International Security - The SAIS Review of International Affairs, <https://saisreview.sais.jhu.edu/the-indic-roots-of-espionage-lessons-for-international-security/> (last visited Aug 9, 2024).

26. *Id.*



administration and internal security are not harmed. References to the use of secrecy are replete in the epics such as Ramayana and Mahabharata.<sup>27</sup> It is to be understood that these are a few of the many examples of records where espionage is tolerated, and, in places, celebrated for its contribution to stability. Even if one traverses beyond the Hindu religion and the borders of the country, several prominent texts have recorded the use of secrecy in administration; for example, Sun Tzu's *The Art of War*,<sup>28</sup> the use of *shinobi*<sup>29</sup> in Japan, or Machiavelli's *The Prince*.<sup>30</sup>

Official secrecy is not a novel concept. It has been in existence since time immemorial; however, its purview has expanded with the expansion of administrative capacities of the State. The relationship between the citizens and the government has undergone a transformative experience, particularly post-World War II. In the 21<sup>st</sup> century, official secrecy, which was once understood to be an unassailable privilege of the State, is grappling with the driving momentum towards 'open governance', which has strengthened the grasp of human rights upon the frameworks of governance. As a result, the dangers of secrecy, which were once accepted as a governmental necessity, were becoming palpable, with several scholars committed to reformation and liberal thought emphasizing individualism and independence of thought. Even so, the secrecy was not completely rejected. Illustrating the point is Jeremy Bentham's *Essay on Political Tactics*<sup>31</sup> wherein, while advocating the 'law of publicity', he cautioned against the misinterpretation or incomprehension from the end of the 'unenlightened public' which could affect law and order in the society.<sup>32</sup>

Jeremy Bentham writes in the time when the multifaceted elements of governance were in formative stages. Post-Cold War, the requirements of governments have assumed roles which were once far-sighted and required constant engagement with the public.<sup>33</sup> Accountable institutions have become inseparable from the workings of a democratic government requiring transparent operations within the framework. That being said, official secrecy, contrary to popular opinion, is not *per se* against democracies. There are multiple occasions and reasons

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27. *Id.*

28. The Internet Classics Archive | The Art of War by Sun Tzu, <https://classics.mit.edu/Tzu/artwar.html> (last visited Aug 9, 2024).

29. It is a Japanese synonym for *ninja*.

30. What Can You Learn from Machiavelli? | Yale Insights, <https://insights.som.yale.edu/insights/what-can-you-learn-machiavelli> (last visited Aug 9, 2024).

31. Jeremy Bentham | Biography, Utilitarianism, Philosophy, & Auto-Icon | Britannica Money, <https://www.britannica.com/money/Jeremy-Bentham#ref99607> (last visited Aug 9, 2024).

32. *Id.*

33. Colin O'Reilly & Benjamin Powell, *War and the Growth of Government*, 40 Eur J Polit Econ 31 (2015).

necessitating secrecy including national security, protection of intelligence, foreign relations, law and order, etc. However, the problem arises when the degree and purpose of official secrecy become arbitrary.

### **Official Secrets Act 1923**

The discourse of secrecy in governance in India is not conducted the way it is prevalent in the West. The amount of deliberation on the OSA 1923 pales grimly in front of the massive literature on the right to information. Quite often, the discussion on official secrecy is limited to the ‘reasonable restrictions’<sup>34</sup> without ever addressing the administrative act of secrecy. However, any analysis of the right to information, particularly access to information, is incomplete without the OSA 1923, which stands as India’s anti-espionage law.

The OSA 1923 is an imperial brainchild purporting to control the flow of ‘official secrets’, or information designated as ‘secrets’ under the law, within and beyond the governmental framework. Originally introduced in a series of resolutions, orders, and circulars, the OSA 1923 is a consolidation of all the intermittent attempts at cultivating a culture of secrecy within the government, especially with the rise of the Press in Britain and other parts of the world. Considered a near replica of the British OSA 1911,<sup>35</sup> it is notorious for its catch-all provisions, which branch out its punitive grasp above and beyond standard espionage. The application of such a law in a colony was an administrative necessity for the colonizers, however, the continuation of the legacy post-independence requires justification on the grounds which are no longer sustainable. This is of great relevance considering the OSA 1911 has been long replaced by the OSA 1989,<sup>36</sup> which despite its shortcomings, has made certain notable amendments in alignment with the Franks Committee Report.<sup>37</sup>

### **SECTION 5 OF THE OSA 1923: THE CATCH-ALL LEGACY**

The general scheme of the OSA 1923 is to protect official secrets and punish any unauthorized dissemination. Section 5 is considered to be a more amplified version of the now repealed Section 2 of the British OSA 1911 which aims to curb the flow of government-held secrets within and outside the government. The very nature of the provision highlights the all-encompassing attribute intending to cover every kind of information and every kind of exchange of information deemed a secret under the Act resulting in a punishment extending to

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34. *supra* note 12 at art. 19(1)(2).

35. The Official Secrets Act, 1911, Ch. 28, Acts of Parliament, 1911 (UK).

36. The Official Secrets Act, 1989, Ch. 52, Acts of Parliament, 1989 (UK).

37. OFFICIAL INFORMATION (FRANKS REPORT) (Hansard, 29 June 1973), <https://api.parliament.uk/historic-hansard/commons/1973/jun/29/official-information-franks-report> (last visited Aug 9, 2024).

three years, or fine, or both.<sup>38</sup> To further explain the provision, it is important to break it down into parts.

### **No definition of ‘official secret’**

The most striking feature of the Act is the absence of any definition of ‘official secrets.’ The preamble of the Act clarifies that it relates to official secrets<sup>39</sup> but there is no indication as to what can and cannot be classified as an ‘official secret’ leaving it to the devices of the public administration to determine the same.<sup>40</sup> In light of any legislative qualifier on the classification standard, the law condones the arbitrary and indiscriminate creation of official secrets regardless of the substantive strength of the information. This gap in the Act—the lack of specificity<sup>41</sup>—was a main highlight under the Franks Report in the UK. However, unlike the progenitor legislation, the OSA 1923 remains unaltered and undefined when it comes to the ambit of official secrets.

Moving on to section 5 of the Act, the language is indicative that punishment can be extended upon any unauthorized dissemination of official secrets.<sup>42</sup> The provision does not investigate or provide any qualifier for investigating the substance of the official secret whose disclosure could potentially invite imprisonment extending to three years.<sup>43</sup> As a result of such wide use of language, the provision can be easily misused to prosecute individuals who may have inadvertently divulged the information or engaged in public interest disclosure. It is essential to distinguish between “information which should lead to criminal prosecution, and general information, which needs lesser disciplinary controls. Without that distinction, we will not have a free society.”<sup>44</sup>

The problem is exacerbated by the fact that ministries and departments tend to keep their manuals on security instructions secret. One of the exceptions is the Defence Procurement Manual which was made public in 2018.<sup>45</sup> In *Venkatesh Nayak v. Ministry of Home Affairs*,<sup>46</sup> the RTI application for the disclosure of the Home Ministry’s Manual on Departmental Security

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38. *supra* note 17 at Preamble.

39. *supra* note 36.

40. SECOND ADMINISTRATIVE REFORMS COMMISSION RIGHT TO INFORMATION SECOND ADMINISTRATIVE REFORMS COMMISSION, (2006), <http://arc.gov.in> (last visited Jul 30, 2024).

41. *supra* note 36.

42. *supra* note 17 at § 5(1).

43. *supra* note 17 at § 5(4).

44. *supra* note 19.

45. Defence Procurement Manual, 2018 (DPM 2018) | Department Of Defence, <https://www.mod.gov.in/dod/news/defence-procurement-manual-2018-dpm-2018> (last visited Aug 11, 2024).

46. *Venkatesh Nayak v. Ministry of Home Affairs*, Appeal No. CIC/WB/A/2009/000758 (CIC).

Instructions was rejected on the ground that its disclosure may potentially create an adverse impact on state interests.<sup>47</sup> The order came despite the applicants citing examples from other democracies where similar manuals are public documents. With little information on the actual content of the Manual barring the Defence Procurement Manual, one has to rely on the information formally released in the press. In 2016, the Press Bureau of Information released ‘Policy of Classifying Documents’ and stated that the Ministry of Home Affairs classifies documents as ‘top secret’, ‘secret’, and ‘confidential’ depending on the nature of the document.<sup>48</sup>

From the point of sustainability, such a degree of secrecy in governance can thwart efforts to create responsive and transparent institutions and allow access to relevant information to the public for forming informed opinions on how the government is addressing matters of environmental and social importance. In the garb of secrecy, governments can misuse the lack of accountability to protect industries otherwise operating in violation of environmental laws and withhold information on pollution levels or the ecological costs of proposed development projects. This way, the governments and their instrumentalities can escape democratic answerability and conduct their functions in a manner suited to their interests.

### **Conditions for wrongful communication**

For the determination of any unauthorized communication, the following conditions will have to be satisfied:

Firstly, it must be shown that a person possessed or controlled any ‘secret official code or password, or sketch, plan, model, article, note, document, or information related to or is used in a prohibited place.’<sup>49</sup> Secondly, such material acquires such character that it is likely to assist an enemy. Thirdly, should the material be disclosed, it is likely to affect the ‘sovereignty and integrity of India’, ‘security of the state’, and ‘friendly relations with foreign states.’<sup>50</sup> Fourthly, the person in possession or control has obtained such material in contravention of the Act or was entrusted with the material by a person who held office under the Government or obtained access to information by his position in government, on behalf of the government, or through contract.<sup>51</sup>

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47. *Id.*

48. Policy of classifying documents, <https://pib.gov.in/newsite/PrintRelease.aspx?relid=137542> (last visited Aug 1, 2024).

49. *supra* note 17 at § 5(1).

50. *Id.*

51. *Id.*

**Wide-Ranging offences**

Section 5 contributes immensely to the culture of secrecy by creating an ecosystem of intimidation and mutual distrust with the inclusion of multi-faceted offences under its purview.<sup>52</sup>

- a. Unauthorized communication of official secret to any person other than those authorized to be communicated, a Court of Justice, or any person towards whom it is in the interests of the State to communicate.<sup>53</sup>
- b. Utilization of the official secret in possession for the benefit of any foreign power or in any manner which can prejudicially affect the safety of the State.<sup>54</sup>
- c. Unauthorized retention of official secrets when he has no right or duty to retain it.<sup>55</sup>
- d. Negligence concerning official secrets.<sup>56</sup>

It is important to note that the aforesaid provision is not limited to official secrets. Throughout the clauses, the application of the provision is not meant solely for any material designed as an ‘official secret’; it covers those which are not secrets and includes ‘password, sketch, plan, model, article, note, document, or information.’ This has been affirmed in the case of *Sama Alana Abdulla v. State of Gujarat*<sup>57</sup> in which the Supreme Court stated that the word ‘secret’ only qualifies as a code or password, but not any ‘sketch, plan, model, article note or other document or information’<sup>58</sup> thus the latter series of the material need not be a ‘secret’ to attract the rigour of Section 3. Section 5 uses the sequence *ad idem* in its structure as a result of the foregoing enumeration of offences under it with equal and indiscriminate force on materials which are not designated secrets. In a nutshell, any piece of information within the government can potentially attract the provisions of Section 5.

The 43rd report of the Law Commission<sup>59</sup> encapsulated the problem points in Section 5. In the report, it reported the wide language of the provision which can penalize any transmission of information conducted by a person by virtue of his office in or contract with the government.<sup>60</sup>

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52. *Id.*

53. *supra* note 17 at § 5(1) (a).

54. *supra* note 17 at § 5(1) (b).

55. *supra* note 17 at § 5(1) (c).

56. *supra* note 17 at § 5(1) (d).

57. *Sama Alana Abdulla v. State of Gujarat*, 1996 SCC (1) 427.

58. *Id.*

59. Fifth Law Commission | Law Commission of India | India, [https://lawcommissionofindia.nic.in/report\\_fifth/](https://lawcommissionofindia.nic.in/report_fifth/) (last visited Aug 11, 2024).

60. *Id.*

As a result of this, ‘every noting in the Secretariat file to which an officer of the Secretariat has access is intended to be kept secret.’<sup>61</sup> However, it is notorious that such information is generally communicated not only to other government servants but even to some of the non-official public in an unauthorized manner. Every such information will not necessarily be useful to the enemy or prejudicial to national security.’<sup>62</sup> The ARC Commission recommended using intelligent drafting devices to alter the language of the provision and include a clear delineation of official secrets and curtailing the provision’s application on matters of trivial or purely administrative nature.<sup>63</sup>

In *R.K. Karanji v. Emperor*,<sup>64</sup> the Bombay High Court pronounced that the lack of definition of ‘official secrets’ under the law which regulates it creates ambiguity as to the extent to which this law can be applied.<sup>65</sup> Addressing the problem, the court in *Shankar Adawal v. CBI*,<sup>66</sup> determined that a person cannot be prosecuted under the Act simply because he was found in the possession of a document marked as an official secret.<sup>67</sup> It went on to state that it is essential to investigate the content of the document in question to consider the question of any violation.<sup>68</sup>

### **Reception of official secrets, etc**

The wide coverage of Section 5 can be understood from Section 5 (2) in which the reception of official secrets, etc voluntarily ‘knowing’ or ‘having reasonable ground to believe’ that it was communicated in violation of the Act is punished.<sup>69</sup> This provision directly impacts the RTI activists, whistleblowers, and journalists who investigate the workings of the government through such voluntary reception of authorized information. The sub-section makes no exception to public interest defence wherefore any disclosure of any government-held information to the press or whistleblowers in matters of corruption, human rights violations, and other forms of illustrations indicative of maladministration.<sup>70</sup> The reluctance of the government to empower the press and whistleblowers is reflected in the now-lapsed 2015 amendment Bill<sup>71</sup>

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61. *supra* note 39.

62. *Id.*

63. *Id.*

64. *R.K. Karanji v. Emperor*, (1946)48BOMLR151.

65. *Id.*

66. *Shankar Adawal v. Central Bureau of Investigation*, AIR ONLINE 2019 DEL 1243.

67. *Id.*

68. *Id.*

69. *supra* note 17 at § 5(2).

70. In the RTI Act 2005, exceptions to non-disclosure are given in cases of public interest, corruption, or human rights violations are involved.

71. The Whistleblowers Protection (Amendment) Bill, 2015, Bill No. 154, Bills of Parliament, 2015;



to the Whistleblowers Protection Act 2011<sup>72</sup> that aimed to exclude whistleblowing protection concerning information under the OSA 1923. Thus, the legislative intent is to plug all potential sources of leaks, irrespective of the nature and purpose, and punish those who engage in it, directly or indirectly.

## THE RIGHT TO INFORMATION: A BALANCED LEGISLATIVE RESPONSE TO ADMINISTRATIVE SECRECY

The right to information is a powerful instrument in the citizens' hands to facilitate the observation of good governance. Good governance is broadly premised on public participation, accountability, transparency, and predictability.<sup>73</sup> Effective enforcement of any or all of these principles requires *knowledge* because citizens are otherwise disempowered to make *informed decisions* about their governors. As James Madison puts it, "A people who mean to be their own governors must arm themselves with power that knowledge gives."<sup>74</sup> Unless the citizenry has the right legislative and administrative channels to access information held by the government, the proverbial 'democracy of the people, for the people, and by the people'<sup>75</sup> only remains a cosmetic stroke of a brush on the face of governance.

The Right to Information is one of the most critical aspects of Article 19(1)(a) of the Indian Constitution. Expressly articulated for the first time in the high-profile *Raj Narain* case,<sup>76</sup> the right to information has been interpreted to be a facet of fundamental rights. Several judgments were pronounced subsequently that consolidated the jurisprudence on the right to information under Article 19 (1)(a) such as *Indian Express Newspapers v. Union of India & ors.*,<sup>77</sup> *Dinesh Trivedi, M.P. v. Union of India*,<sup>78</sup> *People's Union for Civil Liberties (PUCL) v. Union of India*.<sup>79</sup>, and *Union of India v Association for Democratic Reforms*.<sup>80</sup> In all of these preceding cases, the Supreme Court emphasised immensely the fundamental value of informed decision-making

72. The Whistleblowers Protection Act 2011, No. 17, Acts of Parliament, 2014 (India).

73. *supra* note 37; About good governance | OHCHR, <https://www.ohchr.org/en/good-governance/about-good-governance> (last visited Aug 11, 2024).

74. Epilogue: Securing the Republic: James Madison to W. T. Barry, <https://press-pubs.uchicago.edu/founders/documents/v1ch18s35.html> (last visited Aug 11, 2024).

75. You may not know these 7 quotes on democracy | Inter-Parliamentary Union, <https://www.ipu.org/news/news-in-brief/2021-09/you-may-not-know-these-7-quotes-democracy> (last visited Aug 11, 2024).

76. *supra* note 18.

77. *Indian Express Newspapers v. Union of India & ors.*, 1986 AIR 515.

78. *Shri Dinesh Trivedi, MP v. Union of India*, AIR ONLINE 1997 SC 304.

79. *People's Union for Civil Liberties (PUCL) v. Union of India*, 2003 AIR SCW 2353

80. *Union of India v Association for Democratic Reforms*, 2002 (3) SCR 294..



that can only be rendered possible in the presence of information about how the citizenry is being governed.<sup>81</sup> Over time, courts have expended the application of the right to otherwise restricted spaces of administration such as the declaration of the office of Chief Justice of India subject to the RTI Act 2005 in *Central Public Information Officer, Supreme Court of India v. Subash Chandra Agarwal*,<sup>82</sup> and the inclusion of the political parties under the ambit of the RTI Act 2005 in *Subhash Chandra Agarwal v. Indian Congress & Ors.*<sup>83</sup> Recently, in the sensational *Electoral Bond* case,<sup>84</sup> a five-judge Constitution Bench declared the Scheme violative of the right to information vested with votes.<sup>85</sup>

The RTI Act 2005, in all of these developments, is a galvanising force that translated the evolving jurisprudence on the right to information at the time into a statutory framework. Its introduction is often regarded as a watershed moment in India's long-standing campaign for freedom of information. However, what is the most striking feature of our *Sunshine law* is that it lays the foundation for a framework that is not only a theoretical exposition of rights and duties purely with the right but also instrumental in the establishment of new and expansion of existing institutions and participating in capacity-building and monitoring. Equally important for our discourse is the fact that the RTI Act 2005 captured the necessities of governance while advocating for access to information as mentioned in its preamble; in its preamble, the Act clarifies that it intends to set out a practical regime wherein citizens' right to information is recognized and ensured without disabling the governments and their instrumentalities when it came to, *inter alia*, efficient operations, and 'preservation of confidentiality of sensitive information.'<sup>86</sup> The Act goes on to state that wherever a conflict arises between the right to information and government interests an exercise of harmonisation would be facilitated while 'preserving the paramountcy of the democratic ideal.' Thus, the purposive framework of the RTI is to sustain a balance without undermining its core tenet i.e. *information is the rule, and secrecy is an exception*.

### **Section 8:<sup>87</sup> A Comprehensive Enumeration of Exceptions**

One of the striking features of the RTI Act 2005 is that it provides an explicit enumeration of the types of information whose disclosure may potentially adversely impact the interests

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81. *Id.*

82. *Central Public Information Officer, Supreme Court of India v. Subash Chandra Agarwal*, AIR 2010 Delhi 159.

83. *Subhash Chandra Agarwal v. Indian Congress & Ors.*, 2019 SCC OnLine SC 1459.

84. *Association for Democratic Reforms v Union of India.*, [2024] 3 S.C.R. 417.

85. *Id.*

86. *supra* note 11 at Preamble.

87. *supra* note 11 at § 8.

of the state. These exceptions can be found from Section 8 (a) to Section (j), which offers a glimpse into those kinds of information which are traditionally considered sensitive and are generally subject to security classification. The 2<sup>nd</sup> ARC Report<sup>88</sup> suggests that amendments should be incorporated in the OSA 1923 in accordance with the list provided hereunder in the RTI Act 2005, adding clarity to the otherwise nebulous piece of legislation.<sup>89</sup> The scheme of Section 8, which reflects the general scheme of Article 19(2) of the Indian Constitution, provides that there shall be no obligation on the Information Officer to disclose the information if it, *inter alia*, would ‘prejudicially affect the sovereignty and integrity of India,’<sup>90</sup> result in breach of privilege of Parliament or the State Legislature,<sup>91</sup> or ‘was received in confidence from foreign government.’<sup>92</sup>

The enumeration of these exemptions is a reflection of Article 19 (2) of the Indian Constitution. However, they are not absolute very much like the restrictions under the latter. The rationale is that “if angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and the next place, oblige it to control itself.”<sup>93</sup> In furtherance of the same, the word ‘restrictions’ is suffixed with the word ‘reasonable’ for which there is no standard, one-for-all technique and whose interpretation depends on the material facts in hand. While several notable cases have been studied and cited when it comes to the test for reasonableness, the most recent landmark application of the same was in the *Electoral Bonds* case,<sup>94</sup> wherein the court applied the test of proportionality to determine whether the restriction on Article 19(1)—access to information—is justified under Article 19(2). Any restriction is reasonable if the measure was intended to restrict a fundamental right, serve a legitimate purpose, be necessary for achieving that purpose, and not create a disproportionate impact on the fundamental right. In the case, the Court found that the non-disclosure of information about the purchasers of the electoral bonds was not the ‘suitable means’ to clean up black money and facilitate transparency in funding.<sup>95</sup>

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88. *supra* note 39.

89. *Id.*

90. *supra* note 11 at § 8 (a).

91. *supra* note 11 at § 8 (c).

92. *supra* note 11 at § 8 (f).

93. James Madison, Source of Inspiration, <https://www1.cmc.edu/pages/faculty/welliott/inspire/madison.htm> (last visited Aug 11, 2024).

94. *supra* note 83.

95. *Id.*

The Supreme Court, while arriving at this conclusion, had referred to a range of precedents, including the *Puttuswamy*<sup>96</sup> and *Modern Dental College & Research Center*.<sup>97</sup>

The aforementioned is the essence of the RTI Act 2005. Despite enumerating a wide range of exemptions from disclosure, Section 8 does not render them absolute, implying the dangers of rendering excessive discretion to withhold information which otherwise must be disclosed in the public interest. To prevent disproportionate withholding of information under the pretext of sensitivity and denying legitimate access to information, Section 8(2) makes it clear that where there is a conflict between the RTI Act 2005 and the OSA 1923 no exemption will be automatically given to an official secret in certain circumstances.<sup>98</sup> Thereby, should a question regarding the disclosure of any information otherwise covered under the OSA 1923 arise, the RTI Act 2005 shall take precedence if ‘public interest in disclosure outweighs the harm to the protected interests.’<sup>99</sup> Thus, even if any material is a secret under the OSA 1923, it shall not acquire complete protection merely by virtue of its classification.

#### **Section 24:<sup>100</sup> Exempted organizations**

The Second Schedule of the RTI Act 2005 provides a list of certain security and intelligence organizations established by the Central Government. These organizations include the Intelligence Bureau, Research and Analysis Wing, Special Protection Group, and Central Bureau of Investigation.<sup>101</sup> Evidently, the nature and functions of these organizations are largely sensitive and critical in nature. Their roles are directly aligned to preserve and protect the national security of the country. Allowing unrestricted access to information in these organizations could severely jeopardise their ability to perform their projects such as collection of intelligence, protection of the identity of the officers involved in missions, and preservation of diplomatic confidence.

Unlike Section 8, which lists general exemptions across all public authorities, Section 24 narrows its coverage to intelligence and security organizations. The intention was to treat these organisations differently due to their special status. However, similar to Section 8, the inapplicability of the Act to these organisations is not without exceptions. The first proviso to Section 24 adds that exception and states that any information referring to allegations of

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96. Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1.

97. *Modern Dental College and Research Centre & others v. State of Madhya Pradesh & Ors.*, (2016) 7 SCC 353.

98. *supra* note 11 at § 8 (2).

99. *Id.*

100. *supra* note 11 at 24.

101. *supra* note 11 at Second Schedule.

corruption and human rights violation can be provided.<sup>102</sup> In the second proviso, the provision clarifies that such information can, however, be only provided following the grant of approval by the Central Information Commission.<sup>103</sup>

Under the scheme of the OSA 1923, ‘sovereignty and integrity of India, the security of the State or friendly relations with foreign States’<sup>104</sup> remain the core of the protection, however far-fetched, extended to information. These grounds manifest the multi-faceted necessities of national security which may be compromised should information regarding the same is wrongfully disclosed. However, on the other side, it remains common knowledge that intelligence and security organisations, generally, are exempt from ordinary law of the land and are exempted from liability in certain cases. An example to note is the Armed Forces (Special Powers) Act, under which armed forces have often been accused of misusing their powers.<sup>105</sup> It is important to note that the lack of any definition for the phrases ‘allegation of corruption’ and ‘violation of human rights’ means that they must be contextually interpreted. In *Prashant Gwaliory v CPIO, CBI, Anti-Corruption Branch*<sup>106</sup> states that a mere charge or belief that there is corruption or any violation of human rights is not sufficient if there is no supporting material.<sup>107</sup> Moreover, in *Dr. Ruchika Manchanda v CPIO & Ors.*,<sup>108</sup> the CIC observed that ‘human rights’ under Section 24(1) proviso does not extend to all allegations of violation of fundamental rights.<sup>109</sup> Rather, the expression excludes any allegations related to service or disciplinary matters.<sup>110</sup>

### Section 10:<sup>111</sup> Severability

One of the most fundamental inadequacies of the OSA 1923 is the absence of any provision for separating sensitive information from non-sensitive information. Considering the scheme and implementation of the OSA 1923, it offers unrestricted discretion to public servants to create secrets regardless of the content. Even if the exercise has been reasonable, official secrets may very well consist of information whose disclosure would have minimal impact on the protected interests of the State. In the creation of sustainable institutions, the goal is to ensure

102. *supra* note 11 at § 24, Second Proviso,

103. *supra* note 17 at § 5(1).

104. The Armed Forces (Special Powers) Act, 1958, No. 28, Acts of Parliament, 1958.

105. AFSPA: The Misuse of Power | Economic and Political Weekly, <https://www.epw.in/journal/2021/52/comment/afspa-misuse-power.html> (last visited Aug 11, 2024).

106. *Prashant Gwaliory v CPIO, CBI, Anti-Corruption Branch*, CIC/CBRUI/A/2018/626623.

107. *Id.*

108. *Dr. Ruchika Manchanda v CPIO & Ors*, CIC/CRPFO/A/2018/131557

109. *Id.*

110. *Id.*

111. *supra* note 11 at § 10 (1).

maximum access to information; the ideals of sustainable development are not premised on the Utopian imagination of accountability. Severability, therefore, is instrumental in achieving sustainable access to information.

Section 10 of the RTI Act 2005 has been included to empower public authorities in the exercise of separation of information. Wherein any request concerning any information otherwise exempt from disclosure is made, disclosure may be made if the non-exempt part of the information can be separated from the exempted part.<sup>112</sup> To illustrate, it should be pertinent to refer to the *Dinesh Tripathi* case<sup>113</sup> in which an abridged copy of the Vohra Committee Report was tabled before the Parliament. The said Committee was constituted to investigate and compile a report on the activities and operations of all Mafia organizations.<sup>114</sup> The Petitioners before the Supreme Court argued that the complete report must be tabled to enable comprehensive discussion on issues of alarming importance. Rejecting the Writ Petition, the Supreme Court ruled that the nature of the investigation conducted concerns matters which can be ‘severely and detrimentally injurious’ to the public interest if disclosed.<sup>115</sup> Incidentally, the Court refused to consider the question of the going into the constitutionality of the OSA 1923. The research, here, is trying to put forth an important point: that severability is an exercise that is commonly used wherever necessity warrants and bridges the gap considerably between complete access to information and lack of access to information. Thus, Section 10 is a significant addition to the scheme of the RTI Act 2005, overshadowing the opacity that the OSA 1923 allows under which every departmental noting, casual conversations among officers, or inadvertent disclosure of information within and beyond the government could potentially invite prosecution irrespective of the substantive character of the information in question.

## CONCLUSION

The essence of sustainable development lies in creating an ecosystem for accountable institutions and ensuring justice. Good governance is imperative to encourage the growth of accountable governance institutions, which can be implemented by regulating administrative functions and preventing their excesses. One of the ways has always been to control secrecy within government and provide citizens with access to information. As a result, there remained a constant conflict between official secrecy and the right to information—and in the case of India, the conflict is only aggravated in the presence of an anachronistic anti-espionage law, OSA 1923, despite the enactment of the RTI Act 2005.

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112. *Id.*

113. *supra* note 77.

114. *Id.*

115. *Id.*

From the scheme of the RTI Act 2005, it is abundantly clear that the legislative intent has been to prioritise the dissemination of information to the members of the public. The framework is in alignment with international commitments and the evolving jurisprudence on fundamental freedoms, particularly freedom of speech and expression. As the Open Government campaign gains pace and strength, India shoulders the responsibility to stay true to its democratic value systems wherein rights are upheld as a rule and curtailed only as an exception. Such balance is of utmost relevance because the state is involved in myriad complicated functions, which can legitimately warrant confidentiality for effective execution and impartial decision-making. Moreover, the members of the public may not always be in the position to properly comprehend the fundamentals of governance and pressurize their governors in otherwise unsound or hasty decisions. Thus, the RTI Act 2005 provides for an opportunity to collaborate with the state in information exchange without affecting the protected interests of the state.

In the presence of the RTI Act 2005, the redundancy of the OSA 1923 becomes more pronounced. Up until the *Raj Narain* controversy, government secrecy was an accepted rule and followed to its truest form. The rule was reinforced by the OSA 1923, which surprisingly continued to stay in operation with its colonial undertones with little opposition. From a legal context, until the enactment of the RTI Act 2005, there was no incongruity so far as legislative intent was concerned, and the only divergence came through a series of judicial precedents wherein Article 19(1)(a) was interpreted to include right to information.

It is high time that the OSA 1923 is amended and brought in alignment with the RTI Act 2005. Several reports recommend either a repeal or consolidation of the laws on official secrets in an umbrella national security law. However, as evident from the foregoing analyses of the two laws, it is clear that there is a significant lack of harmonisation between them resulting in ambiguity. The OSA, undoubtedly, address matters of great relevance, however, it has been overridden to the degree of inconsistency under the RTI Act. With the OSA completely prohibiting dissemination of official information, it stands in stark contrast with the RTI Act which does not extend absolute protection to official secrets so long as public interest warrants or allegations of corruption or human rights violations are in question.

In conclusion, the researcher recommends that there is an urgent need to amend the OSA 1923 in light of the RTI Act 2005. In situations where there is more than one law on the same subject matter, confusion is bound to occur in the absence of harmonisation. Such duplication results in unnecessary litigation and thereby waste of financial and mental resources. Even though the OSA has been repealed by implication, no changes have been so far incorporated in the OSA to either materially change it in conformity with the *sunshine law* or expressly repeal and replace it with reasonable legislation regulating official secrets. All of this ultimately affects the sustainability efforts in governance because institutional efficiency is undermined by

contradictory legislative frameworks premised on divergent principles which make governance models unstable and unreliable. And, weak governance institutions cripple democracies because there is no justice to be delivered.



## THE ROLE OF MEDIA IN SHAPING PUBLIC PERCEPTION OF LGBTQ RIGHTS IN INDIA: A SOCIO-LEGAL PERSPECTIVE

Priya Sushil Totale<sup>1</sup>

Dr. Pahuja Rekha Purshottamdas<sup>2</sup>

### INTRODUCTION

Public opinion, societal viewpoints, and legislative agendas are all greatly influenced by the media, which has progressively emerged as one of the most vigorous instruments for representation and communication. The way that LGBTQ (Lesbian, Gay, Bisexual, Transgender, and Queer) individuals are portrayed in the media has a significant impact on how Indian society views and treats this group.<sup>3</sup> Lesbian, Gay, Bisexual, Transgender, and Queer is an acronym that includes an extensive variety of gender identities and sexual orientations. Sexual attraction to persons of the same sex is known as homosexuality, and it is one form of gender identification. Gender identity is the feeling that one is masculine or feminine.<sup>4</sup> Thus, when talking about media portrayal and its impacts, it is significant to understand the whole spectrum because all of these identities have distinct experiences and difficulties of its own.

India has a diverse media landscape that includes radio, television, newspapers, and the digital network. Previously, LGBTQ people have frequently been negatively portrayed in Indian media, often depicted as destructive stereotypes. LGBTQ characters are frequently seen in TV serials and films as either morally questionable or as comic relief,<sup>5</sup> which feeds into prejudice and makes it more difficult for LGBTQ people to get acceptance. For examples Bollywood

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  3. Poonam Phogat and Vasundhra Verma, *The Impact of Stereotypical Media Portrayals on the Urban LGBTQ+ Youth: A Qualitative Study of their Lived Experiences*, © 2022 Indian Association of Health, Research and Welfare, ISSN-2347-3797, <https://www.proquest.com/open-view/7c374e1e6214a9d66733f2b26db2123f/1?pq-origsite=gscholar&cbl=5347679>. (visited on 18/07/2024)
  4. Tasker, F. and Wren, B, *Sexual identity and gender identity: Understanding difference*, 2 CLINICAL CHILD PSYCHOLOGY AND PSYCHIATRY, 315-319 (2002)
  5. Pushpinder Kaur, "HUMAN RIGHTS VIOLATIONS AGAINST LGBT PEOPLE IN INDIA: NEED FOR INTROSPECTION" (2016), [https://yior.org/wp-content/uploads/2019/01/Pushpinder\\_kaur-1.compressed.pdf](https://yior.org/wp-content/uploads/2019/01/Pushpinder_kaur-1.compressed.pdf). (visited on 20/07/2024)

movies “Dostana” (2008)<sup>6</sup> was criticized for their portrayals of homosexuality, leading to stereotypes and protests from the LGBTQ+ community.

These incorrect representations have a significant effect. They influence not only public perception but also the legal and social landscape that LGBTQ individuals must constantly travel. The stigmatisation of LGBTQ people by the media contributes to societal marginalization and has an impact on their social acceptance, employment prospects, and mental health.<sup>7</sup> The legal obstacles they encounter, such as legislation that discriminate against them and a lack of legal protections, are reflections of this societal bias. For instance, consenting same-sex relationships were illegal in India until 2018 under Section 377 of the Indian Penal Code, which was supported by deeply rooted cultural prejudices that were reinforced by media portrayals.

Many people may never come into contact with LGBTQ people in person and instead rely mainly on media representations to help them comprehend. Regrettably, there are many misconceptions in society as a result of the media’s frequent confusion of gender identity with sexual orientation. For example, Transgender is commonly associated with homosexuality although both are different.<sup>8</sup> These untruths can affect the legal and social standing of LGBTQ people and feed into society prejudices. On the other hand, positive media representations have the power to educate the public, promote sympathy, and reinforce the cause of social acceptance and legislative reforms. The media is one of the tools that has the power to create public awareness about the rights of LGBTQ people, advance their rights and reduce discrimination against this group in India by presenting the diversity and humanity of LGBTQ people.

This study investigates into how media portrayals have led to stereotyping and stigmatization, affecting the day-to-day experiences and legal issues faced by LGBTQ people. It also explores how positive media representation can bring about legal reforms and improve societal attitudes toward LGBTQ rights.

## **MEDIA PORTRAYAL OF LGBTQ INDIVIDUALS**

LGBTQ people have been marginalized and demonized in Indian media for a long time. Characters from LGBTQ communities are frequently portrayed as villains, comedic relief,

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6. Tejas Harad, ‘*Think Like a Girl*’: Why ‘Dostana’ Was Anything But LGBTQ+ ‘Representation’, THE QUINT, <https://www.thequint.com/voices/blogs/pride-month-hope-a-dostana-is-never-made-labelled-representation-again#read-more>. (Last visited July 20, 2024, 10:00AM)
  7. Marrero, Christian, “*Media Representations of LGBT People*”. Honors College Theses. 641. <https://digitalcommons.georgiasouthern.edu/honors-theses/641>. (Last visited July 20, 2024, 10:00AM)
  8. Jessica N. Jobe, “Transgender Representation in the Media” (2013). [https://encompass.eku.edu/cgi/viewcontent.cgi?article=1145&context=honors\\_theses](https://encompass.eku.edu/cgi/viewcontent.cgi?article=1145&context=honors_theses). (Last visited July 20, 2024, 10:00AM)

or deviants, perpetuating stereotypes and biases in society. The following are some notable examples of how the LGBTQ community has been negatively impacted by Indian media:

#### **a) Portrayal in Bollywood Films**

The Hindi-language film industry, known as Bollywood, has a lengthy history of portraying LGBTQ+ characters negatively. These depictions frequently mock the community and perpetuate preconceptions. Among the noteworthy instances are:

**“Dostana” (2008):** Despite its popularity, this movie drew criticism for how it portrayed homosexuality. In order to get an apartment, the characters pretend to be gay, which gave rise to a number of jokes and scenarios that denigrated and stereotyped the LGBTQ community.<sup>9</sup>

**“Singham Return” (2014):** The LGBTQ community and activists protested this movie because they felt it reinforced negative stereotypes because it contained a disparaging representation of a transgender character.

#### **b) Portrayal in Television Reality Shows**

Indian television has also played a role in the negative representation of LGBTQ+ people.

**“Bigg Boss”:** LGBTQ participants have been in several seasons of this well-known reality show; however, their portrayal has frequently been sensationalised. For example, Laxmi Narayan Tripathi, a transgender candidate in the 2010 season, endured disrespectful comments and intrusive questioning.

#### **c) News Media Coverage**

The Indian news media has frequently faced criticism for sensationalizing and inaccurately portraying matters pertaining to the LGBTQ community.

**Coverage of Section 377 IPC:** The legal fight to decriminalise homosexuality under Section 377 of the Indian Penal Code was extensively covered by the media, with sensationalist headlines and intrusive coverage of the private lives of LGBTQ people.

**Homophobic Commentary:** There have been cases reported of commentators and news anchors making homophobic remarks. For instance, several news outlets have invited speakers to publicly voice homophobic opinions during discussions of LGBTQ rights without providing enough context to balance them out.

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9. ‘Think Like a Girl’: Why ‘Dostana’ Was Anything But LGBTQ+ ‘Representation’, (2022), Edited By: Tejas Harad, <https://www.thequint.com/voices/blogs/pride-month-hope-a-dostana-is-never-made-labelled-representation-again#read-more>. (Last visited July 20, 2024)

#### **d) Social Media Harassment**

The emergence of social media has brought greater visibility to the LGBTQ community in India. This has been somewhat beneficial, but it has also resulted in an increase in online harassment.

**Trolling and Abuse:** For LGBTQ individuals who use social media regularly, for them threats, hate speech, and trolling are common experiences.<sup>10</sup> This sort of harassment may affect their psychology seriously and also create an environment of intolerance, which has an impact on their physical and mental wellbeing. In addition to these consequences, this sort of harassment also discourages LGBTQ persons from expressing their identities and sharing their stories on online media portal.

#### **Pride Parades in the Media**

Pride parades play an important role in creating awareness in respect of the rights of the LGBTQ community in India. Though the media's emphasis on the most dramatic aspects of these events sometimes minimises their implication and the important messages they are trying to convey.

**Skewed Focus:** Media stories mainly concentrate on the vibrant costumes and celebrations rather than the difficulties and problems faced by the LGBTQ community, thus limiting the event to simply entertainment instead of a significant social movement.

### **SOCIO-LEGAL CHALLENGES**

India's socio-legal environment for LGBTQ people is characterised by numerous challenges. They remain marginalised due to ongoing discrimination in public services, housing, and the workplace as well as the lack of legal recognition for same-sex unions. Adverse representations in the media promote societal prejudices and obstruct public and political backing for essential law changes. Thus, LGBTQ people deal with a lot of issues in their daily lives as a result of prejudice and negative media representation.

#### **a) Marginalization and Social Exclusion**

One of the main issues LGBTQ people in India experience is marginalisation, which has an adverse effect on their mental health, general well-being, and capacity to fully engage in society. LGBTQ people are still excluded from mainstream social, economic, and cultural life because of ingrained societal prejudices and cultural conventions. Occasionally, people experience social rejection, making it challenging for them to lead independent lives. They receive bad sentiments from society and are stigmatised. They wish to be involved in all aspects

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10. GUIDE TO ANTI-LGBTQ ONLINE HATE AND DISINFORMATION, <https://glaad.org/smsi/anti-lgbtq-online-hate-speech-disinformation-guide/>. (Last visited July 20, 2024)

of society, but because they are marginalised, they are not able to do so equitably. This can be called as homosexuals' societal exclusion.<sup>11</sup>

### **b) Absence of Legal Recognition for Same-Sex Marriages**

In 2018, the Supreme Court of India overturned Section 377 of the Indian Penal Code and decriminalized consensual same-sex relationships through the historic case of *Navtej Singh Johar v. Union of India*.<sup>12</sup> Despite this landmark judgment, same-sex marriages remain unrecognized in India, consequently, are unable to exercise rights and benefits enjoyed by heterosexual couples, such as inheritance rights, rights to adoption, parental right, and spousal benefits. This legal vacuum leaves LGBTQ individuals feeling vulnerable and impacts their social acceptance and validation, perpetuating stigma and discrimination against them.

### **c) Family Rejection**

Family rejection is another significant challenge for LGBTQ which can cause them great emotional and psychological suffering. After coming out, many LGBTQ people experience rejection from their families, which can lead to serious mental distress, homelessness, and loss of financial assistance. Discrimination in society sometimes exacerbates this rejection by feeding emotions of worthlessness and loneliness, sadness, anxiety, substance addiction, and suicidal thoughts.<sup>13</sup> Numerous instances exist where LGBTQ individuals or couples end their lives due to discrimination and rejection from their families and society, which pushes them to act suicidally.

Anjana Harish, a young bisexual woman, killed herself in 2020 as a result of pressure from her family and conversion therapy.<sup>14</sup> Her story serves as a tragic example of the terrible effects of rejection like this. These incidents highlight the critical need for social transformation and LGBTQ-friendly networks.

### **d) Mental Weakness**

LGBTQ people frequently experience mental weakness as a result of regular rejection and a lack of support. Anxiety and depression are common symptoms of this. When they look for

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11. Bhaskar Choudhury & Karun Sanjaya, *The Status of LGBT People in India: A Socio-Legal Examination* (2022), <https://www.researchgate.net/publication/357687243>. (Last visited July 20, 2024, 10:00AM)

12. *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321

13. ADITYA BIRLA CAPITAL, <https://www.adityabirlacapital.com/healthinsurance/active-together/2024/04/30/dealing-with-the-stress-of-family-rejections-in-the-lgbt-community-in-india/>. (Last visited July 20, 2024, 10:00AM)

14. Kerala student dies in Goa, death puts focus on inhuman 'conversion therapy' on queer people, <https://www.thenewsminute.com/kerala/kerala-student-dies-go-a-death-puts-focus-inhuman-conversion-therapy-queer-people-124683>. (Last visited July 20, 2024, 10:00AM)

emotional support, they generally face rejection from family, friends, and even society. Their mental health may be severely impacted by persistent feelings of worthlessness, hopelessness, and isolation brought on by widespread exclusion. Living in a hostile environment exacerbates these emotions, leading to chronic mental health struggles.<sup>15</sup> Thus, the constant stress of feeling unsupported and rejected by family, friends, and society can be overwhelming, causing lasting emotional pain and mental health challenges.

#### **e) Discrimination at Workplace**

Workplace discrimination is a major contributing factor to the socioeconomic disparities experienced by LGBTQ individuals. Their employment stability is strongly impacted by discrimination, which also leads to unemployment and poverty. According to a survey, over two-thirds (72.72%) of LGBTQ workers reported experiencing discrimination in the workplace as a result of coming out.<sup>16</sup> It's important to take note of this high percentage. Discrimination can take many different forms, from low wages to rejection for promotions. Another difficult issue for LGBTQ employees is harassment. It was found in a survey that around 69.56% of LGBTQ individuals have experienced harassment at the workplace.<sup>17</sup> Experiencing exclusion from professional groups and hearing derogatory or homophobic comments are frequent instances of harassment that LGBTQ individuals experience.

### **ROLE OF DIGITAL MEDIA**

Digital media has become a significant tool for promoting positive and authentic representations of LGBTQ individuals. Zheng Jiaran and Wen Qianru's investigation came to the conclusion that new media gives homosexual persons a more direct and open platform for communication.<sup>18</sup> People can now interact with people who might be going through similar experiences and express their identities on social media platforms.<sup>19</sup> Being with others who are similar to them in terms of sexual orientation helps them realise that they are neither unique nor abnormal. This can improve their self-identity and give them a greater sense of belonging.

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15. SLIDE SHARE, <https://www.slideshare.net/slideshow/lgbtq-issues-in-india-and-legal-challenges/268637840#1>. (Last visited July 29, 2024, 10:00AM)
  16. Abhay Mane, "Experience of LGBTQ+ Employees at the Workplace in India: Diversity and Inclusion", 9 INTERNATIONAL JOURNAL OF SOCIAL SCIENCE RESEARCH, 2327-5510 (2021)
  17. Ibid.
  18. Zheng Jiaran, Wen Qianru. *Research on the Identity Construction process of gay College students in the New Media Era*, 2020, No.11, pp.1-41.
  19. AMERICAN PSYCHOLOGICAL ASSOCIATION, *Opposing Discriminatory Legislation and Initiatives Aimed at Lesbian, Gay and Bisexual Persons*, <https://www.apa.org/about/policy/discriminatory-legislation>. (Last visited July 29, 2024)



A study was done on lesbian coming out videos on YouTube channel and it is discovered that these videos are useful for the identity development of sexual minorities.<sup>20</sup> When Gay individuals see the film, they might feel self-confident in their own identity by sharing their thoughts and views with others in their community. Their confidence and encouragement might offer them the courage to look further into their own identities. For promotion of rights of LGBTQ and creation of societal awareness regarding their rights the social media has made a great contribution. Now a days many people and different organizations have been using social media to spread news, publicize events, and collect money for LGBTQ. By increasing awareness and developing understanding of the LGBTQ population, this has made a huge contribution to the progress of LGBTQ rights.<sup>21</sup>

Social media has also played a crucial role in exposing more people towards prejudice, hate speech, and cyberbullying. Bullying and harassment of LGBTQ people on online platform is not uncommon, and it can have a very adverse effect on their mental health and overall wellbeing. This outcome has given increase in demands for more online platform guideline in addition to heightened accountability for those who harass and spread hateful conversation online.

## COMPARATIVE ANALYSIS

The media's role in promoting LGBTQ individuals in Western countries has significantly evolved, leading to societal acceptance and progressive legal reforms. The United States Supreme Court delivered a landmark judgement mandating that all states comply with the 14th Amendment by providing marriage licenses to same-sex couples and recognizing all marriages performed according to state law.<sup>22</sup> Globally, media attention on minority groups, particularly LGBTQ issues, has significantly increased, reflecting a shift in societal attitudes. While representation in TV and movies still needs improvement, platforms like Netflix are leading the way in inclusivity. The rise in LGBTQ-focused content online and the popularity of shows like 'RuPaul's Drag Race' highlight growing visibility and support for the community, signaling positive change and broader acceptance in public discourse.<sup>23</sup>

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20. Michael Lovelock. *My coming out story: Lesbian, gay and bisexual youth identities on YouTube*, 2017, Volume: 22 issues: 1, page(s): 70-85 (2017).

21. BARNES M. & MASSEY, S. (2001). VOICES OF GAY AUSTIN. AUSTIN AMERICAN-STATESMAN.

22. Joseph Fawbush, Esq., *Legally reviewed by Laura Temme, Esq., Obergefell v. Hodges Case Summary and Significance*, FIND LAW, <https://supreme.findlaw.com/supreme-court-insights/obergefell-v--hodges-case-summary-and-significance.html>. (Last visited July 29, 2024, 8:00AM)

23. LGBTQ media in the U.S. - statistics & facts, Statista.com, <https://www.statista.com/topics/5324/lgbtq-media-in-the-us/#topicOverview>. (Last visited July 29, 2024, 10:00AM)



The Commemorate Canada program is funding a project to mark the 50th anniversary of the decriminalization of homosexuality in 1969. Over \$770,000 will support Egale Canada, a national organization committed to advancing equality and justice for lesbian, gay, bisexual, and trans-identified people and their families across Canada, in creating a traveling exhibit and a multilingual documentary. These will highlight the history and struggles that led to this milestone, celebrating the progress made for LGBTQ rights in Canada.<sup>24</sup>

Despite enormous societal obstacles, LGBTQ individuals in India have accomplished great things. Madhu Bai, the nation's pioneering trans mayor, and Grace Banu, the trailblazing trans woman engineer in Tamil Nadu, are two examples of individuals who have broken down barriers. Their success stories highlight the community's resilience, even though genuine political inclusion and broader acceptance are still works in progress,<sup>25</sup> but Indian media did not highlight such news as much as it needed to be reached towards the common all.

## CONCLUSION AND SUGGESTIONS

This research concludes by highlighting the significant impact of media on the public's opinion of LGBTQ rights in India. It exposes how severely inaccurate media representations of LGBTQ people have aggravated societal prejudices by contributing to the stigmatisation, discrimination, and stereotyping of this community. The lack of strong legal safeguards intensifies these difficulties, generating an antagonistic atmosphere for the LGBTQ community.

This paper studies historical and present scenario to lighten the continuous socio-legal struggles faced by LGBTQ people. It highlights the ways in which unfavorable media representations have obstructed the advancement of legislation changes that are essential to ensure the rights of the LGBTQ community. By a comparative study with other countries, it is found that positive media impact can make meaningful changes and offer valuable lessons which India can take into consideration. In addition-with, the digital media offers more genuine and affirming portrayals of LGBTQ people giving a positive indication of confidence. But in order to fulfil this there is a need of careful action.

In conclusion, the study reveals that there is a need for the adoption of detailed rules of media, necessary changes in legislation, joint initiatives such as media, legislative body and legal professionals. The legislature and judiciary must take initiative for the protection of

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24. *Government of Canada initiatives to support LGBTQ2 communities and promote diversity and inclusion, Prime Minister of Canada Justin Trudeau*, <https://www.pm.gc.ca/en/news/backgrounders/2017/11/28/government-canada-initiatives-support-lgbtq2-communities-and-promote>. (Last visited July 27, 2024, 10:00AM)

25. *Zoya Mateen, BBC NEWS, Delhi, Lok Sabha elections: LGBTQ Indians are more accepted than ever - but politics hasn't caught up*, <https://www.bbc.com/news/world-asia-india-68933715> (Last visited July 29, 2024, 8:00PM).

rights of LGBTQ community. Now it is time to make law for recognition of same sex marriage otherwise number of secret solemnizations of same sex marriage in society will increase. The Indian Constitution protects the rights of the LGBTQ community through the various Supreme Court verdicts, but still, most of the areas need to be covered as per the fundamental rights that are provided for all the other common people, and most of the cases are rejected considering the socio-religious condition of India.

1. Guidelines for Media: Form and implement rules for the media for their depiction of LGBTQ people and ensure that they are represented fairly and respectfully and avoid their portrayal as harmful stereotypes.
2. Need of Legal Reforms: New stronger laws to be formed to protect LGBTQ rights, ending discrimination, legalizing same-sex marriage. Outdated laws to be discarded in accordance with their current social needs.
3. Public Awareness: National efforts to be initiated to educate people, remove stereotype image and create a more accepting and inclusive environment for LGBTQ individuals.
4. Collaboration: Encourage Media, LGBTQ advocates, legal experts, NGOs, and policymakers to work jointly and create supportive environments for LGBTQ community.
5. Research and Monitoring: Regular studies should be conducted in respect of Media portrayal of LGBTQ people and identify problems, take corrective actions and track progress so as to ensure fair representation of LGBTQ community
6. Use of Digital Media: Online platforms should be effectively used to show contributions of LGBTQ community by sharing their experiences and real stories

## RIGHT TO BE FORGOTTEN & RIGHT TO INFORMATION: CONFLICT & CONVERGENCE IN DIGITAL AGE

Shriya Badgaiyan<sup>1</sup>

### INTRODUCTION

Since the post-modern society has been defined by digital developments and the constant stream of information, the principles of the RTBF and RTI have become the key legal rights that define the concept of privacy and the right to the information. These rights depict two aspects of a dynamic and frequently contradictory legal and ethical environment.

The RTBF is a comparatively novel concept in data protection and privacy legislation; it allows persons to demand that their data be erased from search engines and other directories. This request is especially poignant where such information is no longer required, the retention of which is considered unnecessary or undesirable in the best interest of the subject's privacy. The RTBF serves the best interest of a person's privacy and self-respect, providing them with a way to regain control of their online profiles. That is, the RTBF assists in preventing the exploitation of information that may have been collected in the past but is no longer useful or even beneficial, to a person's reputation or well-being. It respects the fluidity of personal identity and the need for laws to respond to the constant changes in the technological environment where people's data are always available.<sup>2</sup>

On the other hand, the RTI is part of the democratic principles; it is the right which essentially gives the citizens a right to information possessed by the authorities. This right enhances accountability, participation in governance, and openness of the state's activities to the public. The RTI has been very useful in fighting corruption, advocating for good governance, and enabling citizens to gain relevant information to enable them to make informed decisions. It supports the notion that an informed populace is vital in any functioning democracy. Since the RTI allows the citizens to get information on actions and decisions of the government, the power is checked and the cases of abuses of power are minimized.<sup>3</sup>

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  2. Prashant Mali, *Privacy Law: Right to Be Forgotten in India*, 7 NLIU L. REV. 1 (2018).
  3. Abdul Jabbar Haque, *Right to Information in India: A Critical Appraisal*, 5 INDIAN J.L. & JUST. 99 (2014).

The interplay between RTBF and RTI is a delicate balancing act between two fundamental principles: right not to be exposed in any way and right of public to be informed. This clash is especially evident in the Indian context considering the fact that the country is bound by two principles which are right to privacy of individuals & RTI of government. According to RTBF, people should not be followed by the remnants of their previous actions and decisions throughout their lives, which is why one can delete some unnecessary or irrelevant data. This protective measure is paramount given that information in the digital age can be procured and distributed with a lasting impact on one's personal and professional life.<sup>4</sup> On the other hand, the RTI advocates for free access to information, which is very central to exercising power and equally helping the public to be informed. It represents the doctrine that openness in the exercise of political authority is a vital cog in the wheel of democracy, thus allowing the people to engage in the democratic process effectively and also to demand accountability from those who are in power.<sup>5</sup>

## CONCEPTUAL FRAMEWORK OF RIGHT TO BE FORGOTTEN AND RIGHT TO INFORMATION

### Right to be Forgotten

The RTBF is another significant legal right which enables a person to demand the non-availability of certain personal information in the search engine results and other directories subject to certain circumstances. This idea seeks to enable people to have the ability to manage what they post on the internet especially information that may be old, wrong or irrelevant. The principle of RTBF was first developed in the European Union and received its major boost when the CJEU decision in 2014 in *Google Spain SL, Google Inc v. Agencia Española de Protección de Datos, Mario Costeja González*.<sup>6</sup> In this particular judgment, it became clear that the EU citizens could appeal to search engines asking them to remove certain links from the search results concerning the individual person in case the information is 'inadequate, irrelevant or no longer relevant'. This decision was a significant contribution to the recognition of the role of personal data protection in information society, to the recognition of privacy rights in the conditions of the growing digitalization of data.<sup>7</sup>

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4. Naman Khatwani, *The Right to Be Forgotten: Incorporation in India*, 4 J. INTELL. PROT. STUD. 57 (2020).

5. Bhavna Singh, *An Overview of the Right to Information Act in India*, 5 INDIAN J.L. & LEGAL RSCH. 1 (2023).

6. Case C-131/12.

7. *Id.*

International awareness of the RTBF has been high and this has resulted in a varying level of acceptance and/ or adoption. In the EU, GDPR has even enshrined the RTBF giving it a stronger legal basis. Other countries like Argentina and South Korea have also incorporated similar principles but the way they have implemented and the proportion between privacy and freedom of information is quite different. Peculiarly, RTBF's changes reflect the increasing concern with the privacy of the individual across world due to the growing problem of the digitalization of personal information. It is for this reason that ever-changing environment adds to difficulties and impossibility of the achievement of privacy in the growing global network society.<sup>8</sup>

In India, RTBF is still in relatively unrecognized legal domain that is slowly entering the legal consciousness primarily by way of judicial decisions and not as a legislative creature. Indian law for RTBF does not have specific legislation like GDPR but has been influenced through court decisions. The Indian constitution was applied by Supreme Court in *Justice K.S. Puttaswamy (Retd.) v. Union of India* and declared right to privacy as fundamental right.<sup>9</sup> While it did not directly recognise the RTBF, this judgment nonetheless advanced the necessary preparation for later judicial recognition of privacy rights under the Constitution.

As to the growth of RTBF, Gujarat High Court in *Dharamraj Bhanushankar Dave v. State of Gujarat* recognized right to privacy and stressed the requirement of contemplating RTBF in certain circumstances.<sup>10</sup> Likewise in 2019, in *Sri Vasunathan v. The Registrar General*,<sup>11</sup> Karnataka High Court directed that one's name be deleted from online judgment to protect his/her privacy, thus, endorsing the RTBF. These cases show an increasing trend of the judiciary towards accepting and enforcing RTBF, although in a piecemeal manner. This judicial trend demonstrates how there is a growing recognition for the necessity of fairly weighing the privacy's individuals' rights against RTI.

The supporters of RTBF assert that it is vital to safeguard individual's privacy in the context of the new technologies. Thus, when large quantities of personal data become available in World Wide Web, there is potential for abuse. RTBF enables individuals to have ways and means of protecting their personal data from being available and sometimes dangerous for eternity. This protection is especially important in situations where the information may be out-of-date or not relevant to the person's current status and thus, is prejudicial to their rights. In this way, RTBF

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8. Michael J. Kelly & Satolam David, *The Right to Be Forgotten*, 2017 U. ILL. L. REV. 1 (2017).

9. Justice K.S. Puttaswamy (Retd.) v. Union of India (2017) 10 SCC 1.

10. Dharamraj Bhanushankar Dave v. State of Gujarat Special Civil Application No. 1854 of 2015.

11. Sri Vasunathan v. The Registrar General 2017 SCC OnLine Kar 424.

assists in avoiding possible harm resulting from constant accessibility of particular information by allowing certain information to be removed from the list.<sup>12</sup>

RTBF is the capability to protect data from misuse. Ever since data is being called the new oil then the chances of it being misused are very high. Personal information if not managed can be misused for example it can be used to defraud individuals, harass or discriminated against them. The RTBF enables an individual to minimize the access of such information hence minimizing the risk of misuse. Thus, allowing people to erase such or such information, the RTBF plays the role of a protection mechanism against the risks resulting from the global exchange of personal data.

Furthermore, RTBF can be regarded as an effective means of the rehabilitation and the second chances. People who have changed for the better or who have repented for their previous sins should not be continuously punished for something they are not anymore. The RTBF enables the deletion of such data so that an individual is given a second chance to transform and live a normal life without having the stigma chasing them for the rest of their lives. This aspect is especially relevant in nurturing a culture of redemption in society and people's transformation. Thus, by enabling the erasure of the data that might have prejudiced the subject's life for the worse, the RTBF fosters a context in which people can start anew and become productive members of society without the stigma attached to their names.<sup>13</sup>

### **Right to Information**

One of the most potent instruments is RTI that is the citizens' constitutional right to access the information held by public authorities. This right is based on the twin pillars of transparency and accountability which are cardinal virtues in any functioning democracy. People are made efficient by making them legally capable of seeking information on how the government operates, how decisions are made and how the public funds are spent. Since RTI enables citizen activism through monitoring the actions of the government, it has the crucial responsibility of promoting citizens' awareness, thereby enhancing the democratic culture in a society.

The interest in RTI spread across the globe in mid of the twentieth century, specifically, Sweden was first who introduced the freedom of information law in 1766. This piece of legislation would act as a benchmark to many other countries that would later embrace the necessity of transparency in enhancing democratic culture. In the span of decades, countries all over the world adopted similar laws due to the realization that free flow of information is crucial in the process of checking on governments. This movement received support from

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12. Riddhi Tripathi, *The Right to Be Forgotten*, 2 INDIAN J. INTEGRATED RSCH. L. 1 (2022).

13. *Id.*



international organizations through the call for open governance and fighting of corruption thus strengthening the global governance agenda.<sup>14</sup>

The need for RTI in India started receiving massive support in the 1990s because of the activism from the citizens and CSOs. These groups exposed the corrupt and inefficient individuals in the various offices hence mobilizing public support for change. This combined endeavour led to the passage of RTI Act in 2005 which was a major step for India's democracy. The Indian RTI Act has been designed to embody the desire of a society that is clamouring for more transparency in the functioning of the government and has put in place a strong mechanism to enable the citizens to seek information and to act against the erring officials of the public authorities.<sup>15</sup>

The RTI Act, 2005 is one of the major enactments that describes the mechanisms through which the citizens can seek information from the public authorities. It makes provision on how to respond to information requests within the shortest time possible to keep the government open for the People. The Act applies to the central, state and local government and any non-governmental organisation that is significantly financed by government. This broad application guarantees that transparency encompasses different aspects of governance, thus supporting the democratic accountability.

RTI Act has indeed transformed the system of governance in India by encouraging the culture of transparency. In the case of the Act, the citizens have been allowed to demand information on the functioning of the government, thus reducing corruption levels and promoting transparency. The result is that public authorities can no longer afford to keep poor records and be un-proactive in the disclosure of information, which means better governance. Through this change, people can engage better in the democratic activities, thereby contributing to the development of Indian democracy and improving citizens' confidence in the executive, legislative, and judicial branches of the Indian government.<sup>16</sup>

Thus, RTI plays the role of a powerful instrument in increasing the transparency of governmental activities. It enables the citizens to access information thus being able to scrutinize all the actions of the government. This oversight ensures that public officials are answerable to the public for the decisions and actions they take and is critical for the establishment of citizens' confidence in the public organs.

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14. Sanyukta Moitra, *Containing Corruption in India through Right to Information: An Analysis*, 9 INDIAN J.L. & JUST. 127 (2018).

15. Shalini Singh & Bhaskar Karn, *The Implementation of Right to Information Act, 2005 in India*, 4 J.L. POL'y & GLOBALIZATION 22 (2012).

16. *Id.*



RTI is in a way people empowering act as it gives the right to information that is crucial for democracy. It helps a person to be informed on the decisions to be made, fight for his or her rights, and even prosecute the authorities. The above listed points signify the more involvement of the citizens in the political process not just as spectators but as players.<sup>17</sup>

Another advantage, and perhaps one of most important ones, is the reduction of corruption levels thanks to RTI. Due to this, misuse of public resources is checked and this helps in reduction of corruption since RTI exposes corrupt practices. RTI also empowers the citizens to fight against corruption and malpractices within the government offices hence, increasing the level of integrity in the government. The transparency created by RTI therefore is very instrumental in ensuring that the fight against corruption is won.<sup>18</sup>

## **POINTS OF CONFLICT BETWEEN RIGHT TO BE FORGOTTEN & RIGHT TO INFORMATION**

### **Conceptual Conflicts**

RTBF & RTI are conceptual opposites that form basis of the conflict between privacy and transparency, two principles that are the global foundation of modern societies. RTBF also insists on RTBF whereby an individual has the right to request service providers to delete any data, which is personal and would be of no more use in future. This right extends the idea of protection of personal data & right to prevent the use of such data if it interferes with his or her daily and professional life.

While on the other hand, RTI also holds the principle of openness where the citizens have the right to information that is being held by the public authorities. This is particularly important to ensure that the public is aware of the progress of its government leaders, their activities, and decisions ensuring that accountability, fighting corruption, and empowering citizens to engage in democracy-related processes are met.<sup>19</sup> Information empowers the public in the ability to assess the performance of the government and its leaders and to make proper decisions on civic issues. It enables journalists, activists, and citizens to fight against misconduct, inefficiency, or abuse of power in the government, thus strengthening democracy and the public's trust in it.<sup>20</sup>

The tension is illustrated when RTBF results in the withdrawal of information which contradicts RTI. For example, if the information regarding misconduct or criminal records is

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17. *Supra* note 4.

18. *Supra* note 13.

19. *Supra* note 13.

20. Pranay Duggal, *Balancing Transparency and Security: The Right to Information Act in India and Global Perspectives*, 4 JUS CORPUS L.J. [579] (2023).

deleted under RTBF, then it can give a chance to obscure the facts that the public has a RTI, if it related to people in power or with public responsibility. For instance, a political or a corporate figure who has been implicated in previous scandals would prefer to hide records of his or her actions thus denying the public crucial information about the integrity of the said figure. This can create a significant ethical dilemma: is it fair to let the person become free of his or her past sins at the expense of the public interest by denying information on the dangers that the 'free' person might pose to society, or the-such a person's history of crimes that are considered not serious enough to warrant a jail term, but would still compromise the interest of the public.<sup>21</sup>

Therefore, the conceptual conflict that exists revolves around the tension between privacy rights as opposed to RTI by the public. It does this systematically and calls for a balanced approach where each case is looked at to determine the extent of harm that would be socially caused by the exposure of personal information against value that public should continue to receive accurate information from their sources. Legal systems and courts' decisions are very helpful in regulating these conflicts, which try to determine admissibility of specific actions and acknowledge both rights without encroaching on one to the extent that it would be highly prejudicial for the other. This on-going oscillation is all-important for maintaining a proper balance that would make respect for the value of privacy and the value of transparency possible in a way that makes democracy healthy and the dignity of human beings meaningful.

### **Legal and Practical Conflicts**

Issues related to the RTBF and RTI occur when there is a request to delete information about a citizen and there is a request under the law to avail such information to the public. It is quite apparent that these rights cannot be harmonized under the legal regime without careful consideration and determination of how much an individual's desire to have his or her data removed can go in a way that it does not compromise the public's right to be informed. This balance is especially important in circumstances where people's data per se may be considered sensitive while the information relating to it is of high public concern.

For example, in India, the legal battles occasionally pertain to the people trying to delete their criminal antecedents or certain statements from electronic records and search engines. Despite its being a personal record, such documents may prove to be life altering for the owner, journalists, researchers, and members of the public where the subject is or was in the line vying for or holding a public office. Courts are then left with the challenging role of balancing such

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21. Aditi Sandeep Malkar, *Right to Be Forgotten: Need for Constitutional Recognition in India?*, 3 JUS CORPUS L.J. 615 (2022).

right as right to privacy against RTI. This entails the means of legal interpretation that would consider the social gains of both rights in equal measure.<sup>22</sup>

A typical legal issue relating to the removal of previous judgement is illustrated in *X v. Union of India*<sup>23</sup> wherein application was filed to have certain judgement erased because petitioner argued that judgement had no relevance to his current life and it continued to harm his privacy. In such cases, factual circumstances relating to the judgment contain some factors like the time elapsed before making the judgment, the current status of the freed person, and the harm that the public is likely to suffer if they continue accessing that information. The settlement of these conflicts requires a proper understanding of how both the privacy and transparency are beneficial to the society, and therefore it often results in the making of a balanced decision to meet the rights of the individuals as well as the needs of the society.

### **Ethical and Moral Conflicts**

Dealing with RTBF and RTI requires consideration of various ethical and moral dilemmas that are not strictly related to legal and practical concerns. In essence, the RTBF is the quintessential ethical principle derived from the responsibility to respect a person's liberty and worth. It is based on the idea that it is possible for a person to get a second chance and start a new life without having one's past baggage drag him or her down. This right helps support the general principle of rehabilitation, and enables proponents to argue that people should have a second chance in society and not be branded for life. Thus, making individuals have the capabilities to minimize or avoid the negative impact of their digital footprints, the RTBF has put a stand for the ethical principle of respect of individual's growth and opportunities for a second chance.<sup>24</sup>

Whereas, RTI is ethically right that information essential to welfare of the public should not be withheld. Transparency is critical in ensuring that everyone and every organization is answerable for all the deeds they execute. It is instrumental in checking instances of dictatorship, enlightening people & creating awareness. Hence, RTI fosters the principles of democracy and allows more citizen engagement in societal governance processes. This right emphasizes ethical importance of revealing public information that would affect the people and their communities and keep the balance of power on the society's side.<sup>25</sup>

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22. Vidhi Tomar, *Reflecting the Need of "Right to Be Forgotten" in India*, 5 INDIAN J.L. & LEGAL RSCH. 1 (2023).

23. W.P.(CRL) 1082/2020.

24. Tejashree J., *The Need for the Right to Be Forgotten in India*, 5 RGNUL FIN. & MERCANTILE L. REV. 106 (2018).

25. Sandeepani A. Neglur, *Right to Information: Comparison of India's Legislation with That of United Kingdom and China*, 13 SUPREMO AMICUS 238 (2019).

This has a meaning that emphasizing one right over the other has a great effect on the society when need be. It elicited thought that emphasizing on RTBF is likely to cause environment whereby important information is concealed, thereby permitting people to escape their responsibility. Such a situation may further erode people's trust in various spheres of their lives and the very idea of a knowledge-based society. On the other hand, if RTI is prioritized, there would be invasion of the rights to privacy, especially hurting those who want leave their past behind.<sup>26</sup>

## JUDICIAL PERSPECTIVES

In India, the interplay between RTBF & RTI has been examined in various judicial pronouncements, leading to significant legal interpretations that shape the understanding and application of these rights. One notable case is the *K.S. Puttaswamy vs. Union of India*,<sup>27</sup> where Supreme Court recognized the RTBF as intrinsic part of the right to privacy under Art. 21. This landmark judgment set the stage for future deliberations on RTBF, emphasizing the importance of individual privacy in the digital age.

Another landmark case is *X v. Union of India*,<sup>28</sup> where Delhi High Court recognized RTBF in the context of a woman seeking to remove her name from a judgment that could potentially harm her reputation. The court meticulously balanced petitioner's right to privacy against public's right to access judicial records. Ultimately, the court favoured the RTBF, emphasizing need to protect personal data from being perpetually accessible online. This decision underscored the importance of individual privacy in the digital age and highlighted the necessity of safeguarding personal dignity and reputation against the backdrop of an increasingly transparent and interconnected world.

Another notable case is *Jorawar Singh Mundy v. Union of India*,<sup>29</sup> where Delhi High Court addressed RTBF in context of criminal record for first time. The petitioner sought removal of his name from public order, arguing that the ongoing availability of this information online hindered his right to live with dignity and pursue employment opportunities. The court acknowledged the potential harm caused by the perpetual accessibility of such records and directed search engines to de-index the judgment. This decision reinforced the RTBF in India, demonstrating the judiciary's recognition of the long-term consequences that digital records can have on individual's personal & professional life.

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26. Pratyush, *Right to Information Act with Reference to Constitutional Law in India*, 2 INDIAN J.L. & LEGAL RSCH. 1 (2021).

27. *Supra* note 8.

28. *Supra* note 22.

29. W.P. (C) 3918/ 2020 & CM APPL. 11767/ 2021.

On other hand, the decision-making by the Madras High Court discussed the precedence of the RTI Act as to co-operative Societies. Accordingly, it was concluded that Sec. 8 of RTI Act could not be superseded by RTBF; instead, obligation of transparency and accountability in public establishments must be upheld. In other words, the court stated that this particular aspect of privacy based on protection of personal data is not absolute right; it remains subordinate to communication and information, which forms a public interest, especially when the information is about public figure or official. This verdict reiterated the principles governing sections under RTI Act, with the main emphasis being made on fact that public's RTI plays important role in any democratic society.<sup>30</sup>

These judgments depict how the Indian judiciary exercises the RTBF and competently deals with the RTI. The legal case law proves that in certain circumstances, the courts are ready to acknowledge the RTBF next to the principle of protecting the privacy and dignity of individuals with applying sufficient concern to the principles of transparency and accountability. It shows judiciary's attempt to name digital medium while protecting rights of citizens & public's right to information. These decisions have enabled the judiciary to engage in the ongoing debate on the balance between privacy & information and in the process has attempted to make law in such a way that tries to resolve this tension.

### Comparative Analysis with International Jurisprudence

Globally, the confrontation over RTBF & RTI has resulted to different judicial decisions depending upon the country. Among these, GDPR of EU <sup>31</sup>can be mentioned, as it recognises RTBF and, at same time, provides for exceptions for important reasons of public interest, including journalistic, artistic or literary ones. The case of *Google Spain SL v. Agencia Española de Protección de Datos* (2014) that was implemented by European Court of Justice (ECJ) further endorsed RTBF.<sup>32</sup> This decision obliges search engine to expunge links to the personal data, if a request is filed so, the data is old, irrelevant or excessive. Although the ECJ gave this right significant importance it also acknowledged that there is a counter right for the public to

30. *Co-op societies not bound by RTI Act, rules Madras High Court*, THE NEW INDIAN EXPRESS (June 9, 2024), <https://www.newindianexpress.com/states/tamil-nadu/2024/Jun/09/co-op-societies-not-bound-by-rti-act-rules-madras-high-court>.

31. Art. 17 GDPR <Recital 66> To strengthen the right to be forgotten in the online environment, the right to erasure should also be extended in such a way that a controller who has made the personal data public should be obliged to inform the controllers which are processing such personal data to erase any links to, or copies or replications of those personal data. <sup>2</sup>In doing so, that controller should take reasonable steps, taking into account available technology and the means available to the controller, including technical measures, to inform the controllers which are processing the personal data of the data subject's request.

32. Ajay Pal Singh & Rahil Setia, *Right to Be Forgotten - Recognition, Legislation and Acceptance in International and Domestic Domain*, 8 NIRMA U. L.J. 37 (2018).

information. To manage this tension, the court set parameters according to which data subject's public connection & public interest in data are considered.

However, freedom of speech & the press upholds the First Amendment in US more than adhering to the RTBF. This is as demonstrated in *Riley v. California* wherein the judiciary focused on the need to maintain the public's RTI.<sup>33</sup> The US legal system is in general rather sceptical towards the notion of RTBF, because of potential violations of freedom of speech & RTI. The emphasis on these democratic values can be seen to indicate such difference in emphasis compared to the EU.

India being a developing country as it tries to chart its own policy course concerning data protection and privacy; it can learn lot from aforementioned international experiences. Analysing GDPR's criteria, it becomes clear that the approach is rather balanced: India could also search for the criteria by which RTBF & RTI could be restored in equilibrium. This would involve proper consideration of the public interest and the part which the individual plays in it, always bearing in mind that while working towards the achievement of RTBF, the latter should not be used as tool to deny public right to access vital information. Moreover, free speech and free press liberties of US citizens also explain why the India needs to better demarcate the boundaries of RTBF. This would assist in keeping the violation of basic democratic liberties at an arm's length; this shielding of liberties would ensure that corporates were not hiding what the public deserved to know while at the same time safeguarding their rights to privacy.<sup>34</sup>

## **BALANCING RIGHT TO BE FORGOTTEN & RIGHT TO INFORMATION**

The conflict between RTBF & RTI requires the legal regulation that can understand and take into consideration equal importance of privacy and free access to information. Currently, these rights are dealt with under the Indian Law by various statutes and decisions taken by the judiciary. The RTI Act, 2005 vis-à-vis RTI Amendment Act, 2019 enabled the citizens to obtain information relating to affairs of public authorities with view of enhancing level of transparency in governance. On the other hand, the Digital Personal Data Protection Act, 2023 that is still awaiting operationalization contains provisions on RTBF where by individuals may request their data to be erased under certain circumstances.

However, there seems to be little to no specific legal framework that might sought out the conflictions between RTBF & RTI. This is the reason why there is a need to have other extensive revisions in order to define the extent of both rights. An important amendment could state criteria under which RTBF will prevail over RTI like in case of an identifiable risk of

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33. 573 U.S. 373 (2014).

34. Animesh Sharma & Harshit Sharma, *Right to Be Forgotten - An Analysis*, 4 INDIAN J.L. & LEGAL RSCH. 1 (2022).



data protection of a certain individual. Moreover, it is important to come up with a sound procedural means of addressing the conflict of these rights so that fair solution could be offered. Incorporating particular provisions that require excluding some or all of the identification data in RTI replies where necessary can help to protect personal data while at the same time preserving the openness and accountability goals of RTI Act.<sup>35</sup>

Achieving balance between RTBF & RTI is not an easy task, which means that the practical implementation of the mechanisms that will protect both rights but will not infringe upon the rights of the other, has to be worked out in details. One of the efficient solutions that could be suggested is the conception of the tiered system of information availability and restrictions based on the level of information sensitivity and its impact on public interest. For instance, non-sensitive data that do not justify legitimate interest to community at large should be easily capable of being erased upon RTBF request. This method of data segregation makes sure that private & perhaps prejudicial data are shielded while at same time free data to public is freely available.<sup>36</sup>

Thus, the contribution of technology has been instrumental in the achievement of this balance. Sophisticated information/ records management technologies can assist the RTI applicant in either partially or fully anonymizing personal information in the RTI disclosure so that insensitive/ identifying data is removed while the rest useful data is provided to the requester. Compliance with these legal requirements can be overseen by the data protection agencies as well as handling with the complaints. Besides boosting the effectiveness of the data exchange and processing, this technological solution also serves as a protective barrier in the context of the possible privacy violations.

It is important to note that RTBF & RTI awareness raising interventions are particularly significant in disseminating necessary information to citizens on their rights, as well as the available means to claim them. It is through these campaigns that people may be endowed with knowledge regarding the essence of both rights as well as how to handle situations of conflict regarding same. Moreover, these training programs for public officials and data handlers as well as awareness of such rights will facilitate appreciation of these rights in solving these conflicts. Thus, such educational projects guarantee the non-violation of the rights by either the public or the authorities.<sup>37</sup>

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35. Manasvi Gupta, *A Study on Right to Be Forgotten*, 4 INT'L J.L. MGMT. & HUMAN. 586 (2021).

36. Vaibhav Kartikeya Agrawal, *Right to Information: Legal Discourse with Reference to Law in India and Judicial Pronouncement(s)*, 2 INDIAN J.L. & LEGAL RSCH. 1 (2021).

37. *Id.*



Thus, member countries are in the process of trying to negotiate an adequate policy measure that will support the two rights while also balancing them. Governments are advised to form a single body whose responsibility will be the coordination of both RTBF and RTI. This authority could prescribe measures, monitor their implementation and resolve inquiries, to guarantee that same protection & enforcement of two rights will be done in a non-discriminative manner. The creation of such an authority would follow a systematic way of addressing these conflicting interests while at the same time preserving rights to privacy as well as RTI.<sup>38</sup>

Policy measures should also encourage adoption of PBD in the formulation of information systems. This way, RTF controls the consideration of privacy from development and implementation of systems used in management of personal data in order to avoid possibilities of the conflict between RTBF & RTI at large. Thus, by implementing these principles, one can prevent leakage of data during the development of information systems thereby enhancing the privacy of such data.<sup>39</sup>

In addition, policies should promote cooperation between the government and other authorities on this matter as well as civil society and the private sector to work out the standard ways of protecting these rights interrelated. Such opportunities include the identification of the best practices in the sphere from the experience of other countries, which would allow India to determine the measures that best correspond to the requirements of the International Standards. Through this kind of cooperation, one can get to the perfect solution to satisfy the requirements of both RTBF & RTI where the interest of inquisitive individuals willing to gain information regarding other persons would be satisfied without violating the rights of data controllers & citizens.

## CONCLUSION & THE WAY FORWARD

RTBF & RTI crossover is a major and contentious issue of normative and legal conflict in India. RTBF plays the significant role of the guard of individual rights of privacy and data non-usage, as well as an opportunity for the patients of online reputation to rectify it. On the other hand, the RTI is proactive in matters relating to enhancement of transparency and citizens' power in fighting corruptions through provision of information. The main issue of contestations between RTBF and RTI is in their ideological antecedent; privacy and right to individual autonomy against RTI. Disputes in legal and practical contexts occur when RTBF interests collide with RTI rights, which can be reconciled only through the courts' intervention. Some of

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38. Omkar Upadhyay, *Enumerating the Unenumerated: Recognising the 'Right to Be Forgotten' in Indian Jurisprudence*, 9 NLIU L. REV. 468 (2020).

39. Sethakorn Puttamongkol, *Maybe Then I'll Fade Away: Modern Implications of Right to Be Forgotten*, 2015 ALSA 64 (2015).

the significant Indian cases and the jurisprudence across the world offer a helpful guide on how best to manage this conflict, however, the perfect balance has still not been arrived at.

Upon reviewing the judiciary's considerations and leading cases, one observes that the courts have not easily reconciled these two rights. Thus, while some of the judgments tilt towards preserving one's privacy, others underscore the revelation of what is in the public domain. This segregation draws attention to the importance of the middle ground that preserves the dignity of a person's privacy while adhering to freedom of information.

Due to such requirements a comprehensive approach is relevant with the use of legal measures, realistic strategies and policy proposals. Now one can see that existing legal regulation requires changes and, in some cases, corrections corresponding to the modern digital environment. The more pragmatic approaches, including the influence of the technology and the functioning of the data protection agencies, can provide novel ways of dealing with these rights that may appear in operating situations more often. There is therefore need to come up with policies that will effectively balance the two so that neither right is infringed on.

## THE POLITICS OF SUBJECTIVE EXPERIENCE AND ETHICS OF COHABITATION

Ayyagari Subramanyam<sup>1</sup>

### INTRODUCTION

There is a difference between a violent event and a violent process. An event is the culmination of a process, it has a clear demarcation between a violent subject aka perpetrator and the object of violence i.e. the victim. On the other hand a violent process is a structural phenomenon that has politics embedded in its syntax. A process leads into an event. An inquiry into the process not only makes one understand the mechanism behind a violent event, but also questions the categories of subject and object. This paper emphasises to capture the discursive forces that felicitate events of violence and in doing so it redeems perpetrators of the etymological burden. Most anthropological, and sociological studies on violence tend to focus on the position of victim. They generally analyse the victim's position and effect policies from that vantage. Though this methodology certainly foregrounds the problem, it does not necessarily deal with its causation in 'human light', more than it reprimands. It assumes a strong boundary between the victim: docile, available to be violated and the perpetrator: an abstraction, an inevitable celestial push that crushes. The usual academic<sup>2</sup> engagement either involves the marginalised or the state, but renders the perpetrator on ground as inhuman figures<sup>3</sup> of the state machinery. A perpetrator is an onlooker that interpellated<sup>4</sup> powerless into subordinate roles and makes them perform victimhood. Though an onlooker the perpetrator nevertheless has power to make

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1. Research Scholar, NALSAR
  2. Kalokhe, A., Del Rio, C., Dunkle, K., Stephenson, R., Metheny, N., Paranjape, A., & Sahay, S. (2017). Domestic violence against women in India: A systematic review of a decade of quantitative studies. *Global Public Health*, 12(4), 498–513. With all due respect to the academia, this statement does not disavow its merit but merely beckons to the dearth in the literature that employ perpetrator narrative as a research theme.
  3. Any engagement with such entity is deemed partisan; by heeding its vociferous reinstatement of state ideals, one is allegedly condoning it.
  4. Interpellation is an idea developed by Louis Althusser, which is broadly understood as the mechanism through which pre-existing social structures constitute individual human organisms as subjects with agency. Interpellating 'not another' onto the 'seen' makes another kind of discourse, a way of life that is not premised on othering. An alternative conception to nation state, an alternative way of being. Fiske, J. (1998). *Culture, ideology, interpellation*. na.

decisions and alter the course of events for the powerless. But his doing is normative it is an iteration of the systemic disguised as autonomy. The perpetrator is also a category of human, one that is subjected to the limits posed by corporality. And in such a context moral adjudications like “bad humans inflict violence” dissolve and the reified state system is humanised. It is to say that the capacity to inflict violence is inherent in the category of human. Such positioning helps one see the perpetrator in a complex set of relationships. Such contextualising locates this category in a tradition where the perpetrator others (violate) because it was othered and it others because it can other. Thus shifting the onus and attention from a human individual to a collective systemised network operating through linguistic cues and constituting knowledge and reality about the other.

### **POLITICS OF EPISTEMOLOGY AND DISCURSIVE SCHEMES**

All events of violence, barring its specificities, have one thing in common, they are indeed forms of othering. Often ‘the other’ is a body over there. It is the object of desire, and contempt. It is that, which serves the purpose of gratification, at times, and is the source of fear, at others. There is also an other that dwells in the territory of the unformed, it does not figure in the public memory. It is that which when effaced does not leave a trace. Its effacement is met with a rationalisation by the normative and in that instance this other that is obscure is collapsed onto the other that is fearful. The other is the limit with which the self is defined. And hence the conflict. The problem of the other is intrinsically linked to the problem of the self. Both are problems of identity, problems of definition. What the self is and what it identifies with decides the fate of the other. And the times when the other is understood as not the self, it becomes the object of violation. Violence is a relationship, logically it cannot be self-sufficient because it is a phenomenon involving a dyad. Violence is an affect that seeks to annihilate the other, and hence an other is a precondition for violence<sup>5</sup>. Anthropologically, the other is characterised as someone alien to the *western tradition*. Anthropology as a discipline, was developed during the age of enlightenment, an 18<sup>th</sup> century European cultural movement that focused on the power of reason to advance society and knowledge. It is premised on the contrast between cultures which were different from the west. In fact the uniqueness of anthropology itself ‘stems from the use of the human other’<sup>6</sup>. *The anthropological other is epistemological*. It is based on perceived differences and is a consequence of a cognitive process involving observation, collection of data and theorising. Anthropology invents the other only to develop a theory, for it

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5. Though at first glance self-harm seems to defy this dichotomy, the self in the mode of auto-destruction. But understood comprehensively it is often the case that in self-harm the individual loses all sense of self, it ceases to identify with everything that made that self-possible and dwells in an enervating vacuum. The act of destruction is then not about terminating a familiar self but an alien entity that is agonisingly painful and needs to be immediately eliminated.

6. Pandian, J. (1985). *Anthropology and the Western tradition: Toward an authentic anthropology*.

the other is instrumental and serves the purpose of producing knowledge. This anthropological knowledge often was a commentary about the non-western people and how they were seen to embody what the primeval west was before its progress. The other stood for an inferior human and was understood in the paradigm of the native children against the adult west<sup>7</sup>. The basic problem of this anthropological other is not a recognition of the other but its representation. It is just an epistemological other, the other produced by specific theories of knowledge, through specific methods, mediated by certain justified beliefs and opinions. Which says more about the epistemological systems of the ethnographer than give an honest description of the other. Anthropology, unlike other sciences, is not a study of the inanimate, and needs to go beyond the epistemological models of these disciplines. Psychologically, an other is the affective response it evokes. The problem with that is, 'affect is mediated', understanding is prejudiced, and knowledge is historical. In this context, the reality of the other is lost. Affective response or the experience of the affect is the function of the experiencer's epistemology. One only comes in contact with few established kinds of others, one among it is that which evokes rage, it demands one's immediate attention and beckons it to fortify against the other which might as well evoke a violent reprisal. The other kind of affective emerges from desire, it is which enthralls one, enchants, and disturbs its sleep cycle. And often is the cause for losing the 'self'. And then there is also another kind of other that dwells in the realm of obscurity, the unreal, the other against which the human is made, the inhuman which lies beyond what makes one human. To which there is no corresponding human affect, the other which is beyond established knowledge. These are different meanings given to an other and In the context of meaning, Derrida conceives a theory on '*Différance*', and espouses that meaning impossibly exists in the space between the signs and it is the systematic play of differences. The signs depend on other signs for meaning but other signs are always present within the meaning of a single sign by what he calls their trace<sup>8</sup>. Meaning is not only contingent on other meanings but also on a certain deferral. The meaning of the other is contingent on a variety of things, by the virtue of language other meanings are inlaid in the meaning of the other, but the reality of it only exists in perpetual postponement. Any attempt at grasping the other is only met with disappointment, as one is only left with traces, ideas of the other. The traces constitute the perpetual absence of the other because the other is structurally absent and always unreachable<sup>9</sup>. Acknowledging this perpetual postponement, is basically accepting the implausibility of completeness.

7. Sarukkai, S. (1997). The 'Other' in anthropology and philosophy. *Economic and Political Weekly*, 1406–1409.

8. Trace is neither present or absent. The trace is rather a simulacrum of presence that dislocates, displaces, and refers beyond itself. The trace has no place, for effacement, belongs to the very structure of the trace.

9. Degnin, F. D. (1995). Laughter and metaphysics, '. *Philosophy Today*, 39, 31–46.

In events of sectarian violence this fallacy of description takes a form that could decapitate the other, in the guise of majoritarian rhetoric. A system or a syntax that is stabilised through overt and covert force, is a mechanism of war. It is often the weapon of the powerful because only the powerful entail the requisite tools to make a language legitimate. Language is hugely subjective and meaning differs from reader to reader from time to time and therefore there cannot be possibly a shared truth that one can access through one theory, philosophy, or institution. The presence of meaning, and the notion that ‘meaning shall prevail’ is an illusion produced by the repression of these differential structures that meaning originates from<sup>10</sup>. To deify meaning, is to not only commit the oversight of not reading meaning with political undertones, but to also relegate the other to obscurity. Though language serves as a medium that enables one to access other people’s experience, it allegedly has a deep metaphysics and imputes duality. In that context name-calling is labelling and positing is categorizing. The obvious continuity inferred from the simple act of looking goes against the divisions inspired by nomenclature. One can only imagine what an infant thinks when it looks at the world, does it see the tree yonder as an appendage? Does language construct bodies, and the consensus over its discreteness? What is the role of language in world building? Does language merely describe the world or does it assign one with a task, a subconscious insinuation to build the contents of the world? Can violence be a consequence of language? Does a specific kind of language precede the actual event of violence? Is it that in language, are the seeds of ‘othering’ sowed?

Instruments of war facilitate the constitution of an ‘other’. And language is one such instrument which others by creating knowledge and in turn realities. The obsession to kill is passed on as, a knowledge of survival, a tradition of war, leaving a society rife with exploitation. This tradition of war functions as the context in which instruments of war, speech of war are produced and is further celebrated. Theories of war waging and efforts of war recruitment permeate syntax that enables ways of being; consequently blighting humanity with fear and paranoia. Authority maintains that tradition by practicing the norm. *What is the moral obligation of the authority in the light of the normative?* Political precarity is a differentiated distribution of bodily harm, it is a war effort and instruments of war posit this differentiation, where some bodies become sites of conflict and control. War waging is a norm, whose tendency is to deviate from the ethical; a coordinated effort by language, history, and cultural practice that normalise war. Popular assent to war is cultivated, though the event of war is a temporal disturbance that feeds anxiety with paranoia, the process of war is an outlook, a perspective performed day in and day out. The materiality of war machinery and its subsequent effects are enabled by frames. The *frames of war* are epistemological systems that create the ground for social practice. The frames position, capture, and regulate the sensory field: A manipulation of

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10. De Beer, C. S. (2005). Communication frightens me: Derrida on communication. *Communication: South African Journal of Communication Theory and Research*, 31(2), 155–171.



the senses to distort reality or truth. And war machinery overwhelms the sensory, it floods the senses with a surfeit of inputs that eventually manufactures reality or establishes consent on posited realities<sup>11</sup>. The sensory dimension of war is operative in understanding the discursive function of the war machinery and its processes. War is always a war on senses, the senses are the first targets of war, there is no thinking and judgement without the senses and this ‘affected thought’ and judgement takes a social form that is reproduced over time<sup>12</sup>. *Without an assault on the senses, is it possible for a state, to wage a war?* The assault on the senses can take various forms, for example, by rendering certain losses as insensate, the state imposes indirect restrictions on mourning lest they challenge the rationale of war. The implicit or the explicit framing of a population as a war target is the initial action of destruction. By locating the other, in the realm of obscurity and as an entity capable of harm, calls upon itself attention. Such an act is not just a preparation of a destruction to come, but is the initiating sequence of the process of destruction. When populations become implicitly framed as targets for destruction within ordinary discourse, then the frame solicits one’s complicity with the practice of visual and discursive normalisation of war<sup>13</sup>. The frames control the visual and the narrative dimensions of war and thereby delimiting the discourse and fixing notions of reality, that what can be seen and heard. Its instruments partake in a process of creating norms that instil social practice with terms of othering. Instruments of war tactically frame populations as instruments, blockades, shields, and targets. It frames and forms the human, it demarcates the extent of humanity and renders those who live beyond the normative frontier as non-human. The frame through which reality is mediated, actively participates in a strategy of containment, selectively producing and enforcing what will count as reality. The frame while containing also keeps something away, by the virtue of its design. In this way it always de-realises and de-legitimises alternate versions of reality.

## EQUALITY IN GRIEF

The diverse ways in which life’s value is assessed are influenced by implicit systems of evaluation, wherein some lives are deemed more grievable while others are considered barely worthy of acknowledgment—a concept encapsulated by the notion of the absolutely grievable versus the absolutely ungrievable, a loss that is no loss<sup>14</sup>. A frame seeks to forbid ‘mourning’:

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11. Butler, J. (2016). *Frames of war: When is life grievable?* Verso Books.

12. *ibid*

13. *ibid*

14. Butler, J. (2017). *The Force of Nonviolence: An Ethico-Political Bind*. London, UK.



there is no destruction, there is no loss<sup>15</sup>. The sentinels of ‘reality’<sup>16</sup> guard the doors of knowledge, by segregating worthy from refuse. An interpretive manoeuvre; a political ploy to give an account of grievability: for whose life ‘is’ a life, or whose life is a target, an instrument, a number<sup>17</sup>. When cast as a mere instrument of aggressive military power, a threat to civilisation, or as a potentially unmanageable demographic problem, living humans become instruments, blockades, targets, and shields. Numbers, especially the number of war dead, circulate not only as representations of war, but as part of the apparatus of war waging. Numbers are framed and unframed in a way that serves the purpose of the normative. Certainly, the concept of the unequal distribution of grievability suggests that some lives are deemed more worthy of mourning and protection than others. This doesn’t necessarily imply a deliberate calculation by a centralized power, but rather, it suggests that certain societal norms and power structures implicitly dictate whose lives are considered valuable and worthy of grief. When a life is said to be grievable, this assertion holds value that the life should be mourned in the event of its loss. This valuation extends even before the actual loss occurs, implying that precautions are taken to safeguard lives that are deemed grievable. The ability to value and protect a life hinges on the perception of its potential for future loss and grief if it were to be cut short or harmed. If only institutions were built on the principle of absolute equality, in the value of every life; it would mean that each life within the juridical boundaries of the institutions would be deemed equally worthy of preservation and mourning. This would fundamentally alter healthcare, incarceration, conflict, governance, and belonging, as these systems are built on differentiating between populations based on their perceived level of grievability.

### **INTERDEPENDENCY: A PHILOSOPHY OF CONNECT**

The politics of radical equality of grievability suggests that only lives that would elicit grief upon their loss are considered worthy of protection, and these lives are actively safeguarded against violence and harm through structural means. This politics is premised on the understanding that bodies are relational. A body in a classical liberal paradigm is conceived as an individual. The history of liberal political thought posits that one has emerged into this socio-political world from a state of nature. In the state of nature, individuals are depicted as already existing separately and engaged in conflict, but the reasons behind this individuality and the prevalence of conflict over other forms of relations like dependency or attachment are not clearly explained or justified. The influential Hobbesian perspective on political contracts suggests that individuals desire what others possess or compete for control over the same resources, leading to conflicts as they pursue their own interests and seek to establish personal rights to property,

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15. Butler, J. (2016). *Frames of war: When is life grievable?* Verso Books.

16. A heteronormative code of ethic that ensures the survival of the norm.

17. Butler, J. (2016). *Frames of war: When is life grievable?* Verso Books.

territory, and social dominance. Interdependency is an alternative narrative to social contract theory, where every individual doesn't inherently exist but emerges gradually through a process of individuation. No one is born as an individual; rather, they become individualized over time, yet they never fully escape the fundamental state of dependency inherent in this process. This dependency isn't something that can be transcended with time; regardless of one's political beliefs, every individual is born into a state of radical dependency. Disability studies have illustrated that even seemingly independent actions like moving along the street rely on the infrastructure and support systems that facilitate such movement, particularly for those using mobility aids<sup>18</sup>. Support systems are essential for various fundamental human activities, not just for those with disabilities. Whether its mobility, respiration, or nutrition, the ability to function relies on the infrastructure and systems designed to facilitate these actions. From pavements to traffic lights, the environment is structured to support one's movements. Similarly, one's ability to breathe and eat depends on a world that ensures food accessibility and maintains suitable air quality. In essence, every aspect of existence is upheld by a network of support systems within the environment. Dependency can be understood as relying on social, material, and environmental structures to sustain life. The foundational ideas of liberal individualism can be seen as akin to a mirror stage<sup>19</sup>, where individuals perceive themselves as autonomous entities separate from their surroundings. In practice the 'I' responds violently in preserving entities that it identifies (aka loves) with. The boundaries and parameters of these relationships in which the concept of the self, expands to encompass groups of others are arbitrarily conceived. Typically, these relationships are understood in terms of biological relatives or those connected through marriage. It creates a divide between those considered close to oneself—whose protection may justify resorting to violence, even murder—and those perceived as distant, for whom one may not kill in their defence. In fact, the self is a set of relations and nothing outside those relations and even in referring to itself the self is referring to the set of relations that make survival possible. A self is not a discrete, bounded self that is placed in an exterior social world rather it is a *sociality*, without which there is no reference to self at all possible, without which an "I" cannot say I. The term bounded has deep implications, if the term bounded refers to the condition of the self then the self is a discrete entity defined by its boundary and moreover that boundary precisely differentiates itself with the others. And if the self is bounded to others, held in thrall to the other, in a relationship with the others, then there is no boundary which establishes a self as a discrete entity. In fact a self is an incessant negotiation of its boundary

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18. Boys, J. (2017). *Disability, space, architecture*. Taylor & Francis.

19. A Lacanian position that rebukes human creatures that constantly delude themselves as self-sufficient only to find that image undermined repeatedly in the course of life. Exactly like a child who is jubilant to see himself stand on his own but is unaware of the mother or the obscure object that supports (*trotte-bebe*). Lacan, J. (1968). *The Mirror-Phase as Formative of the Function of the I*. *New Left Review*, 51, 71–77.

and the loss of it, which is the set condition of its sociality. In a way one might feel that one will lose itself in losing its boundary; but it is more so the fact that if we are unable to lose our boundary we cannot live in relations with each other which means we cannot live. To become bound up with others is to lose our boundary and to lose the boundary is the condition of survival. One might resist and operate from the egological in safeguarding one's boundary but the process through which the boundary decimates is inevitable. Love is an acknowledgement of this relationality and violence a threat to it. Politically and economically, the reality of global interdependence is either ignored or exploited. While corporate advertisements often tout the benefits of a globalized world, they typically only highlight corporate expansion as a facet of globalization. Despite the potential decline of national sovereignty, new forms of nationalism persist and assert themselves within this framework<sup>20</sup>. The concept of global obligations that extend to all inhabitants of the world, including humans and animals, stands in stark contrast to the individual-centric ideology of neoliberalism and is often dismissed as idealistic. However, only by acknowledging and embracing interdependency can one begin to formulate and fulfil these global obligations.

### **NONVIOLENCE AND POSITIVE LANGUAGE PERFORMATIVES**

Theories of performativity calls out speech that is politically motivated. And it becomes important to address performativity because performance is a category that can be changed unlike the corporeal precarity or vulnerability that is the human condition and is immutable by the virtue of being. In a context where the body is available for a violent act (by its given condition of vulnerability), it is also available for an ethical demand, hence, it becomes necessary to highlight the ethical. And the need to call out speech that is politically motivated arises foremost from the fact that such speech jeopardises the other and the other is a fact. But majoritarian speech is faulty also at epistemological level. The incessant reiteration of utterances that have incendiary locutionary content runs the risk of legitimising it. The truth about the other is legitimised by this constant repetition of other-hood that which is implied in majoritarian rhetoric. This ritualization comes into effect in a climate of othering. This climate precedes the momentary enunciation which reifies the other. Post structural analysis strikes at this juncture, of this reification by distorting its metaphysics. It challenges essentialist notions of identity and emphasises on the role of language, discourse, and power in shaping social relations. It positions othering as a discursive practice through which dominant groups define themselves in opposition to marginalized others. Othering operates through the production of binary oppositions, stereotypes, and hierarchies that reinforce existing power dynamics. Post structuralism explores and rather encourages strategies that deconstruct othering, including critical reflection on language and discourse, destabilization of binary oppositions, and

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20. Brown, W. (2010). *Walled states, waning sovereignty*. Princeton University Press.

recognition of the multiplicity and fluidity of identities. It envisages to consequently usher in counter-narratives, subversive discourses, and resistance movements in challenging dominant forms of othering and promoting social justice and equality. Relationality, is a method of preserving the other. When the self is linked to the other, the self, actualises by nurturing or nourishing the other. It is a much fairer and truer account of knowing because it does not stem from the arrogant position of certainty, it does not aim to kill. To other is an attack on knowing, to other is to assume that things are known and to know firmly is to agree to the possibility of annihilation of the subject of enquiry for the sake of knowledge. To other, is to have the impunity to kill, because an other is already invisible, so to kill then becomes a redundancy or a call for reiterating the truth which is the invisibility of the other. Inter species relationality is a non-violent method of being or engagement with life. Its basic premise is that ontologies are enmeshed in a web of relations that one cannot violate. It is a mode of knowing the other and being the other: that faraway, island of an entity separated by 'genepool'. To be nonviolent is to be ethical and ethics is not contractual because that would take away from ethics its magic that binds each one of us. It would only push self-preservation as the greatest ideal. Ethics is mutually exclusive to egoism and in fact no ethics can be drawn from egoism. The body relates one, against one's will, to others that one does not have in proximity to oneself. To be related to another is to be imbricated in making them, even when one is indifferent to, disgusted by, or hostile to them. The apparent differences are also, as discussed in the previous chapter, a consequence of a knowledge system; Bodies are categorised according to arbitrary notions of sameness and difference and that is the war effort. In fact what bodies are exactly, is something no discourse can pinpoint. Only in that failed effort to make sense of bodies, when one resigns to its exhaustion and supplicate to the unknowability in silence, in that state of non-description does one find or dissolves in 'being', that is the universal living experience. The other life, all those other lives, and my own life that is not reducible to communal affiliations are intertwined. The life of the other, that which is not one's own, is also our life, since the sense of 'our' is derived from this sociality, this being already, and from the start, being dependent on the world of the others, constituted in and by the social world. Can love seed the ground for an ethics of an incomplete but ongoing accountability to those other than the self? Love as a way of being, Love and acceptance. Accepting all, in their imperfect entirety, accepting the other in its infinite transcendence. Because bodies survive, flourish, and gain meaning in the social fabric and to deny this sociality is an act of violence both physical and epistemological. But love does not just happen, but entails work; its affective attachments have to be made flesh and blood through acts of labour<sup>21</sup>. And what does that labour entail? Speech acts creates its subsequent reality. So by shifting language one can essentially shift cultures. But how to do it, so that it has real

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21. Govindrajan, R. (2021). Labors of love: On the political economies and ethics of bovine politics in Himalayan India. *Cultural Anthropology*, 36(2), 193–221.

world implications? One example could be is to change behaviours by affective statements. One can begin by experimenting with colloquial language that will have markers of universal love. That which conceives a self not as an amorphous solid but as a network of dependencies. This change in one's default state where it sees the self in the other, leads to anxiety, a state of primordial existence, stripped of embellishments and exposing the mortality inherent in human existence and evoking a sense to move towards a truer meaningful connection. Language is not only a medium for communication but is also a function of attention, in the backdrop of attention it thrives. And attention is the filter through which the fundamental units of thought, which is a compendium of muscular responses, images, concepts, and language or symbol systems, among others, pass through. The assumption being that evolution has assembled attention into a limiting factor and as a response, it eschews information beyond survival and exists as a reducing valve of the 'mind at large'<sup>22</sup>. Language and its associated symbol systems then formulate the contents of this reduced awareness.

## CONCLUSION

Language is some supernatural force, existing between people, bringing brains encased in thick skulls into communion. A word means something only between people, and life's meaning, its virtue, has something to do with the depth of the relationships one forms. Human relationality undergirds meaning. Different traditions that concern with the spirit like the anishnaabee<sup>23</sup>; the grammar of animacy, the bhakti tradition<sup>24</sup>, use language and linguistic tools differently to relate oneself with the world more holistically which offers a radical insight on the nature of "I". James Baldwin said while talking about generative unsettlement that 'an artist is a spiritual or emotional historian'. His role is to realise the doom and glory of knowing 'who am I' and make that experience available to others. *'He has to tell, because nobody else in the world can tell,*

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22. Huxley, A. (1968). *The doors of perception*. Chatto and Windus London.

23. *Neshnabemwen* or the Potawatomi language is the language used by the Potawatomi or the Anishinaabe people, a Native American tribe of the Great Plains, Upper Mississippi River, and Western Great Lakes region. In the Potawatomi language, the word used for 'Being' is '*Aakib-maadiziwin*', which translates into a being of the earth. The Potawatomi recognize human existence as a phenomenon intrinsically connected with nature and not as an exclusive event beyond the realm of nature. For them, a being devoid of earth, a being that lost touch with the earth is no being at all. This inter-being relationality is inherently coded in the Anishinaabe language.

24. A language; a way of life yielding to the unknown. Sensory perceptions as nothing but an offering to the gods. *Tamburi meetidava bhavabdi dattidava* (composition by Purandara Dasa, and a beautiful rendition by- Raghuram Manikandan). Tamburi is the intervention here, an engagement with life. Purandara implores, take up Tamburi and cross this ocean of *Maya*. In bhakti tradition the world as perceived is considered as an illusion, analogically a projection of axonal interaction, neural linkages equivalent to concepts like *Dharanas*, hence untrue. Bhakti tradition pits truth against the world perceived. Truth only to be experienced and experienced under conditions of yielding to the supreme.

*what it is like to be alive. All I have ever wanted is to tell that, I am not trying to solve anybody's problems, not even my own. I am just trying to outline what the problems are'.*

The heart of the matter and the need of the hour is to speculate a philosophy of connect and to *responsibly reimagine the other*. When one responsibly reimagines the other, what one does first and foremost is tacitly accept the existence of an Other. The philosophy of connect does not do away with the idea of the other rather what it does is, in its claim to responsibly reimagine the other, it acknowledges the multiplicity, and diversity of differences. It does not dwell into the characteristics of this multiplicity because doing so is bound to be hierarchical rather it acknowledges the existence of different populations. The implication that the other is inevitable, by the philosophy of connect is not the same as othering that is politically motivated to annihilate specific populations. Instead this acknowledgement of the other, by the philosophy of connect is a commitment towards the pre-conceptual given. It is a commitment to uphold perception by not compromising on the pre-existing multiplicity or diversity. Othering occurs when this pre-conceptual given, or pre-existing diversity is dealt with instruments of war. Philosophy of connect entreats to deal the given differently. Hence, the need to reimagine. In doing so the philosophy of connect gives primacy to ethics. The need to conceptualise the ethical follows from the objective of the philosophy of connect. Indeed the ethical is the precondition for knowing the other. Ontology is premised on being and being is immediately concerned with ethics. One cannot neglect the other because the other is a given. And to violate is to deny that given hence, an untrue act. One cannot choose one's conditions of cohabitation and to do that is to commit genocide. Connection assures the other with survival. The need for an ethical framework is a necessity for the other, and it stems from Body's fact. Bodies are that cannot be captured by discourse and power is discursive. What power does is situate being in power. Making being affect and react to it. Power hence shapes being and in turn the experience of body. And how it does is in language, in discourse. But bodies long to free from power, power that controls. Hence, bodies are mired in power but are not power. And this social fact becomes relevant when considering events of abuse, when the question is about liveable life, about non-violent engagement between ways of being, when a body is not a mystical entity, capable of all possibilities but a category that needs to be controlled, punished and regulated.



## TRANSFORMATIVE CONSTITUTIONALISM: (U/A)N-ETHICAL POLITICAL SYSTEM OF ANTI-DEFECTION LAW

Vasavi L S<sup>1</sup>

Sowmya Murugesan<sup>2</sup>

With the 2024 Lok Sabha Elections concluding recently, the question of ‘who forms the Government’ was in debate as the results were not in favor of one party. There, played politics and corruption, leading to the regular practice of Horse Trading, also known as the “Defection”.

People in India believe that the politics of defection is a major problem for parliamentary democracy. India has seen an uptick in defections, particularly at the state level, for a while now. A member’s change of loyalty from one political party to another is known as defection or floor-crossing. The primary cause of instability in governments is defection. One reason a government can collapse is if its supporters defect to the other side or another political party, leaving the remaining administration with a minority and ultimately resulting in its defeat. Defection is an unethical activity as it goes against electoral mandates. The fundamental objective of holding periodic elections is to ensure a fair and transparent democratic process. However, if a party is unable to acquire power through fair elections, they can still create a government by using these tactics to gain a majority in the house.<sup>3</sup>

Defection is derived from the Latin word ‘*defectio*,’ which means the act of voluntarily giving up of allegiance or loyalty. It specifically implies an act of rebellion, disagreement, and defiance by an individual or a group. Defection, in this context, refers to the act of renouncing or withdrawing support from a cause, party, or policy. On the one hand, it seems like giving up control, while on the other, it promises to mean accepting another. A person is referred to as a deserter once they have completed this process of leaving one side and joining another. The concept of Defection was originated in the British House of Commons, where the legislator crossed the floor from the Government to the Opposition party.<sup>4</sup>

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3. Prashant Pandey, Anti-Defection Law: A Critical Analysis, Anti-Defection Law in India, (accessed on 05 August, 2024), <https://vbook.pub/documents/anti-defection-law-in-indian-mo-80p0nz7gwn>.

4. id



As Sri. Jayaprakash Narayan once stated that “Defection means - *Any member elected to a legislature who had received the secure election symbol of a political party, if he, after being elected, declares to break his association with that political party or to dislodge his faith in that political party. If it does, it should be treated as a defection, provided its action is not in accordance with the decision of the party concerned*”.<sup>5</sup>

## DEMOCRACY VIS-À-VIS DEFECTION

“*Let us never forget that government is ourselves and not an alien power over us. The ultimate rulers of our democracy are not the President and senators and congressmen and government officials, but the voters of this country*” - Franklin D. Roosevelt <sup>6</sup>

There are two main reasons why the Indian Constitution has adopted the Westminster system: (i) it was familiar to Indians and had been around for a while, and it was already in existence in Britain. (ii) It established the constitutional duty of ministers to be accountable to the legislature. Under a parliamentary system, lawmakers (Legislature) exercise control over executive power (Government).<sup>7</sup> Central and state governments in India, are both based on the democratic principle of parliamentary government, as outlined in the Indian constitution. At the age of eighteen, the Constitution grants every person the right to vote for the representatives who will serve in the several branches of government, as well as the opportunity to run for elections to any of these branches.<sup>8</sup> The Union Legislature, in India consists of two houses i.e., the Rajya Sabha and the Lok Sabha, which makes it a bicameral legislature.<sup>9</sup>

The Core features of a Parliamentary form of Governance is, firstly, the head of state in this system is simply the head of the Constitution (*de jure*). Secondly, the legislature holds the executive branch accountable for the actual powers it has been granted (*de facto*). The Indian Constitution confirms the same by the Article 74, which provides that there shall be Council of Ministers to advice the Constitutional Head for exercising his powers and functions.<sup>10</sup> Furthermore, Article 75 stipulates that the Council of Ministers shares a responsibility,

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5. POLITICS OF DEFECTION IN INDIA, <https://www.lawtool.net/post/politics-of-defection-in-india>
  6. Franklin D. Roosevelt, Address at Marietta, Ohio. Online by Gerhard Peters and John T. Woolley, The American Presidency Project, <https://www.presidency.ucsb.edu/node/209056>, accessed on 03 August 2024.
  7. TK Tope's, *Constitutional Law of India*, Eastern Book Company Lucknow, 3rd ed., 2020
  8. Art. 326 of the Constitution of India, 1950
  9. V. S. Rama Devi and S. K. Mendiratta, *How India Votes Election Laws, Practice and Procedure*, Lexis Nexis, 4<sup>th</sup> ed., 2017.
  10. Art. 53(1) of the Constitution of India, 1950

collectively to the House of People.<sup>11</sup> The States have also adopted the same approach, however with few changes.

Most democracies in existence today function more like party systems. It is impossible to imagine contemporary society without political parties, which are integral to democracies. These parties can be well-established, organized, and based on ideology and principles, or they may spring up around a leader or leaders with no ideology or principles at all, motivated only by the desire to gain or share power (coalition).<sup>12</sup>

The concept of Defection can be traced back to our Ancient Epics, Ramayana and Mahabharatha, where Vibhishana deserted Ravana and joined his hands with Rama. Here, we can derive that it was for Good to win over Evil. Similarly, in Mahabharatha, Karna was asked to leave Duryodhana and join the Pandavas, as he was their brother. However, the former did not agree with the same. As, his loyalty and faithfulness was with Duryodhana, even though he knew that Kauravas chose the wrong path to gain power. In both the scenarios, we can conclude that Defection can be done for the good or bad to the society.

Political Defections could be seen in Indian Politics from the Pre-Independence Era only. Where there were a lot of individuals, holding higher positions deserted Indian Freedom Fighters, and either joined the British or created their own groups.

After gaining independence, we could see various scenarios of Defections, but they did not succeed in creating a significant impact. But the defections seen in the 1967 General Elections left a greater impact leading to the creation of a new law curbing the Defections.

- **1948** - Congress Socialist Party dissociated with the Congress party and instructed all of its members to vacate their seats in the Parliament and seek re- election.
- **1950** - in Uttar Pradesh, a group of 23 MLAs defected from the Congress Party and formed a new party, called Jana Congress.
- **1953** - The Praja Socialist Party (PSP)'s prominent figure, Sri. Prakasam, switched his allegiance to Congress to form the government in Andhra Pradesh.
- **1958** - a total of 98 MLAs openly opposed the Government, leading to the no-confidence in the Sampurnanand Cabinet.
- Yet another instance of desertion can be seen of Sri. Pattom A Thanu Pillai, the Chief Minister Travancore-Cochin.

11. Art. 75 of the Constitution of India, 1950

12. Paras Diwan, "*Aya Ram Gaya Ram: The Politics of Defection.*" Journal of the Indian Law Institute, vol. 21, no. 3, 1979.

- During 1957-1967, a total of 97 members renounced their membership in the Congress party, while 419 individuals joined it.
- During 1967-68 (one-year time frame), 175 deserted from it, while 139 joined the Congress party.
- One exemplary instance was in Haryana in 1967, when the State saw its first State Assembly elections, where Mr. Gaya Lal, an Independent Candidate won the elections. Shortly after the elections, he joined the Congress Party. Within a few hours, he transitioned to the United Front Coalition, only to subsequently return to the Congress party within a few hours. This was an unusual instance. He changed his political affiliation three times within a span of one day. During his news conference, Birender Singh, a prominent leader of the Congress party, used the words “Gaya Ram Ab Aya Ram Hai”. The media popularized the phrase “Aya Ram Gaya Ram,” which is now commonly used in Indian politics to refer to a politician who switches parties (defection).<sup>13</sup>

These Defections were questioned as to whether they were deserting the party from which they were elected for the sake of society or for their own personal benefits and leading to the urgent need of ANti-Defection Law in India to curb these political immoralities.

Under the Chairmanship of Sri. YB Chavan, a Committee on Defection was established on August 11, 1967, following a resolution proposed by P. Venkatasubbaiah, a prominent Congress politician from the Lok Sabha and secretary of the Congress Party in parliament. After much deliberation, the Lok Sabha placed the committee’s findings on the table for debate on February 18, 1969. The Chavan Committee gave various recommendations such as the representatives from all the political parties come together, make a mutual agreement to devise a set of guidelines for the members and parties to abide by; and also to strictly follow that no individual should become a Chief Minister or any Minister, if he/she has not won the Lok Sabha or Assembly elections; and also to make sure that if any person defects a party, he/she, for 1 year or until they resign, should not hold any office under the Government of India or any state.<sup>14</sup>

Even after the Chavan Committee gave recommendations, these could not be implemented properly at that time. Therefore, in 1973, to reduce the defections in Politics, an Amendment Bill was tabled in the Lower House of the Parliament. The Bill stated that any member who

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13. Paras Diwan, “*Aya Ram Gaya Ram: The Politics of Defection.*” *Journal of the Indian Law Institute*, vol. 21, no. 3, 1979, pp. 291–312. JSTOR, <http://www.jstor.org/stable/43950639>. Accessed 08 August 2024.

14. Subhash C Kashyap, *The Politics of Power, Defections and State Politics in India*, (3rd ed., 1985).

‘voluntarily renounces their membership in the political party they ran for election under’, or ‘if they vote or abstain from voting in accordance with their party whip, without obtaining prior approval, that Member of Parliament or Legislative Assembly will lose their seat (disqualified). The Bill also gave a proviso exempting individuals from being disqualified if their defection was a result of a split within their political party. However, the Bill did not specify the minimal threshold for a split. The major drawback of the Bill was that the terms of the Bill did not apply to members of unrecognized political parties, any independent member or nominated members of either of the houses or the Parliament or State Assemblies. The motion was passed in the Lok Sabha and Rajya Sabha regarding the same. However, in 1977, the Committee ceased to exist due to dissolution of the Lok Sabha. In 1978, one more attempt was made by passing the 48th Constitutional Amendment Bill in Lok Sabha. However, the bill didn’t go through, as it received criticisms from both the Ruling as well as the Opposition Parties.<sup>15</sup>

At last, the law to ban defections saw light after the General Elections in 1984, when the Government brought out the 52<sup>nd</sup> Constitutional Amendment Bill on January 24, 1985. The Statement of Objects of the Bill clearly expressed that political defection is an issue of public concern due to its harmful nature. If left unaddressed, it has the potential to undermine the fundamental principles upon which our democratic system is built. The Bill aimed to prohibit defection. The Bill got the president’s consent on 15th February 1985 and the Act came into effect from 1st March 1985.

The 52nd Amendment Act also brought changes to 4 specific Articles. They are - Article 101(3)(a), Article 102(2), Article 190(3)(a), and Article 191(2).<sup>16</sup> Along with that the Amendment inserted the Tenth Schedule to the Constitution. This Amendment is commonly referred to as the Anti-Defection Law.<sup>17</sup>

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15. G.C, Malhotra, *Anti-Defection Law in India and Commonwealth*, E-Parliament, National Informatics Centre, 2005, [https://eparlib.nic.in/bitstream/123456789/58674/1/Anti\\_Defection\\_Law.pdf](https://eparlib.nic.in/bitstream/123456789/58674/1/Anti_Defection_Law.pdf), (Metropolitan Book Co. Ltd).

16. Art. 101 of the Constitution of India, 1950 (vacation of seats with respect to the Parliament); Art. 102 of the Constitution of India, 1950 (disqualifications for membership with respect to the Parliament); Art. 190 of the Constitution of India, 1950 (vacation of seats with respect to the State Legislatures); Art. 191 of the Constitution of India, 1950 (disqualifications for membership with respect to the State Legislatures)

17. Subhash C Kashyap, *The Politics of Power; Defections and State Politics in India*, (3rd ed., 1985).

According to Articles 102(2), 191(2), any MLA or MP of either House of the Parliament is disqualified if they are disqualified under the X Schedule.<sup>18</sup> The Anti Defection Law under X Schedule has divided as eight paragraphs, and they are as follows -

- **Para 1** - defines the terminologies used in the schedule.
- **Para 2** -
  - a. lists two reasons for disqualifying the members –
    - i. if they voluntarily give up their membership or
    - ii. vote / abstain from voting in the house against the party whip, and the party has not made any comment on such vote or abstinence within 15 days.
  - b. An independent candidate, after being elected, joins a political party.
  - c. A nominated member has six months to join any political party, subsequent to which, it would be considered as desertion.
- **Para 3** - if the original party splits and at least 1/3rd of its members support it, no disqualification would occur. However, 2/3rd was substituted in place of 1/3rd by the 91st Constitutional Amendment Act, 2003.
- **Para 4** - protects the original political party from disqualification - if the members join another party and claim to be members of that party / they have opted to work as a separate group and rejected the merger, those members will not be eliminated from the party.<sup>19</sup>
- **Para 5** - exempts the speaker, deputy speaker, chairman, and deputy chairman of a house to resign from their party after being elected for their offices.
- **Para 6** - the Chairman or Speaker, as the case may be, makes the decision regarding the disqualification of a member. Their duty is to find relevant facts, either by collecting them or inferring if the acts of the alleged member falls under para 2(1), (2), (3) of the tenth schedule, the speaker or chairman must decide on disqualification.
- **Para 7** - finality clause - barring the courts from hearing tenth schedule matters.

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18. The Constitution of India, 1950, Tenth Schedule, inserted via the constitution (fifty-second amendment) act, 1985 (w.e.f. March 3rd, 1985).

19. id

- **Para 8** - The speaker or chairman is a quasi-judicial authority under paragraph 6. Therefore, as per the Principles of Natural Justice, the defying member must be allowed to speak. If there is no prejudice, then the claim of natural justice is not necessary to be given.<sup>20</sup>

During the drafting of the Indian Constitution, the founding fathers foresaw that the Indian political system would face certain challenges that the existing Constitution would not be adequately prepared to address. In order to address this issue, they included a mechanism for making changes in the Constitution through Article 368, which grants Parliament the ability to amend the Constitution and outlines the procedure for doing so. By utilizing this provision, the Government brought in TRANSFORMATION in the Constitution, aptly following the concept of Transformative Constitutionalism.

In the landmark case of *Kihoto Hollohan v. Zachillhu*,<sup>21</sup> the constitutional validity of the Anti-Defection Law was contested. The Apex Court, while discussing the aim and importance of Tenth Schedule, highlighted that the political parties are crucial in the political process. The 5-judge bench also gave a detailed analysis with regards to the need of X Schedule where - In elections, parties present their manifesto, which outlines their programs and ideas. The Party nominates suitable candidates and pays all the election expenditures, so the party manifesto can be used to elect them. The law of the X schedule mandates that if an elected member defects and joins another party, he has to vacate his seat and stand for the bye-election in that constituency, with the new party's name. The judgement with 3:2 majority, the ratio decidendi held that the constitutionality of the X schedule will be achieved when the Presiding Officer's decision is judicially reviewed by the Courts. The Majority of the 5-judge bench accentuated that the final goal of the Law is to put a full stop to political defections.<sup>22</sup>

However, the minority judgment (dissenting opinion) pointed out that paragraph seven of X Schedule bars judicial review, which affects the jurisdiction of the HCs & SCs, i.e., Articles 136, 226, and 227 of the Constitution. According to Article 368(2) of the constitution, half of the State Legislatures must ratify a law for it to be legal. Without ratification, it's invalid. The 52<sup>nd</sup> Amendment Act failed to follow the procedure, therefore, the law is not a valid law. Also, the dissenting opinion stated that the Speaker cannot be given the whole and sole responsibility of deciding the disqualification cases, as he continuously functions on the support of the majority

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20. id, Schedule X of the Constitution of India, 1950

21. *Kihoto Hollohan v. Zachillhu & Ors*, AIR 1993 SC 412

22. id



party and he cannot be a sole arbitrator. This goes against the Basic Structure of the Constitution as well as against the Principles of Natural Justice.<sup>23</sup>

With the passage of time, society changed. So did the Constitution of India, through various Amendments. Alongside the Anti Defection Law has also transformed, aligning with principles of Transformative Constitutionalism.

According to the law, a member can be disqualified if they willingly relinquish their membership. This was interpreted with the rationale that even if his/her actions indicate the relinquishment of membership, it is not necessary to wait for a formal resignation. This was held in *Ravi S Naik v. Union of India*.<sup>24</sup> The Apex Court, in the cases of *G. Viswanath v. Honorable Speaker, Tamil Nadu Legislative Assembly*<sup>25</sup> and *Rajendra Singh Rana v. Swami Prashad Maurya & Ors*,<sup>26</sup> established that if members publicly voice opposition to their own party or publicly display support for another party, they would be considered to have resigned.

The recent episodes in Karnataka, Maharashtra, Goa, and other states, where democratically elected governments were toppled through extensive horse-trading, clearly shows us the egregious violation of the law by political parties motivated by their own desire. Paradoxically, a change in the government, sometimes leads to the change in the Speaker as well, which reveals a clear bias when it comes to determining the legality or illegality of defection. This bias is mostly based on whether the defectors are switching to the speaker's political party (majority party). The partial behavior has prompted concerns regarding the integrity of the position, which is precisely why their rulings are contested in the legal system.

In addition, the Anti Defection Law does not specify an exact period for the Speaker/Chairman to make a final decision on a disqualification petition. Till Chairman/Speaker give their final decision, the defector has no option than to wait as he cannot go to the Court on first instance. The Judiciary, on multiple occasions, has expressed its concerns that there is an undue delay in solving the disqualification disputes.

These developments make us question whether the transformation of the Constitution, specifically to the Anti Defection Law, is a positive transformation or a negative one.

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23. id

24. *Ravi S Naik v. Union of India*, AIR 1994 SC 1558

25. *G. Viswanath v. Honorable Speaker, Tamil Nadu Legislative Assembly*, (1996) 2 SCC 353

26. *Rajendra Singh Rana v. Swami Prashad Maurya & Ors*, AIR 2007 SC 1305



## INTERNATIONAL PERSPECTIVE

Anti-defection laws have become a common mechanism in various democracies worldwide, aimed at maintaining political stability and original party loyalty. These laws aim to prohibit elected officials from exploiting their positions for personal gain, consequently compromising accountability and honesty within the democratic system. Anti-defection Law aims to discourage political opportunism by disqualifying elected officials who change parties. The legal requirements pertaining to defectors vary greatly in terms of their scope, execution, and impact across different countries. Each of these countries has developed its own unique experience of defection.

G C. Malhotra<sup>27</sup>, in his book, examines anti-defection laws in 40 Commonwealth countries and makes brief references to 25 other nations. The data reveals that 58% of Commonwealth countries (23 out of 40) enforce penalties, such as parliamentary expulsion, on individuals who switch political parties. Out of the 23 Commonwealth countries that have anti-defection laws, 7 of them additionally enforce expulsion for those who vote against their party whip. In comparison, 28% of the 25 non-Commonwealth nations have anti-defection laws and guidelines. Significantly, none of the provisions result in disqualification for voting outside their party whips, indicating a more forgiving approach in comparison to Commonwealth countries.

The working paper from the Economic and Social Council <sup>28</sup> provides a summary of the existence of legal regulations against parliamentary party defections in various types of democracies as of 2007. The framework divides countries according to their democratic standings and indicates the number of countries within each category that have anti-defection laws. The results are as follows:

- 1. Older Democracies:** Out of 36 countries, 5 (14%) have laws prohibiting floor-crossing, which include India, Israel, Portugal, Trinidad & Tobago.
- 2. Newer Democracies:** Among 54 countries, 13 (24%) have such laws. Some of them are Belize, Ghana, Hungary, Mexico, Romania, Ukraine.
- 3. Semi-Democracies:** Out of 58 countries, 19 (33%) have anti-defection laws and some of those countries are Bangladesh, Kenya, Malawi, Nepal, Nigeria, Papua New Guinea, Singapore, Sri Lanka, Tanzania, Zambia.

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27. Anti-Defection Law in India and Common Wealth, E-Parliament, National Informatics Centre, G.C, Malhotra, 2005 [https://eparlib.nic.in/bitstream/123456789/58674/1/Anti\\_Defection\\_Law.pdf](https://eparlib.nic.in/bitstream/123456789/58674/1/Anti_Defection_Law.pdf), accessed on 03 August, 2024.

28. Kenneth Janda, *Laws Against Party Switching, Defecting, or Floor-Crossing in National Parliaments*, Northwestern University, 2009 ISSN: 2211-1034, accessed on 05 August, 2024.

**4. Non-Democratic Countries:** Out of 45 countries, 4 (9%) have laws against Defections, they are the Democratic Republic of Congo, Pakistan, Thailand, and Zimbabwe.

Among these Belize, Kenya, Tanzania, Mozambique, Sierra Leone and Zimbabwe have multi-party system like India. In Belize, the anti-defection law is embedded in Article 59(2)(e) of the Constitution. The regulation mandates that a member of the House of Representatives vacates their seat in the event of crossing the floor to some other party after being elected. While the presiding officer is in charge for asserting disqualification is not explicitly stated, but the immediate effect of resignation or party-switching ends in the emptiness of the seat.<sup>29</sup>

Kenya's anti-defection law is provided under Article 103 of the Constitution. It states that a member of the National Assembly or Senate loses their seat if they surrender from their political party or are deemed to have resigned due to moves which include expulsion. The Speaker of the relevant House is liable for maintaining the seat vacant after consulting the political party and the member in question.<sup>30</sup>

Similarly in Tanzania, the Political Parties Act governs the anti-defection law, Mozambique, Sierra Leone's Constitution consists of provisions that disqualify members of the Assembly. While Zimbabwe's anti-defection law is provided in Section 129(1)(k) of the Constitution and the Speaker of the National Assembly or the President of the Senate is liable for maintaining the seat vacant after consulting the Zimbabwe Electoral Commission.<sup>31</sup>

The Anti-Defection Act of 2024 in the Maldives requires elected members to resign if they leave their political party after being elected. This includes registering with the Elections Commission (EC) as a member of a different political party or joining a political party after being elected as an independent lawmaker. When a legislator is expelled from their political party, they are granted a period of 7 days to contest the verdict in a court of law. If they are defeated, they must promptly relinquish their position upon receiving notification from the Elections Commission. The law is applicable to members of the city council, atoll council, island council, and the women's development committee.<sup>32</sup>

29. Article 59 (2)(e) of the Constitution of Belize, [https://www.oas.org/dil/Constitution\\_of\\_Belize.pdf](https://www.oas.org/dil/Constitution_of_Belize.pdf), accessed on 05 August, 2024.

30. Article 103 of the Constitution of Kenya, <https://www.klrc.go.ke/index.php/constitution-of-kenya/123-chapter-eight-the-legislature/part-2-composition-and-membership-of-parliament/271-103-vacation-of-office-of-member-of-parliament>, accessed on 05 August, 2024.

31. G.C, Malhotra, *Anti-Defection Law in India and Commonwealth*, E-Parliament, National Informatics Centre, 2005, [https://eparlib.nic.in/bitstream/123456789/58674/1/Anti\\_Defection\\_Law.pdf](https://eparlib.nic.in/bitstream/123456789/58674/1/Anti_Defection_Law.pdf), (Metropolitan Book Co. Ltd).

32. The President's Office Press Release, <https://presidency.gov.mv/Press/Article/30621>, accessed on 05 August, 2024.

## PARTY WHIP

The Anti-Defection Law in India, mentioned in the Tenth Schedule of the Constitution, mandates that members of Parliament or State Legislatures face disqualification, if they vote or abstain from voting as per directives from their political party without prior permission. Papua New Guinea also requires members elected under party endorsement to vote according to their party's directions on considerable problems. In Sierra Leone, participants ought to vacate their seats in the event of violation of party whip. Interestingly, Malawi's Constitution allows participants to exercise their free will to vote without dealing with disqualification for voting against their political parties.<sup>33</sup>

However, various scholars emphasize a liberal approach in defection relating to party whips, suggesting disqualification on violation of party whips only in important bills such as Amendment bills, No-Confidence motion and Money Bills. Although violation of party whips by Coalition party member does not constitute defection, the recognition of party whips by parties to coalition government is necessary to maintain stable government retain the very intent of the Anti- Defection law.

### Suggestions for improvements and implementation

India's Anti-Defection Law, enshrined in the Tenth Schedule of the Constitution, has been the challenge with lots of debate and criticism since its enactment in 1985. Over the years, numerous committees and specialists have proposed reforms to cope with the regulation's barriers. Here are a number of the important reforms which have been advised:

- **Shifting decision-making authority**

The Dinesh Goswami Committee on Electoral Reforms (1990) advocated that power to decide on disqualification petitions be shifted from the Speaker/Chairperson to the President or Governor, based totally on the advice of the Election Commission.<sup>34</sup> The Law Commission Report also suggested reforms to shift the power to decide disqualification petitions to the President or Governor based on the Election Commission's advice.<sup>35</sup> This suggestion pursues certain impartiality and decreases the potential for political bias and acts as a well-established checks and balance in the system.

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33. Malhotra G.C, *Anti-Defection Law in India and Commonwealth*, E-Parliament, National Informatics Centre, 2005, [https://eparlib.nic.in/bitstream/123456789/58674/1/Anti\\_Defection\\_Law.pdf](https://eparlib.nic.in/bitstream/123456789/58674/1/Anti_Defection_Law.pdf), (Metropolitan Book Co. Ltd).

34. Dinesh Goswami Committee Report on *Electoral Reforms*. Government of India, (1990), pp. 15-20

35. Law Commission of India. (2015), *The Anti-Defection Law: A Review*, Law Commission of India, pp. 25-30.

• **Limiting Disqualification Grounds**

The Dinesh Goswami Committee also counseled limiting disqualification to instances wherein a member voluntarily resigns from their party or votes/abstains against their origin party directives in specific motions, such as confidence motions or money bills.<sup>36</sup> This reform would offer more flexibility for legislators to work with a sense of right and wrong on positive troubles without risking disqualification and encouraging debates in the House.

• **Establishing Independent Tribunals**

In the case of *K.M. Singh v. Speaker of Manipur Legislative Assembly* (2020),<sup>37</sup> the Supreme Court recommended shifting the Speaker's selection-making authority over disqualification petitions to an independent tribunal presided over through retired judges. This suggestion seeks to aid the objectivity and fairness of the disqualification procedure.

• **Providing Clear Timelines**

To address delays in deciding disqualification cases, specialists have suggested offering clean timelines for the Speaker/Chairperson or impartial tribunals to adjudicate such petitions.<sup>38</sup> This reform could make sure that defection instances are resolved in a well-timed manner, preventing prolonged felony battles and political uncertainty. Some countries follow a clear timeline to decide defection charges unlike India. Analysis with Other Countries. In Bangladesh, the Speaker ought to put together an announcement within 30 days of a dispute and send it to the Election Commission. The Commission is then required to announce its decision within 120 days of receiving such allegations. In Belize, the Leader of their party needs to notify the Speaker within 7 days. The Speaker is then expected to make a declaration at the next sitting of the House. If a member desires to appeal the decision, they have 21 days to appeal in the Supreme Court. In New Zealand, when a member is expelled, they may be given 21 running days to reply. Following this, one-third majority of the parliamentary party have to agree to notify the Speaker of the expulsion. Similarly, in Pakistan, the Election Commission is required to decide on the matter within 30 days, with an option for appeal to the Supreme Court within an extra 30 days. In Sri Lanka, if a member ceases to belong to their political party, their seat becomes vacant after 1 month from the date of their resignation or expulsion. In Trinidad and Tobago, a member declared to have resigned or been expelled, has 14 days to challenge the declaration. In event of no challenges within this period, the member vacates their seat.

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36. Dinesh Goswami Committee Report on *Electoral Reforms*. Government of India, (1990), pp. 15-20

37. *K.M. Singh v. Speaker of Manipur Legislative Assembly*, Civil Appeal No. 547 of 2020

38. PRS Legislative Research. (2022). *The Anti-Defection Law*. Discussion Paper.

• **Enhancing Transparency and Accountability: A Proposal for an Improved Database on Defections and Members**

To strengthen the enforcement of the Anti-Defection Law and promote transparency, it is critical to create a centralized, digital database that tracks defections and the reputation of elected representatives. This database, maintained with the aid of the Election Commission, should report party affiliations and instances of defection, with real-time updates and enhance public accessibility through government portal, encouraging digital India. Standardizing statistics series and integrating this database with current electoral statistics will enhance accuracy. Additionally, enforcing a reporting mechanism for parties and the public, together with periodic audits, will foster accountability and public trust. By enhancing the database, India can empower citizens to monitor their elected representatives effectively, thereby reinforcing the principles of a strong democracy, leading towards Transformative Constitutionalism.

• **Including Local Representatives under Anti- Defection laws**

The members elected for local elections should also be included in the Anti-defection law, as they are also accountable, and the government can ensure that the mandate of the people are respected. This will help to strengthen political accountability in all levels of Governments.

• **Addressing vacancies due to defection**

In the event of vacancies resulting from disqualification due to the Anti-Defection Law, appointing the second highest candidate from the same electoral constituency as the new representative should offer a realistic solution. This method ensures continuity in governance while respecting the democratic mandate given by the voters. By doing so, disruption can be minimized. Additionally, this method can be a better alternative than the time-consuming, costly bye-elections, therefore promoting balance and responsibility in governance. This measure acts as both check and punishment for the elected members to avoid exploiting their position for financial and other material benefits and to work diligently for the society.

• **Party whip and dissent**

India is known as the largest Democracy in the World and the essence of democracy is the dissent. There is a thin line of difference between dissent and defect. The dissent can also be legal and genuine and that should not be considered as defection. As Abraham Lincoln said that the “Democratic Government is characterized as by the people, for the people, and of the people.” Political parties are the integral part of the functioning of the Government. So, we can assert that “political party is by the people, for the people, and of the people.”<sup>39</sup> Therefore, in a

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39. Christopher Achen and Larry Bartels, “Democratic Ideals and Realities.” *Democracy for Realists: Why Elections Do Not Produce Responsive Government*, REV-Revised, Princeton Univer-

democratic framework, the duty of the MLA or an MP is to work for their constituencies, which might lead to dissent within the party. Therefore, it is very much required to look into the reason for the dissent with regards to the party whip and then disqualify the member.

## CONCLUSION

India, known as the world's largest democracy, and often referred to as the mother of all democracies, has implemented important measures to uphold its transformative constitutionalism principles through various legislations aimed at bringing about social transformation. One such legislation is the Anti-defection Laws. However, the implementation of the anti-defection law should be transparent and effective. The interpretation of the X Schedule should not be in the literal sense, rather it should be in a purposeful, fairness and transformative manner.

It is important to consider the constitutionality of this law, as well as draw inspiration from other countries through the adoption of their suggestions. Additionally, the recommendations provided by various communities and the Law Commission Reports should be taken into account to ensure the inclusion of the anti-defection law in the Constitution. This will result in a significant transformation in the political system, directly strengthening democratic institutions.

The authors also conclude by stating that the Anti Defection Law should be interpreted in such a way that it guarantees internal democracy within political parties. It would also encompass regulations on internal elections, candidate selection, and measures to protect the expression of valid opposition.

The party should ensure that its members are not subjected to discrimination and operate as a whole in accordance with democratic principles. Implementing such a measure will ultimately alleviate the issue of defections, which is a detriment to democracy.

## JUDICIAL ACTIVISM AS A SIN QUA NON IN DEMYSTIFYING THE THREAT OF CLIMATE CHANGE: RENEWING THE HOPE FOR SAFER TOMORROW

Subadev Pandian S.<sup>1</sup>

Naveen J.<sup>2</sup>

“History will not judge us kindly. When the seas envelop our coastal cities, fires and droughts haunt our interiors, and storms ravage everything between, those remaining will ask: Why did so many do so little?”<sup>3</sup>

### INTRODUCTION

Native Americans believed they could dance to summon rains while Bangladesh preferred to enter to frogs into marital bliss for achieving the same. Mankind has now started influencing not just the weather, but the climate itself in an entirely unhealthy way. Environmental law is sui generis in the sense that it is heavily dependent on the judiciary for its successful enforcement. The courts around the world have crafted novel judicial principles to resolve technical issues of admissibility of such matters, in addition to extending the application of existing civil and criminal laws to invigorate the remedies they so offer. However, there exists some apprehension about whether the courts are willing to extend the principles they have meticulously devised to engulf the threat of climate change.

It would be one thing for a common man to come across an article addressing the dangers of climate change and sigh away thinking, “it’s just the way it is” or that a higher power is to be blamed. However, for the Courts to do the same, might quite literally spell the end of the world. One may ask, why is there a fear that courts may express helplessness in allowing climate change litigation in the first place?

The answer to this question lies in the stance taken by some of the highest courts in the world’s “most developed nation”. The case of *Juliana vs United States*<sup>4</sup> is a stellar example of this very nihilism.<sup>5</sup> Given the absence of explicit national laws addressing this global challenge,

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3. *Juliana v. United States*, 947 F.3d 1159, 1191 (9th Cir. 2020) (Staton, J., dissenting).

4. *id*

5. Scott Novak, *The Role of Courts in Remediating Climate Chaos: Transcending Judicial Nihilism and Taking Survival Seriously*, 32 Geo. Env'tl. L. Rev 743 (2020)



there's a very real possibility that the judiciary may get influenced in tracing backwards through such decisions.<sup>6</sup> Thus, this paper recommends why it would be the morally and logically superior alternative for the Courts around the world to follow the trend set by the Supreme Court of Netherlands and other such progressive decisions to prevent the established judicial standards in environmental issues from becoming inapplicable to climate change litigation.

## **THE SCIENTIFIC KNOW-HOW BEHIND CLIMATE CHANGE**

Primary level education has been successful in teaching us that the weather changes day to day or even hour to hour on the same day. Seasons change every few months. We also know that the season changes every year. And of course, climate refers to the long-term weather patterns of a particular region, usually a period of 30 years.

The climate is also changing, but at a considerably slower speed. Climate Change is defined as the long-term change of the earth's climate including changes in temperature, precipitation, and wind patterns over a period of several decades or longer.<sup>7</sup>

If climate change is a part of nature, then why would there be an issue? The current rate of warming is 10 times greater than those at the end of an ice age cycle, the fastest known natural climate change on a global scale.<sup>8</sup> The earth's average surface air temperature is warming, has increased by about 1°C from 1900. The decade from 2010-19 has been the warmest decade in instrumental record, from 1850. Why this hastened change? Mankind. The differential rates of cooling in the different levels of the atmosphere, increased concentration of GHG emissions in the more recent years, suggest that the sun's output variations or other natural causes could not be the only cause for such change. Use of fossil fuels, deforestation, land use and other human interferences have an undeniable role to play. The natural process which could balance the CO<sub>2</sub> concentration are simply not able to keep pace with the human emission levels.

## **WHY CLIMATE CHANGE A THREAT**

The fact that the earth's lower atmosphere is becoming warmer and moister compared to the other layers is facilitating more energy for storms and certain extreme weather events. The types of events most closely related to temperature such as heatwaves and extremely hot days, heavy rainfall and snowfall events which in turn increase the risk of flooding are also becoming

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6. Elizabeth B.Fata, *Actions and Reactions: The Evolution of Environmental Common Law and Judicial Activism in India and the United States*, 23 U.Miami Intl'l & Comp. L. Rev 216 (2015)

7. Intergovernmental Panel on Climate Change. (2007). WG I: Summary for Policymakers. Geneva: Intergovernmental Panel on Climate Change

8. Marcia McNutt & Venki Ramakrishnan, *Climate Change Evidence & Causes*, NATIONAL ACADEMIES, (Sept. 26, 2024, 2:00 PM), <https://nap.nationalacademies.org/catalog/25733/climate-change-evidence-and-causes-update-2020>

more frequent. The warning of the Arabian Sea, intense formation of dense cloud complexes are said to have caused the downpours which ultimately resulted in the Wayanad landslides which have struck grief in the hearts of thousands across the nation.<sup>9</sup>

## GLOBAL WARMING

Despite their synonymous use, global warming is merely one prong in climate change. It could be considered a contributing factor to the same. Global warming is defined as the increase in the earth's average surface temperature, which has been occurring since the Industrial Revolution, primarily due to the emission of greenhouse gases from the burning of fossil fuels and land use change.<sup>10</sup>

Our planet's climate is stable because of the presence of "greenhouse gases," (GHGs) which have made life on earth possible by preventing the sun's heat from escaping fully. If the GHGs did not "catch" the heat, the earth would have an average temperature of minus 15°C. Thus, more the amount of GHGs generated, the higher the heat retained. Planet earth maintains an energy balance.

However, due to the increased GHG emissions arising from human activities, the earth's climate balance has been altered towards warming,<sup>11</sup> to such an extent that even if greenhouse gas emissions were to suddenly and completely stop overnight, it would still take thousands of years to go back to the pre-industrial levels.<sup>12</sup>

## WHY THERE EXISTS A NEED TO "DEMYSTIFY" AMONG THE PEOPLE

The Yale Project on Climate Change conducted a revolutionary study with 2 study pools, both asked the same set of questions, but one group (830 people) questioned using the word global warming and the other using climate change. In addition to discovering that 'Climate change' is less frightening than 'global warming'<sup>13</sup> it also made the following findings:

9. Wayanad landslides: How climate change is linked to Kerala disaster, BUSINESS STANDARD, (Sept. 25, 2024, 4:00 PM), [https://www.business-standard.com/india-news/wayanad-landslides-how-climate-change-is-linked-to-kerala-disaster-124073001649\\_1.html](https://www.business-standard.com/india-news/wayanad-landslides-how-climate-change-is-linked-to-kerala-disaster-124073001649_1.html)
10. Anthony Leiserowitz et al, What's In a Name? Global warming versus climate change, Yale Project on Climate Change Communication, 1 (2014)
11. Marina Robles et al., What Is Climate Change?, UNCCLEARN (Sept. 26, 2024, 10:00 AM), [https://www.uncclearn.org/wp-content/uploads/library/idb01062016\\_what\\_is\\_climate\\_change\\_eng.pdf](https://www.uncclearn.org/wp-content/uploads/library/idb01062016_what_is_climate_change_eng.pdf)
12. *supra* note 9
13. Anthony Leiserowitz et al, What's In a Name? Global warming versus climate change, Yale Project on Climate Change Communication, 1 (2014)

| Year | Findings                                                     | Global Warming | Climate Change |
|------|--------------------------------------------------------------|----------------|----------------|
| 1    | It is a good thing.                                          | 21%            | 33%            |
| 2    | It is actually happening.                                    | 62%            | 63%            |
| 3    | Extremely sure it is happening.                              | 27%            | 20%            |
| 4    | It is due to natural changes in the environment.             | 37%            | 37%            |
| 5    | It will harm future generation.                              | 65%            | 63%            |
| 6    | The government should take small or no efforts to combat it. | 39%            | 35%            |

*Table no. 1*<sup>14</sup>

Needless to say, there exists a need to establish among the masses, that climate change / global warming, whatever they choose to call it, is very real and coming for us. The good news, as elaborated in the coming pages, we still have a fighting chance.

## THE UNIQUE ROLE OF INDIAN COURT IN PROTECTING THE ENVIRONMENT

It is natural to wonder why the participation of courts in environmental matters is more prominent than that of the other organs. Conversely, one might wonder why judicial involvement is more in environmental law than in other areas of law. The simple answer is, judicial initiatives pre-date express legislature in addressing the evils in this realm of law.

However, all around the world, the origins of environmental law are based on nuisance claims which are in turn a common law creation. Even after evolving beyond nuisance-based tort claims as the foundation for environmental litigation, the Indian Judiciary began addressing environmental wrong doings as a violation of the Constitution itself and the fundamental rights of its masses. Even today, the judiciary continues to pick up the ball where the legislature and executive dropped it<sup>15</sup>.

For instance, the Pollution Control Boards set up in each state, for implementing the statutes, are constricted to exercising their jurisdiction only in “heavily polluted areas”. Apart from being unable to take any preventive measures, they also lack the authority to independently prosecute polluters in ordinary courts of law.<sup>16</sup>

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14. id

15. supra note 5

16. id

Adding on to the prowess of the existing ordinary courts of law, are the National Green Tribunals (NGTs), an independent judicial body in India established to address environmental protection and conservation.

Even though, the NGT has been established under a statute the very enactment of the statute was a result of various judicial decisions as enumerated in the preamble of the Act itself. For example, it was the Supreme Court<sup>17</sup> emphasised on the need of having learned expert bodies with technical and scientific knowledge to dispose environmental disputes. The court noted that complex environmental issues often implicate interests in competing domains — such as scientific, legal and policy arenas — which fall outside the traditional ambit of judicial expertise. The court suggested the setting up of specialised environment tribunals with both original and appellate jurisdiction comprising judges and environmentalists.

### **ACTIVISM vs NIHILISM, HOW FAR THE COURTS CAN GO:**

Though there may not be a strait jacket formula in defining the term, judicial activism is in the simplest of terms, a strengthened form of judicial review.<sup>18</sup> In a more specific sense, it has been defined as the expanded role of the judiciary which covers legislative vacuum in the field of human rights.<sup>19</sup> It believes the role of the judiciary doesn't stop at interpreting the law but to make it but by imaginatively sharing the Constitution to meet the ends of social justice.<sup>20</sup>

One example of how far the courts are ready to extend their reach in the interests of protecting the world we live in is the example of legal personhood. It's deeply etched in history's dark pages that courts have been reluctant to accept and even outright refused to accept that women, native Americans, Chinese or other human beings who were “not white”, as “persons” within the meaning of law<sup>21</sup>. So when the Supreme Court of India gave fundamental rights to animals<sup>22</sup> and the Uttarakhand High Court<sup>23</sup> went on to hold that, “the entire animal kingdom in the state, including the avian and aquatic animals, will be treated as legal entities with distinct persona and corresponding rights, duties and liabilities of a living person” so as to safeguard them from

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17. A.P. Pollution Control Board v. M.V. Nayudu II, (2000) 2 S.C.C. 591 (India).

18. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)

19. Semwal, M. M., and Sunil Khosla. “JUDICIAL ACTIVISM.” *The Indian Journal of Political Science*, vol. 69, no. 1, 2008, pp. 113–26. *JSTOR*, <http://www.jstor.org/stable/41856396>. Accessed 9 Aug. 2024.

20. Sukhdas v. Union Territory of Andhra Pradesh, (1986) 2 S.C.C. 202

21. Steven M. Wise, A New York Appellate Court Takes a First Swing at Chimpanzee Personhood: And Misses, *Denver L. Rev.* 95 (2017) 265

22. Animal Welfare Board of India v. A. Nagaraja & Ors., (2014) 7 SCC 547.

23. Narayan Dutt Bhatt v. Union of India & Ors., (1997) 2 S.C.C. 498.

exploitation and assure them a chance at a more pain free living, they were creating a better legacy for courts all over the world. This is what an active judiciary is capable of.

### **The Origins of Environmental Activism in India**

Acquainting with the origins of judicial activism in India is important to understand what the Indian Courts have done for furthering the protection of the world we live in. There are 2 underlying catalysts which assured the birth of judicial activism in India. The emergency period ushered in by the then Prime Minister Indira Gandhi had substantially limited the reach of the Courts. The Bhopal Gas tragedy and the subsequent failure in holding the responsible parties liable, in a way that way that would matter. The legislature had enacted the Environment Protection Act, 1986 and established the Ministry of Environment and Forests in response to one of the world's most tragic disasters. However, this was too little too late and the courts had no choice but to embrace a more proactive role in undoing the errors of the past. Thus, unlike the US where the fight for a sustainable environment began simply because people had more money and time, in India it was a "do or die" situation all over again, for a completely different set of reasons this time.

### **How Indian Activism Has Broken Down the Barriers to Judicial Review of Environmental Concerns**

The requirements of locus standi (the capacity of a party to bring a suit before a court of law) are almost similar in India and the USA. However, in the US Courts, locus standi needs 3 essentials: specific injury to the plaintiff, traceable to the defendants and scope for redressability, provided for in the Constitution itself.

1. The Indian courts have substantially eliminated the barriers put up by standing requirements, through the advent of Public Interests Litigations, (PILs). Now, a bystander could bring a suit without having personal injury himself in public interest.

The case of *Sierra Club vs Morton*<sup>24</sup> is an example of how the US courts lag behind in lacking in comparison to India, wherein the courts denied the plaintiff, an environmental organisation, standing. However, it is noteworthy for 3 reasons:

- i. The finding that an injury in fact could cover aesthetic and environmental interests as well.
- ii. The fact that environmental interests are enjoyed by many doesn't take away their entitlement to legal protection.

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24. *Sierra Club v. Morton*, 405 U.S. 727, 730 (1972)

- iii. And finally, the dissent of Justice Douglas wherein he asks, while inanimate objects like ships can have legal personality, thanks to legal fiction, why the same shouldn't apply to valleys, alpine meadows, rivers, lakes, estuaries, beaches, ridges, groves of trees, swamp lands or even air." With all the more gravitas, he added, that the voice of the existing beneficiaries of these wonders, (say a fisherman or canoeist in case of a river), must be heard before they are reduced to the eventful rubble of the urban environment.
2. Having added in a new arrow in the quiver of the ecologically concerned, the Courts then removed the procedural hurdles in the existing legal remedies. In *M.C. Mehta vs UOI*<sup>25</sup> the Court emphasised that procedure was just a hand-maiden of justice in the following words:
 

*"Even a letter addressed by a public spirited individual or a social action group acting pro bono public would suffice to ignite the jurisdiction of this Court."*
3. Adding on to this newly fortified remedy was the fact that suits could be instituted *forma pauperis* so that economic distress wouldn't fall in the path of a just cause.
4. Perhaps the most remarkable move of finesse by the courts to date is the declaration of the right to access a clean environment as a fundamental right. In *Chhetriya Pardushan Mukti Singh Samati vs State of UP*,<sup>26</sup> the Courts came close to such a declaration: "Every Citizen has a fundamental right to have the enjoyment of quality life and living as contemplated in Article 21 of the Indian Constitution."<sup>27</sup> However, the vivid recognition of the right in explicit terms was in the case of *Subhashkumar vs State of Bihar*,<sup>28</sup> "Right to live includes the right to enjoyment of pollution free water and air for full enjoyment of life."
5. In addition to acting within its bounds, the courts have also bravely risked venturing into outside territories in the name of Justice. In *Entitlement Kendra vs State of Uttar Pradesh*, the suit was for the preventing the continued operation of limestone quarries in the Himalayas which had degraded the environment for a long time in a sizeable manner. The Courts even before getting into the merits of the case, appointed a committee and ruled on its findings while the Water Act specifically entrusted this power on the Department of Environment. Interestingly enough, the Court went on to

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25. *M.C. Mehta v. Union of India*, (1987) 4 SCC 463

26. *Chhetriya Pardushan Mukti Sangh Samiti v. State of Uttar Pradesh*, (1996) 2 S.C.C. 549

27. P. Leelakrishnan, *Environmental Law in India*, 1 LexisNex. J.(2008)

28. *Subhash Kumar v. State of Bihar*, (1991) 1 SCC 598

direct the Department of Environment to appoint an additional Committee with the officials it nominated.

It is important to note that in addition to laying down strong principles ensuring that environmental activists can access the judiciary, the Courts around the world, especially in India, have devised decisive principles to administer effective remedies. Notable among them being<sup>29</sup>

### **Barriers Unique to Climate Change Litigation**

It would be one thing for a court of law to look into a case, analyse its merits and decide that the defendant is helpless in the allegations made against him. However, for the courts to limit their own reach by considering climate change associated claims as non-justiciable and wait for the legislature to take charge is nihilism at its prime. The case of *Juliana vs United States*<sup>30</sup> explains what factors have been used by a few courts to shy away from their duty to protect the environment.

In *Juliana*, a nonprofit organisation by the name, Earth Guardians, involving a group of 21 young people, aged 8 to 19, the lead plaintiff among them being Juliana and climatologist Dr. James Hansen filed a lawsuit against the US government. Their accusation being, the government had, despite having knowledge about the catastrophic effects that the CO<sub>2</sub> emissions from industries were causing, in addition to not taking preventive actions, actively facilitated the slow destruction of the environment as a whole through its activities for half a century. The plaintiffs claimed that the Government had violated their 5th amendment rights given under the Due Process Clause, “No one shall be deprived of their life, liberty or property without due process of law” and its own Public Trust obligations.

The reliefs claimed by the plaintiffs are three-fold: A declaration that the government had in fact been acting in violation of their unenumerated constitutional right under the Ninth Amendment, “The right to a stable climate system.” Secondly, an injunctive relief preventing the government from enabling fossil fuel projects. Finally, the US government had to devise a plan effectively curb down its CO<sub>2</sub> emission rates (350 ppm by the end of the century).

Despite the well-deserved acceptance of this case in the district court, it was dismissed by the Ninth Circuit on the following grounds:

1. The issue wasn’t redressable, wherein the claimed relief even if granted wouldn’t make a difference.

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29. Indrajit Dube, *Environmental Jurisprudence - Polluter’s Liability* 94-117 (1st ed. 2007)

30. *supra* note 3



2. The separation of powers, and the resultant political question doctrine. The issue was not meant for judicial discretion. In other words, the people should have elected leaders who perceived emissions as a threat and believed in the role of mankind in climate change.
3. There are no judicially discoverable and manageable standards in determining how the relief for the plaintiffs may be granted.
4. Apart from the above reasons offered by the Ninth Circuit panel in its dismissal, US courts have concocted the “bigness” of such issues for staying aloof from climate change litigation in their halls. As in the hurdles in establishing chain of causation and resultant locus standi.

Despite the plaintiffs dropping their claim for an injunctive relief in an effort to make their case admissible, as of 12th July, 2024, the “Planet’s Biggest Case” has been put down indefinitely by the Ninth Circuit court of appeals.

### **COUNTERACTING THE FLAWS IN JULIANA – PROACTIVE DECISIONS FROM AROUND THE WORLD**

Let us consider the scenario in the case of Govind Singh vs Shanti Swaroop<sup>31</sup> The case was against a bakery whose smoke emissions posed an eminence threat to the people in its proximity. Here, standing is afforded to anyone who might live in the nearby areas. The subdivisional magistrate himself had evaluated the emissions. As for redressability, the Magistrate had ordered for a demolition of the chimney and oven producing the smoke while the Supreme Court took a more relaxed stance and called for the business continue without using the two aforementioned equipment. Such simple logic may be possible in case of pollution cases. But climate change brings with it, its own intricacies. Thanks to the PILs, specialised injury isn’t an issue anymore. However, causation and redressability remain to be answered.

The one-of-a-kind barriers presented by climate change litigations and how they may be counteracted on the basis of inspirational decisions from around the world are explained as follows:

#### **1. Overcoming the political question doctrine**

This doctrine as explained in the case of Baker vs Carr<sup>32</sup> means federal courts should not hear cases which deal directly with issues that the Constitution makes the sole responsibility of the Executive / Legislative branches. It may not be the role of the Courts to make law. It is still,

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31. Govind Singh v. Shanti Swaroop, (2003) 6 S.C.C. 583

32. Baker v. Carr, 369 U.S. 186, 192 (1962).

however, the duty of the courts to assess whether they have exercised their freedom in political decision making in a lawful manner. District Justice Ann Aiken, who is the reason Juliana has at least received such level of attention, rightly quoted Chief Justice Marshall in her district court finding, “it’s emphatically the province and duty of the court to say “What the law is”<sup>33</sup>

It doesn’t mean that Courts should not venture into political decision making at all.

The comparison made by Justice Aiken to *Brown vs Board of Education*<sup>34</sup> also draws relevance here. The US courts had ordered the government to desegregate schools in an attempt to repent for years of racial atrocity. It doesn’t get more political than that. Thus, whether an issue is political doesn’t depend on whether the other organs will be involved, how large a number of parties the suit will involve or how complex the subject matter is.<sup>35</sup>

Even in countries like the US where the Constitution is being used an excuse for diverting climate change litigations, there is no Constitutional or statutory word of law giving the legislature or executive organs the final indisputable say in climate change related matters. Moreover, the international conventions like the UNFCCC, 1992 (United Nations Framework Convention on Climate Change) and the ECHR, 1950 (European Convention on Human Rights) have established the right to a habitable environment as a fundamental right. Thus, by partaking in the battle against climate change, courts would only be exercising their powers for the enforcement of foreign agreements ratified by the State<sup>36</sup>.

## 2. The misconception about redressal

The Court noted that, “No reduction is negligible.” Each reduction will clear up more space in the carbon budget. Sweden for instance, has through its dependence on nuclear power, biofuels and wind power, in the 2-decade period from 1970 to 1990, cut its total carbon emissions by half and per person emission by 60% all the while furthering its economy by 50%, not to mention more than doubling its electricity generation.<sup>37</sup>

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33. supra note 15

34. *Brown v. Board of Educ.*, 347 U.S. 483, 488 (1954).

35. James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 DENVER UNIV. L. REV. 919, 932–33 (2008).

36. McDonald & Erika, *The Judicial Activism of Inaction: India’s National Green Tribunal and the Reeducation of U.S. Jurists*, 25 UCLA J. Int’l L. & Foreign Aff 159 (2020).

37. JOSHUA S. GOLDSTEIN & STAFFAN A. QVIST, *A BRIGHT FUTURE: HOW SOME COUNTRIES HAVE SOLVED CLIMATE CHANGE AND THE REST CAN FOLLOW* 20 (2019).

It may not be for the Courts to say the US or any other country must blindly follow the footsteps of Sweden. However, it's for the Courts to say what objectives the state must achieve. The how part is for the other 2 organs to determine.

Even if no power on earth can prevent the global temperature increase by two degrees, the courts' interference can optimistically speaking prevent an increase by 3,4/5 degrees.

Is the increase in temperatures so huge a deal? The example of staple cereal crops elucidates on the same. Studies suggest that the yield of such crops falls by 10% for each degree increase from their optimal temperature. Whether the crop yields will fall by 20% or 50% in the coming years is definitely not a negligible issue.<sup>38</sup>

### 3. The issue of causation

The refusal of the Courts to accept causation in *Kivalina*<sup>39</sup> explains the issue clearly. "In a global warming scenario, emitted greenhouse gases combine with other gases in the atmosphere which in turn results in the planet retaining heat, which in turn causes the ice caps to melt and the oceans to rise, which in turn causes the Arctic Sea ice to melt, which in turn allegedly renders *Kivalina* vulnerable to erosion and deterioration resulting from winter storms."

In contrast, scientific methods capable of addressing how much emissions each individual company and country cause and how such emissions have been increasing over the years are well established. Thus, it is a question of whether, the courts are ready to accept proven scientific findings into their court halls.

Moreover, it is not necessary for a party to prove that the defendant was particularly responsible for the climate change issue in dispute. As long as the defendant is also causing harm to the environment, they could be tried as a joint tortfeasor irrespective of whether the other guilty members have been punished. Even if some courts should prove unwilling to accept climate change facilitators to be tortfeasors, the violators of a constitutional right to a habitable climate cannot be allowed to go scot-free merely because there are other actors who haven't been brought before the courts yet.<sup>40</sup>

If all else fails, reference can always be made to the precautionary principle which prevents environmental miscreants from hiding behind the uncertainties in science by conveniently shifting the burden of proof. After all the judicial attitude has been, as seen in the Indian

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38. DAVID WALLACE-WELLS, *THE UNINHABITABLE EARTH: LIFE AFTER WARMING* 86 (2019).

39. *Native Vill. of Kivalina*, 663 F. Supp. 2d at 875, *aff'd*, 696 F.3d 849 (9th Cir. 2012).

40. *supra* note 5

Supreme Court's decision<sup>41</sup>, "It is better to err on the side of caution and prevent environmental harm, than to run the risk of irreversible harm."

### **Renewed Hope in the Face of an Upcoming Catastrophe:**

Following is a list of proactive judicial pronouncements which reflect the much-needed progressive stance that must be taken up by courts around the world to ensure a safer tomorrow.

1. The Supreme Court of India<sup>42</sup> has declared the right to be free from the adverse effects of climate change is a fundamental right by virtue of articles 14 & 21 of the Indian Constitution. The right to a clean environment has already been declared as a fundamental right based on article 21. Through this case, while balancing between the need for protecting the biodiversity, the continued survival of the Great Indian Bustard and the need for switching to renewable forms of energy, the Court held that the two rights were two sides of the same coin. While constituting a committee to help address the situation further, the court held that this newly declared fundamental right was based on Article 14 as well, given the fact that climate change affects certain communities, the economically and geographically disadvantaged for example, more than others.
2. Despite having a long history of production and export of coal, the New South Wales Land and Environment Court<sup>43</sup> denied approval for a new coal mine as it was the "wrong time". The Court rejected the argument that some other countries would take up such operation if not for Australia while holding that given the urgent need to reduce GHG emissions, a developed nation like Australia had a duty to lead the way in mitigation measures. Additionally, it held that the court's duty stopped with assessing a particular entity for its emissions and hold if the same were reasonable in the given context and not overall policy making.
3. The Federal Constitutional Court of Germany<sup>44</sup> reached a historically significant decision wherein in re-emphasised the principle of Intergenerational equity, a facet of sustainable development, wherein the present generations cannot be allowed to cause reckless emissions and be allowed to meet a very minimal reduction target, thereby forcing the upcoming generation to reach an "emergency stop". As in, the future generations cannot be imposed with a ridiculously difficult reduction burden straining

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41. A.P. Pollution Control Board v. M.V. Nayudu, (2000) 2 S.C.C. 591

42. M.K. Ranjitsinh & Ors v. Union of India & Ors., (2022) 10 S.C.C

43. Gloucester Resources Limited v. Minister for Planning, [2019] NSWLEC 7 (Austl.)

44. Neubauer et al. v. Germany, App. No. 39686/18, Eur. Ct. H.R. (2020)

their freedom drastically. The statement of one of the defendants in the case of Juliana draws relevance here “As a citizen of America, I have the same right to life, liberty, property as [my] forefathers. But what life do I have if I die twenty years early from carcinogenic smog? What liberty, if I must stay indoors all day to avoid the stroke-inducing heat? What property, if the land itself is burned to ash?”

4. The US Courts, in the case of *EPA vs Massachusetts*<sup>45</sup>, despite their inherent defect in standing requirements, granted special standing to a State to represent its people. While reflecting the fact that each emission counts, the courts interpreted that CO<sub>2</sub> and other GHGs were “pollutants” within the meaning of Clean Air Act, so as to impose the duty of regulating their emissions on the Environmental Protection Agency, particularly w.r.t. vehicular emissions.
5. The aforementioned *Uganda*<sup>46</sup> decision is perhaps truly the Environmental Case of the century. This was the first time a court promulgated a government’s duty to increase its climate ambition. The government on failure to meet its emissions target, had reduced it to 16% reduction by 2020 (compared to the 1990 levels). The court held the same to be unlawful, as bearing upon the rights of the future generations and asked for the target to be reduced to 25% over the 1990 levels. The state may have discretionary power in matters of climate change policy. However, the courts can determine whether the exercise of such discretion has been lawful, as in if the state has failed its duty to the people.
6. The Netherlands Judiciary<sup>47</sup> didn’t stop there. In a case against the Royal Dutch Shell Company. The Shell Company, though all of its operations around the world, was emitting CO<sub>2</sub> more than the entire State of Netherlands. While asking the corporate entity to cut down its emissions by 45% (relative to 2019 levels), the court extended its decision in the *Urgenda* case to establish that private enterprises can also be held liable for violation of its duty of care and human rights obligations, w.r.t the activities of its entire value chain, irrespective of the state’s responsibility.

### **The Path Ahead, What Litigation can do for Climate Change:**

Perhaps one of the most important functions of litigation is setting the narrative straight. They help us realise, how alarmingly close we are to an impending catastrophe, which is very much a result of our own doings and cannot be blamed on a higher power. More importantly,

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45. *Environmental Protection Agency v. Massachusetts*, 549 U.S. 497, 500 (2007)

46. *Urgenda Foundation v. State of the Netherlands*, [2015] HAZA C/09/00456689 (Neth. 2015)

47. *Milieudefensie v. Royal Dutch Shell plc*, [2021] ECLI:NL:RBDHA:2021:5337 (Neth.)

they help us realise that, the government and even private entities can and should be held liable for their role in leading us along a disastrous path. In South Africa<sup>48</sup>, even before the final verdict, on-going litigation against a coal-fired power station, almost all of the financing institutions withdrew their support.

On a very similar note, in France when a Bank was sued for the first time ever in relation to climate change, the bank announced it would stop such financing fossil fuels.<sup>49</sup> Studies suggest that litigation doesn't just hit the reputation of fossil fuel firms. Their corporate value falls under risk as the share prices themselves take a hit.

Where, a teenager failed in trying to establish through the Australian judiciary that the Federal Environment Minister had a legal duty to protect young people from climate change, it still inspired an independent senator to introduce a bill which if passed would address the same.<sup>50</sup> The courts have taken serious action even when probate players have misled the public about their contribution to climate change, in other words, greenwashing. A European dairy company was banned from using the phrase, “net zero climate footprint.”<sup>51</sup>

## CONCLUSION

If the emissions continued at the same rate without any regulatory or technological restrictions, there may be 2.6°C to 4.8°C during the 21st century itself. India aims to keep the rise less than 1.5°C till 2030<sup>52</sup> and reduce emissions by a mere 9% compared to 2005 within the same period. and reduce emissions by a mere 9% compared to 2005 within the same period.

In Pakistan's first climate change litigation, the Lahore High Court held that the established international environmental principles like polluter pays, precautionary principle etc. are applicable to climate change as well and are a sine qua non for counteracting climate change. Justice Swatantar Kumar, the NGT's chair from 2012 to 2017,<sup>53</sup> claims it is time we moved on from a public trust towards an atmospheric trust.

There exists a critique that by overstepping its bounds, the courts have paved way to political turmoil and mistrust. However, the alternative is to trust the future of our entire nation

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48. *Save Lamu et al. v. National Environmental Management Authority and Amu Power Co. Ltd.*, [2020] eKLR (Kenya).

49. *Notre Affaire à Tous and Others v. BNP Paribas*, [2021] Paris Cour d'Appel, 20/08619 (Fr.

50. *Sharma v. Minister for the Environment*, [2021] FCA 560 (Austl.)

51. *Arla Foods v. Swedish Consumer Agency*, [2023] ECLI:SE:2023:1234 (Swed.)

52. UN Climate Change, COP26: Praise for updated national climate plans, but 'nowhere near' goal, UN News (Oct. 25, 2021), <https://news.un.org/en/story/2021/10/1103972>.

53. *supra* note 6

and the world by an extension into the hands of the ever-changing legislature and the relatively influenceable executives. Even if precise legislation capable of addressing climate change are enacted for the judiciary to take it down a notch like its Ninth Circuit compatriots would be an even bigger risk that no one bargained for.



## ONLINE DISPUTE RESOLUTION: PIONEERING DIGITAL INNOVATIONS IN RESTORATIVE JUSTICE

Soumya Khanna<sup>1</sup>

Sushant Dabral<sup>2</sup>

### INTRODUCTION

Crime involves more than just breaking the law; it also entails harming individuals and relationships. As a result, there is an emphasis on obligation rather than guilt and justice.<sup>3</sup> The focus of the criminal justice system has always been on the offenders, often overlooking the needs and justice parameters of the victims. “Hegel’s idea that human progress necessitates the sacrifice of certain individuals is both flawed and unsatisfactory (Reyes Mate, 2011; Galain Palermo/Garraud, 2012).” An optimal solution to this issue would involve active participation from all parties involved in a crime - including the victims, offenders, and community members - to ensure fairness and resolution. Thereby, quoting Walter Benjamin would be most appropriate, “Justice should be achieved by compensating for injustice and repairing the damages inflicted upon those affected.” Habermas supports the notion of “communicative actions” as expedient for resolving social conflicts through dialogue, encounters, and communication.

Moreover, this fresh perspective on justice, centered around the will and needs of those affected, rather than the authority and advocates (Christie, 1977; Wright, 1991), is poised for bringing substantial amendments to the “existing normative, retributive, and traditional legal framework” (Kerner, 1983). This shift prompts researchers to advocate for a modern outlook on justice with different inquiries. Instead of inquiring “Who committed this act?”, it is necessary to ask “Who has been harmed?” and then determine what steps should be taken and how the offender, victim, as well as the community be able to find the resolution (Zehr, 2004). Also, the issue at hand includes the modern perception through which legal conflicts are assessed lead to minor adjustments within the traditional concept of justice or if they call for significant reform

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  3. N.V. Paranjape, *Crime and Punishment - Trends and Reflections* (Lexis Nexis, 1st edn. 2015).

in response to crime.<sup>4</sup> This new philosophical perspective on justice calls for the development of novel theories concerning justice.

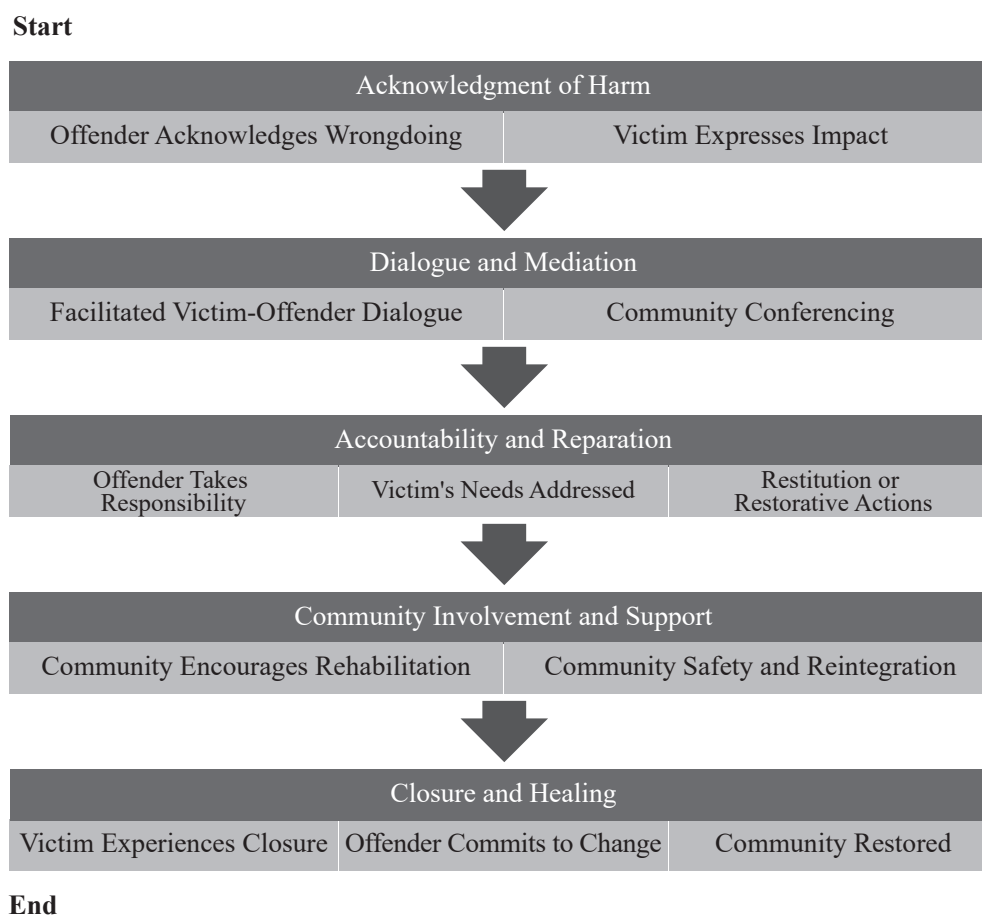
Also, victims are now receiving increased attention as they call for their justice needs to be taken more seriously. The evidence suggests that it is not just a paradigm shift, but rather the issue of defining the appropriate involvement of traditional criminal justice and determining the areas for interaction between stakeholders (Galain Palermo, 2009). Therefore, Restorative justice, as a concept and practice, emerges as a response to the shortcomings of traditional criminal justice systems (Rombouts & Parmentier, 2009). With respect to this research, another important consideration arises: can technology serve as an effective tool for restorative justice?

### RESTORATIVE JUSTICE: CONCEPT AND CONTOURS

The term “restorative justice” can refer to an assortment of notions, such as an approach, a set of tenets or targets, or, in a broader sense, an initiative that strives to significantly alter how criminal justice systems function.<sup>5</sup> Restorative justice is a belief system and methodology that aims to mend damage, attend to the requirements of victims, and promote responsibility and recovery for all individuals affected by a dispute or criminal act (Palermo et al., 2018). A commonly referenced definition is that “restorative justice is a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future (Marshall 1999:5).” It highlights the necessity for all the stakeholders to have a chance to express their views, opinions, and feelings on the implications of the crime and what actions are necessary and feasible to restore them back in the society.<sup>6</sup>

A renowned name in the field of Restorative justice **Howard Zehr in his book “*The Little Book of Restorative Justice*” (2002)** laid down the process, principles and practices of Restorative Justice.

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4. Galain Palermo, Pablo & Freitas, Pedro. (2016). Restorative Justice and Technology. Interdisciplinary Perspectives on Contemporary Conflict Resolution.
  5. Theo Gavrielides, “Restorative Justice Theory and Practice: Addressing the Discrepancy” 2-3 (Criminal Justice Press, Helsinki, 2007).
  6. Chris Cunneen, “Understanding Restorative Justice Through the Lens of Critical Criminology”, 2008, University of New South Wales Faculty of Law Research Series.



*Figure 1: Pictorial Representation of Restorative Justice Process*

Evidently, the contemporary criminal justice systems are failing to not only reducing criminal recidivism rates in the society, but also not able to provide a sufficient platform for the victim's predicament to be heard.<sup>7</sup> To address these substantial issues, certain states in the west have started adopting restorative justice as a new alternative to resolve a dispute or conflict (Sherman, 1993; Sherman & Strang, 2007). It is based on the principles of inclusion, participation, and dialogue, emphasizing the importance of restoring relationships and resolving conflicts in a non-punitive manner. Restorative justice can be seen by its traditional implementation in the face-to-face settings, such as victim-offender meetings and community support programs. However, as technology continues to shape and transform our society, there is a growing need to explore the application of restorative justice principles in the realm of online dispute resolution.

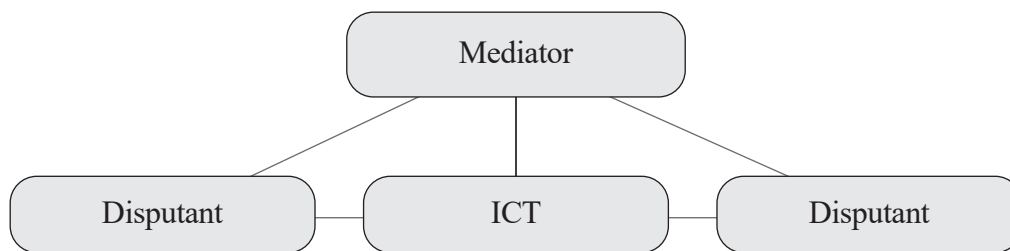
7. Umbreit, Mark S., and Robert B. Coates. 1992. "The Impact of Mediating Victim-Offender Conflict: An Analysis of Programs in Three States." *Juvenile and Family Court Journal* 43(1):21-28.

## ONLINE DISPUTE RESOLUTION

The augmentation in employing internet made it feasible for the businesses to diversify and render its services to large e-consumers groups. But over time, it was felt that cyberspace would not be a harmonious environment either, and that there would be a requirement for various devices, resources, and proficiency in acknowledging the conflicts that would arise. Thus, e-disputes are e-transactions' by-product.<sup>8</sup>

Electronic conflicts thus required the establishment of a conflict resolution system centered on data utilisation and digital systems for avoiding, handling, and settling conflicts rather than conventional dispute resolution approaches. The adoption of ODR in the criminal justice process addresses inherent challenges in traditional dispute resolution methods. Overburdened courts, lengthy trial proceedings, and resource constraints have led to a reevaluation of alternative methods. As a result, ODR came into force as an extension of ADR.<sup>9</sup> ODR offers a streamlined, efficient, and cost-effective means of resolving disputes, particularly in cases involving minor offenses.

The advancement of Information and Communication Technology (ICT) has substantially complemented the primary methods of resolving disputes<sup>10</sup>, i.e., mediation, negotiation, conciliation and arbitration.



*Figure 2: The fourth party involvement in ODR*

In the context of dispute resolution, “ODR introduces a fourth party (Katsh & Rifkin 2001) at the table, which is the technology that works with the mediator or arbitrator.”

The secure and confidential nature of legal proceedings necessitates robust encryption and security measures within ODR platforms. Ensuring the privacy of sensitive information and maintaining the integrity of the dispute resolution process is paramount. ODR platforms

8. S. Khanna, and S. Shukla “Barriers To Consumers In The Era Of Online Dispute Resolution” White Black Legal Journal, Vol. 2 Issue 2, June 2020.
9. Mohamed Abdel Wahab, Ethan Katsh & Daniel Rainey, “Online Dispute Resolution: Theory and Practice” 22 (1<sup>st</sup> edn, Eleven International Publishing 2011).
10. Chitranjali Negi, ‘Online dispute resolution in India’ (3 December 2014) Santaniello & Partners, International Law Firm <[www.legalsl.com/en/online-dispute-resolution-in-india.htm](http://www.legalsl.com/en/online-dispute-resolution-in-india.htm)> accessed 08 March 2024.

employ state-of-the-art encryption protocols to safeguard communications, case documents, and any confidential information exchanged between parties. An exploration of encryption methodologies sheds light on the mechanisms that contribute to the trustworthiness of ODR platforms within the criminal justice context.

The effectiveness of ODR in the criminal justice process depends on its availability, inclusiveness, convenience, and user-friendliness. ODR platforms strive to provide user-friendly interfaces that accommodate individuals with varying levels of technological proficiency. Examining the design principles and accessibility features of these platforms unveils the efforts made to bridge the digital divide. An analysis of user interfaces and accessibility measures highlights how ODR technologies aim to enhance inclusivity, ensuring that individuals, regardless of their technological background, can effectively participate in the dispute resolution process.

Delving into the advantages and limitations of ODR in criminal cases is essential for a comprehensive understanding of its impact. While ODR offers speed, accessibility, and cost-effectiveness, potential limitations such as the inability to address complex legal issues or the challenge of ensuring procedural fairness should be critically examined. A nuanced exploration of these aspects provides insights into the optimal contexts for ODR implementation within the criminal justice system.<sup>11</sup>

ODR facilitates victim-offender mediation by providing a secure online environment for parties to engage in constructive communication and resolution. This approach humanizes the criminal justice process, allowing victims and offenders to participate in a mediated dialogue that focuses on restitution, understanding, and rehabilitation.<sup>12</sup> Examining the role of ODR in facilitating communication and resolution sheds light on its potential to bring about transformative outcomes in the realm of victim-offender relations.

Ensuring the rights of victims is paramount in any dispute resolution process, and ODR is no exception. This section explores the mechanisms within ODR platforms that safeguard victim rights, addressing concerns related to privacy, emotional well-being, and the fair treatment of victims. By examining these considerations, we gain a comprehensive understanding of how ODR can contribute to a victim-centric approach within the criminal justice system.

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11. Zhang, Wusheng; Zeleznikow, John; and Vries, Berend, "Online Dispute Resolution: The Benefits Of Enhancing Alternative Dispute Resolution Through The Use Of Internet Technology" (2004). ACIS 2004 Proceedings. 79

12. Jennifer Gerarda Brown, "The Use of Mediation to Resolve Criminal Cases: A Procedural Critique" 43 EMORY L. J. 1247 (1994).

This mutual approach of participation of the stakeholders of the crime by giving them the platform via providing the opportunity to the victim to voice out the predicament vis-à-vis creating a distance with the offender at the same time, putting a chance for the offender to take accountability, in both the systems of restorative justice and ODR makes it an approach that will create a new paradigm of justice i.e. Restorative Justice.

### **Online Restorative Justice**

The relevant question to answer here is “Whether an online environment of dispute resolution could be suitable in the context of restorative justice?” As per the mutual approach discussed above, this mode of conflict resolution could create ample advantages for both the justice system as well as the parties to the conflict. To further make it evident, the research can rely on the most accepted restorative e-mechanism globally for conflict resolution i.e. Victim-Offender Mediation (Santana, 2007).

Victim Offender Mediation (VOM) is a widely implemented restorative justice approach that benefits both offenders and crime victims by facilitating a structured and secure environment for victims to engage directly with their offenders.<sup>13</sup> The primary aim of VOM is to ensure offenders take direct responsibility for their actions while simultaneously prioritizing support and appropriate compensation for the victims.<sup>14</sup>

Victim-offender mediation is primarily “dialogue-driven, with emphasis upon victim empowerment, offender accountability, and restoration of losses.” Over 95 percent of Victim Offender Mediation (VOM) sessions conclude with a signed restitution agreement. However, the significance of it, is secondary to the critical role of the initial dialogue between the parties. “This conversation is essential in addressing the varied needs of the victims, which is pivotal for both victim empowerment and fostering empathy in offenders—an outcome that can contribute to the reduction of future criminal behaviour.”<sup>15</sup> Numerous studies conducted to date have consistently shown that for crime victims, “the restitution agreement is less significant than the chance to directly convey their feelings about the offense to the offenders” (Schneider, 1986). The restorative effect is closely linked to the establishment of a secure environment for dialogue between both the parties to the crime.

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13. Mark S. Umbreit, “Mediation of victim offender conflict”, J. Disp. Resol. 85 (1988).

14. Mark S. Umbreit, “The Handbook of Victim Offender Mediation: An Essential Guide to Practice and Research” xxxvii-xxxviii (1st ed. 2001).

15. Mark S. Umbreit, “The Impact of Victim Offender Mediation: Two Decades of Research” (Dec 2001), available at: [https://www.uscourts.gov/sites/default/files/65\\_3\\_6\\_0.pdf](https://www.uscourts.gov/sites/default/files/65_3_6_0.pdf) (last visited on March 08, 2024).

In this scenario, incorporation of restorative justice mechanism through ODR would be best suited.

### **Challenges in Implementing ODR in Criminal Justice**

The assimilation of Online Dispute Resolution (ODR) in the criminal justice process is not devoid of challenges, with resistance to technological change standing as a significant hurdle. Legal professionals, accustomed to traditional court practices, may exhibit reluctance in embracing ODR. Analyzing strategies to address this resistance is crucial for the successful integration of ODR into the criminal justice system.

A critical challenge in the widespread adoption of ODR in criminal cases is the digital divide, which exacerbates existing disparities in access to justice. This may impede certain demographics' ability to fully engage with ODR platforms. Exploring strategies to bridge this gap, such as providing technological education and ensuring accessibility features, is essential for fostering an inclusive and equitable ODR framework.

As ODR involves the exchange of sensitive legal information online, ensuring robust cybersecurity measures is imperative. Challenges include the unique cybersecurity challenges associated with criminal cases, including the protection of confidential evidence and personal information. Examining encryption protocols, secure data storage practices, and strategies to mitigate cyber threats is vital for instilling trust in ODR processes within the criminal justice domain.

Future directions for restorative justice in online platforms should focus on further research and evaluation to continuously improve the effectiveness and accessibility of these programs. Additionally, efforts should be made to develop and implement guidelines and standards for online restorative justice<sup>16</sup> to ensure consistency and ethical practice across different platforms and jurisdictions. Moreover, collaboration between legal professionals, technology experts, and stakeholders is crucial to ensure that online restorative justice programs meet the diverse needs of participants and uphold fundamental principles of natural justice. Restorative justice in online dispute resolution has the potential to transform how conflicts are addressed and resolved in digital spaces.

### **CONCLUSION**

Criminal law is poised for progressive shifts towards a new justice theory, particularly in civil law countries that have, until recently, lacked structured and sustained exposure to such ideas. This emerging paradigm holds the potential to fundamentally transform how crimes and

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16. Mark S. Umbriet, Robert B. Coates & Betty Vos, "The Impact of Victim-Offender Mediation: Two Decades of Research" 65 FED. PROBATION 29 (2001).



their responses are understood and constructed. A core element of this shift is the belief that the criminal justice system should become victim centric. There is growing recognition that the aggrieved party of a criminal act can no longer be marginalized, as if the crime solely concerns the State's discretionary treatment of the offender. Moreover, technology offers opportunities to establish restorative structures, but regardless of the tools or platforms selected for dispute resolution, it is expedient to preserve and adhere to the contours of restorative justice system. These essential aspects of establishing a mode recognizing the needs of the victims at every stage of dispute resolution must be incorporated from the stage of designing of the ODR platform to its final implementation. In this context, "technology serves as a means to an end—the restoration of justice."

To evaluate the effectiveness of online restorative justice programs, it is necessary to consider various factors such as participant satisfaction, rates of recidivism, restitution compliance, and the extent to which underlying causes of conflict are addressed (Gude & Papic, 2018). Additionally, it is important to examine the impact of online restorative justice on access to justice, particularly for marginalized groups and individuals who may face barriers in participating in traditional justice processes. Restorative justice in online dispute resolution has been successfully implemented in various contexts, such as e-commerce, insurance disputes, and property tax appeals. Despite that, integrating restorative justice practices into online dispute resolution mechanisms, particularly for criminal offenses, presents both challenges and opportunities that must be carefully addressed. These challenges include the need for technological infrastructure and support, ensuring confidentiality and privacy in online interactions, and addressing power imbalances between parties. Moreover, it is crucial to ensure that online restorative justice programs adhere to constitutional values and due process rights, like "the right to be heard and the right to a fair and impartial process."

In conclusion, incorporating restorative justice principles into online dispute resolution can promote dialogue, reconciliation, and empowerment in digital spaces. Restorative justice in online dispute resolution can be a valuable tool for addressing conflicts and promoting social peace, by involving all parties and utilizing technology to enhance communication and accessibility.





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